

No. 18-719

IN THE

Supreme Court of the United States

KATHLEEN URADNIK,

Petitioner,

v.

INTER FACULTY ORGANIZATION, ET AL.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BRIEF OF *AMICUS CURIAE* THE
COMPETITIVE ENTERPRISE INSTITUTE IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether it violates the First Amendment to appoint a labor union to represent and speak for public-sector employees who have declined to join the union.

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INTEREST OF *AMICUS CURIAE*¹

The Competitive Enterprise Institute (“CEI”) is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

SUMMARY OF ARGUMENT

In *Janus v. AFSCME*, this Court recognized the importance of this issue in its holding that the certification of an exclusive representative to speak for public employees “substantially restricts the [First Amendment] rights of individual employees.” 138 S. Ct. 2448, 2460 (2018). Currently, 6.8 million state and local public employees are covered by union contracts. Julia Wolfe and John Schmitt, *A profile of union workers in state and local government*, Economic Policy Institute (June 7, 2018), <https://goo.gl/RQz1qD/>. Of those about 600,000 are non-members. Their First Amendment rights are trampled by state laws that provide for exclusive representation. As it stands, public employees are now free from subsidizing the speech of an exclusive representative, but are forced to

¹ Pursuant to Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, their members, or their counsel made such a monetary contribution. All parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file and consented to the filing of this brief.

associate with unions and let those unions speak for them, no matter how strongly employees disagree with that speech.

An exclusive representative, under Minnesota law, speaks “on behalf of all employees,” including non-members who have refused to join the union. Minn. Stat. § 179A.03 subd. 8. As the Minnesota statute indicates, the union’s speech is considered the speech of the employees it represents: “*Public employees, through their certified exclusive representative, have the right and obligation to meet and negotiate in good faith with their employer.*” Minn. Stat. § 179A.06 subd. 5 (emphasis added). Minnesota law is clear—when the union is speaking during collective bargaining, it is on the behalf of the Petitioner and other non-members.

The issues on which the union’s speech is treated as the Petitioner’s, against her will, are issues that *Janus* recognized as “matters of substantial public concern.” 138 S. Ct. at 2460. As this Court has decided repeatedly, freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U. S. 705, 714 (1977). In *Janus* the court stated, “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” 138 S. Ct. at 2463. The state law compelling the Petitioner to accept the union’s speech as her own on issues of substantial public concern infringes on her First Amendment rights.

Equally troublesome, the state compels the Petitioner to accept the advocacy of an exclusive representative that she never had a chance to vote on.

For the most part, public employees simply inherit union representation that was voted on by past workers, and are forced to accept it without any choice in the matter.

For these reasons, the Minnesota statute that establishes exclusive representation is in conflict with First Amendment jurisprudence and warrants review by the Court.

ARGUMENT

Minnesota state law compels the petitioner, Kathleen Uradnik, as a condition of her employment, to accept the Inter Faculty Organization (IFO) as her exclusive representative. Minn. Stat. § 179A.03 subd. 8. As an exclusive representative, the IFO represents all St. Cloud State University employees, both those who join the union and those who do not. *Id.* The law authorizes Minnesota state employers to treat the speech of the union as the speech of all the employees in determining work terms and conditions for employees. This allows a majority of employees in a bargaining unit to select an exclusive representative who speaks for both them and for those employees who want nothing to do with the union.

As the Supreme Court recognized in *Janus v AFSCME*, that requirement is “a significant impingement on associational freedoms that would not be tolerated in other contexts.” 138 S. Ct. at 2478.

But, making matters worse, the vast majority of public employees who are compelled to accept representation from a union were never afforded the opportunity to vote on whether they want a union or the specific union that would represent them. In the

case before the Court, the IFO was certified as the exclusive representative for St. Cloud State University faculty in 1975. Dr. Uradnik, and the majority of her colleagues, were not University employees at that time. As such, many employees represented by the IFO have never had a voice or a vote in selecting the union that represents them today.

Another consequence of this state-law requirement is that the IFO represents and speaks on behalf of Dr. Uradnik through collective bargaining sessions, meet and confer sessions, and other venues. This is permitted even though she opposes many of the union's positions during collective bargaining negotiations and advocacy on political issues. And the IFO, like other public-sector unions, frequently advocates for or against a broad variety of contentious political matters.

The Supreme Court has consistently held that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U. S. at 714. Under Minnesota State law, public employees must accept the speech of the IFO as their own and lack the ability to distance themselves from the political advocacy of their exclusive representative.

I. MOST PUBLIC EMPLOYEES ARE FORCED TO BE REPRESENTED BY ORGANIZATIONS THEY DID NOT VOTE FOR

Under a majority of state legal regimes governing public employees, when a public-sector union is certified as the exclusive representative of a bargaining unit, it is granted the sole right to negotiate on the behalf of members and non-members over terms of employment like pay, promotion, layoffs,

and retirement. For example, the State of Minnesota permits public employers to require public employees to accept an exclusive representative that is granted the authority to “meet and negotiate with the employer on behalf of all employees.” Minn. Stat. § 179A.03 subd. 8.

