No. 18-719

IN THE
Supreme Court of the United States

KATHLEEN URADNIK,
Petitioner,

v.

INTER FACULTY ORGANIZATION, ST. CLOUD STATE UNIVERSITY, AND BOARD OF TRUSTEES OF THE MINNESOTA STATE COLLEGES AND UNIVERSITIES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*

The National Association of Scholars ("NAS") is a network of scholars and citizens united by a commitment to academic freedom, disinterested scholarship, and excellence in American higher education.[1] This commitment compels NAS to stand for the freedom to question and think independently from ideological imposition. Moreover, as an organization including university faculty throughout the United States, many NAS members are similarly situated to the Petitioner. For these reasons, NAS has an acute interest in this case.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and no one other than *amicus curiae* or its counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) of the Rules of this Court, counsel for all parties received timely notice of the intent to file this brief and all parties have consented to its filing.

SUMMARY OF ARGUMENT

The growing unionization of university faculty raises considerable tensions with First Amendment freedoms—particularly the freedom of non-union members to not associate with ideological objectives that they find objectionable. In NAS's view, this case presents an excellent opportunity to reinforce that freedom. It respectfully files this brief to illuminate the extent to which this Court's theoretical distinction between collective bargaining matters and ideological advocacy has been eroded.

Many unions serve as the exclusive representative of university faculty in collective bargaining, and those unions frequently use that perch to push the very sort of ideological agendas that led certain faculty to not become union members. By forcing all faculty members to accept a given union as their exclusive representative—while, at the same time, permitting that union to take positions on all matters of public concern—the exclusive representation regime comes into intractable tension with the First Amendment's freedom of association guarantee. This threat to the freedom of association is especially acute in the university context, where intellectual diversity and the freedom of every individual faculty member to explore and comment on public issues is the norm. To safeguard the freedom of association, NAS respectfully submits that the Court should grant this Petition.

ARGUMENT

I. EXCLUSIVE REPRESENTATION RAISES SUBSTANTIAL FREEDOM OF ASSOCIATION PROBLEMS.

"Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018). This restriction is particularly problematic for those employees who chose *not* to join a union, but are nevertheless deemed "represented" by the union during collective bargaining. *See id.* at 2469 (noting that exclusive representation "substantially restricts the nonmembers' rights"). "Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Id.* at 2460. This status "'results in a tremendous increase in the power' of the union." *Id.* at 2467 (quoting *American Communications Assn v. Douds*, 339 U.S. 382, 301 (1950)).[2] In such a situation, the union's viewpoint is

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[2] Indeed, due to the "many benefits" and "special privileges" coming from exclusive representation status, the "designation . . . is avidly sought." *Janus*, 138 S. Ct. at 2467; *see also* Heather Weiner, *Illinois Unions Wrote the Laws they Blame in 'Fair Share' Debate*, Illinois Policy (Feb. 28, 2015); Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. SOC. POL'Y & ECON. STUD. 163, 179 (1995) (explaining that union

the only one that matters, as the union is the only speaker with whom the employer must bargain.[3] Unsurprisingly, this Court has analogized a statutorily approved, exclusive union representative as being "clothe[d] . . . with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). Nor, given this extensive discretion and ability to bind nonmembers, is it any surprise that this Court has imposed fiduciary obligations on unions. *See ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991). Because the exclusive representation designation gives unions power over even those

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advocacy for and benefits from exclusive representation status make it "disingenuous for unions to claim that exclusive representation is a burdensome requirement").

[3] A number of state statutes authorizing exclusive representation status explicitly state the role's privileges. *See, e.g.*, 5 Ill. Comp. Stat. 315/6(b) (prohibiting any employee from bargaining for goals that are "inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative"); Minn. Stat. § 179A.07 ("If an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through that exclusive representative."); N.M. Stat. Ann. § 10-7E-15 ("The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit."); Ohio Rev. Code Ann. § 4117.04 ("[A]ny party shall address to the appropriate designated representative all communications concerned with collective relationships.").

employees who have declined to join them, "serious 'constitutional questions [would] arise' if the union were not subject to the duty to represent all employees fairly." *Janus*, 138 S. Ct. at 2469 (quoting *Steele*, 323 U.S. at 198). Such questions are presented here.

II. FACULTY UNIONS ROUTINELY BLUR THE LINE BETWEEN IDEOLOGICAL ADVOCACY AND COLLECTIVE BARGAINING.

Many faculty members chose to not join a union precisely because they are well aware that unions engage in ideological advocacy, and they do not want any association with it. For example, some faculty members at Oregon State University cited the use of union power to benefit "*a single political party*" as a reason to resist unionization. *See Why we are opposed: AFT and AAUP are the wrong choice for OSU faculty at this time*, OREGON STATE UNIVERSITY EXCELLENCE, https://www.osuexcellence.org/projects/ (emphasis in original). Those same faculty members noted that this ideological lopsidedness is at odds with the "diverse political viewpoints" and "intellectual freedom" that should characterize a university. *See id.* Their statement also noted that "both the University of Washington and the University of Minnesota [recently] worked to successfully defeat unionization of their faculty for [similar] reasons." *Id.* Another faculty member at Washington

University's business school opposed unionization on comparable grounds. He noted that "one of the biggest problems" with unionization "is the ill fit between [a union] and academics. They [*i.e.*, the union] just don't understand that academics do by nature basically challenge assumptions. They're less willing to simply hand over and defer to other people's judgment, and just do what they're told." Dale Singer, *Faculty Unions Continue to Prompt Questions at Washington U., UMSL*, ST. LOUIS PUBLIC RADIO, Oct. 21, 2016, http://news.stlpublicradio.org/post/faculty-unions-continue-prompt-questions-washington-u-umsl#stream/0.

This Court has also recognized the blurred line between a union's collective barging advocacy and its political speech. After noting in *Knox v. SEIU*, 567 U.S. 298 (2012) that "a public sector union takes many positions during collective bargaining that have powerful political and civic consequences," *id.* at 310, *Janus* observed that those positions possess a considerable range. *See* 138 S. Ct. at 2476-2477 (citing examples of unions "speak[ing] out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions.") (internal quotation marks and citations omitted). Given the divisive and political nature inherent to so much union advocacy—even as part of collective bargaining—it should be expected

that some employees would want no part of it and chose to not join their bargaining unit's union.

Exclusive representation status turns the decision to not join a union into a meaningless gesture. As the exclusive bargaining representative of even nonmembers, any position the union takes during collective bargaining may be fairly imputed to all employees, members and nonmembers alike. No matter how much an employee sought to avoid association with a union's ideological goals, the laws forcing all employees to accept the union as their exclusive representative nullify that effort.

The "continued growth in the number of bargaining units in the public sector among tenured/tenure-track faculty, non-tenure track faculty, and graduate student employees,"[4] combined with politicized conceptions of collective bargaining, *see Janus*, 138 S. Ct. at 2483, compound this problem.

Making Controversial Political and Social Positions A Part of Collective Bargaining. Unions with exclusive representation are free to consider the

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[4] William A. Herbert, *The Winds of Changes Shift: An Analysis of Recent Growth in Bargaining Units and Representation Efforts in Higher Education*, 8 JOURNAL OF COLLECTIVE BARGAINING IN THE ACADEMY 1, 1 (2016) available at http://thekeep.eiu.edu/jcba/vol8/iss1/1. *See also id.* at 9 (noting that, while the growth in higher-education unions is most pronounced at private universities, that is partly due to "the scope of pre-existing union density" at public universities).

advancement of certain ideological