To become certified as an “exclusive representative of all employees in a [bargaining] unit,” Minn. Stat. § 179A.12 subd. 2-3, a union must receive a “majority of those votes cast in an appropriate unit.” *Id.* at subd. 10. Upon certification, all public employees are forced to accept union representation, work under a union negotiated contract, and accept that the union speaks out on their behalf. Minnesota law requires Dr. Uradnik to accept these conditions despite the fact that she vehemently opposes many of the union’s positions during bargaining negotiations and political stances.

A section of the collective bargaining agreement between St. Cloud State University and the Inter Faculty Organization (IFO) further limits the ability of independent employees to speak for themselves. A section entitled “Exclusive Right” states that “[t]he Employer will not meet and negotiate relative to those terms and conditions of employment subject to negotiations with any employee groups or organizations composed of employees covered by this Agreement except through the [Union].” Pet. App. 73.

As it stands, Dr. Uradnik, and other employees who are similarly dissatisfied with their union representation, are prohibited from seeking representation other than from the IFO, and from individually negotiating their own work terms and conditions with St. Cloud State University.

Compounding the problem of compelling unwilling employees to accept union representation is that very few public employees represented by a union voted for this representation or the specific union that represents them. Once a group of employees is organized, its union remains certified in perpetuity unless it is “decertified” or “another representative is certified in its place.” Minn. Stat. § 179A.12 subd. 1. Yet, it is important to note, decertifying an exclusive representative is an arduous process. Minnesota law erects several hurdles to removing an exclusive representative. A “petition for a decertification election during the term of a contract” will not be considered “except for a period from not more than 270 to not less than 210 days before its date of termination.” *Id.* at subd. 4. In addition, when an exclusive representative is certified, its status cannot be challenged “for a period of one year.” *Id.* at subd. 12.

Instead of voluntarily selecting a specific union representative, employees are compelled to accept union representation as a condition of employment, chosen by past employees.

In the public-sector, inherited union representation is the norm, not the exception. A majority of states passed laws in the 1960s and 1970s to give government employees the right to collectively bargain. For the most part, unions organized public employers shortly after these laws were passed and there has been relatively limited organizing activity in that area since. As a result, most unionized public workforces were organized over 30 years ago. Few of today’s public employees even worked for the government when elections were held to certify the labor unions that act as their exclusive representatives today.

For example, while New York City public school teachers voted to certify the United Federation of Teachers (UFT) in 1961, the UFT continues to represent these teachers to this day. Neill S. Rosenfeld, 50 Years, UNITED FEDERATION OF TEACHERS (2010) <http://www.uft.org/files/attachments/uft-50-years-book.pdf>. Analysis of U.S. Department of Education data show that “virtually every teacher who voted in that election has since retired.” James Sherk, Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives, HERITAGE FOUNDATION (Aug. 27, 2012), <http://goo.gl/nxDqaC>.

Several school districts in Kansas are similarly situated. The Kansas state legislature passed legislation granting public-sector unions collective bargaining privileges in 1970. By 1971, a number of Kansas’ largest school districts had unionized. Calculations using data from the Schools and Staffing Survey conducted by the National Center for Education Statistics show none of the teachers who voted to elect the Kansas National Education Association still are employed at these school districts. *Id.*

In the top 10 largest school districts in Florida and Michigan, only 1 percent of current teachers were employed in the year that the union representative was elected. *Id.*

In the instant case, the IFO was elected and certified as the exclusive representative in 1975 for teachers at Minnesota’s seven public universities. As such, Dr. Uradnik, whose employment at St. Cloud State University began in 1999, never had the

opportunity to vote on whether she desired union representation or not. Dr. Uradnik is not alone.

An analysis of the St. Cloud State University's Faculty and Administration webpage, which allows users to search for professors in each department at the University, found only two professors whose tenure began prior to 1975. One faculty member in the Psychology Department began at St. Cloud State University in 1965, St. Cloud State University, University Catalog Faculty & Administration, Psychology (last accessed Dec. 17, 2018), <https://goo.gl/jeGpfZ>. The start date of another employee, in the Special Education Department, was in 1974. *Id.* at Special Education, <https://goo.gl/jiLWNv>. This analysis shows that less than one percent of faculty at St. Cloud State University had the opportunity to vote on choosing the union that represents them and that they are compelled to have speak for them.

II. EXCLUSIVE REPRESENTATION ALLOWS GOVERNMENT TO COMPEL SUPPORT FOR POLITICAL AND IDEOLOGICAL ADVOCACY

As a result of Minnesota State law, public employees at unionized workplaces are forced to accept the speech of an exclusive representative as their own. It is irrelevant whether the employee is a non-member or strongly opposes the speech of the union; the union's advocacy is attributed to and on behalf of these unwilling employees.

As recognized by the Supreme Court, "In the public sector, core issues such as wages, pensions, and benefits are important political issues." *Harris v. Quinn* 134 S. Ct. 2618, 2632 (2014). But the speech of an exclusive representative that is assigned to non-

members goes further than important political issues that arise during collective bargaining negotiations.

Public-sector unions, such as the IFO, in their capacities as exclusive representatives, speak out on a variety of political matters. In the run up to the 2018 elections, the IFO issued political endorsements for Minnesota Governor, Lieutenant Governor, Attorney General, Secretary of State, State Auditor and state Representatives. Inter Faculty Organization, *Political Endorsements—Inter Faculty Organization* (last accessed Dec. 17, 2018), <https://www.ifo.org/political-endorsements/>. All 22 of the 2018 IFO’s political endorsements were all in support of a Democrat politician except for one.

On the IFO website, the union touts its “Legislative Advocacy,” which includes working “closely with lawmakers to advance the interests of state university faculty during budget and policy discussions.” Inter Faculty Organization, *Why Join the IFO?—Inter Faculty Organization*, (last accessed Dec. 17, 2018), <https://www.ifo.org/why-join-the-ifo/>. Reports submitted to the Minnesota Campaign Finance Board show that the IFO lobbied the state legislature and administration on a variety policy matters: K-12 education policy, higher education policy, pensions, labor relations, human rights, and taxes. Minnesota Campaign Finance and Public Disclosure Board, *Lobbying-organizations* (last accessed Dec. 17, 2018), <http://goo.gl/ycmT6X>. All of the IFO’s speech on these topics is attributed to members and non-members, regardless of their personal stances on these issues.

When the IFO released its 2019 legislative priorities, it stated that these priorities were on behalf of state university faculty. Inter Faculty Organization,

2019 Legislative Priorities (last accessed Dec. 17 2018), <https://goo.gl/fwyj8N>. The IFO's legislative priorities and advocacy include:

- Increased educational spending consisting of “\$252 million additional state investment for direct campus support,” “\$150 million investment in Higher Education Asset Preservation and Restoration (HEAPR) bonding,” and “\$37 million for NextGen student records system update.” *Id.*
- Tuition-free college education for “Minnesota’s low- and middle-income students to attend a Minnesota State college or university” for up to four years. *Id.*
- A call to repeal “the statute requiring Minnesota State campuses to pay one-third debt service on all general obligation bonds.” *Id.*
- Opposition to any federal tax conformity bill that “includes corporate tax cuts or tax breaks for high-income Minnesotans.” *Id.*

National public-sector unions take positions and advocate for an even broader and more divisive set of policies. For example, the published proceedings of the American Federation of State, County, and Municipal Employees (AFSCME) 2018 convention record the advocacy that non-members like Dr. Uradnik were compelled to support via their forced association with the union:

- **Advocacy against Donald Trump.** The convention adopted a resolution condemning “Donald Trump and his vision of America.” More specifically, the convention resolved that

AFSCME will encourage and support the “defeat” of Donald Trump and his policies. AFSCME, Saluting and Supporting the Role and the Leadership of Women and Youth in Building the Movement Against Donald Trump and His Vision for America, (July 16-18, 2018), <http://goo.gl/P6JfVJ>.

- **Advocacy for Single Payer Health Care.** The convention endorsed state and federal legislation to provide a universal single payer health care system. AFSCME, Adopt Single Payer, (July 16-18, 2018), <https://goo.gl/9wrsNp>.
- **Advocacy on Tax Policy.** Tax funds are the lifeblood of public-sector unions. Since taxes fund the government, public-sector unions pay close attention to tax policy and generally support policies that raise taxes. For example, the convention passed a resolution against the “Tax Cuts and Jobs Act,” which President Trump signed into law in December 2017. More specifically, AFSCME vowed to “demand the U.S. Congress to repeal these harmful tax cuts, and enact progressive tax laws that close loopholes for the wealthy and corporations to ensure they pay their fair share.” AFSCME, Repeal Harmful Tax Cuts for the Wealthy and Big Corporations (July 16-18, 2018), <https://goo.gl/9cx9sN>.
- **Advocacy for Exclusive Representation.** This resolution explains that “Exclusive representation means the duly chosen union is the *sole voice* for all workers.” AFSCME, Preserving Exclusive Representation (July 16-

18, 2018), <https://goo.gl/7hsnMj> (emphasis added). The union condemned any legislative effort to “eliminat[e] exclusive representation.” *Id.*

- **Advocacy for Immigration Policy.** The convention called upon the “Trump administration to drop its DACA [Deferred Action on Childhood Arrivals] appeal in the courts” and resolved that Congress should pass a “clean DREAM Act” that creates a “pathway to citizenship for a generation of young people.” AFSCME, AFSCME Rejects Immigration Policy Based on Fear (July 16-18, 2018), <http://goo.gl/KM4ubj>.

These kinds of compelled political advocacy through forced representation are beyond what the First Amendment allows. As this Court noted in *Janus*, there can be no justification for a state requiring a person to “express[] support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.” 138 S. Ct. at 2464. And yet this is exactly what is happening to non-members like Dr. Uradnik.

CONCLUSION

For the foregoing reasons, this Court should grant this petition to consider whether the exclusive representative requirements in Minn. Stat. § 179A.03 subd. 8 violate the First Amendment.

Respectfully submitted,

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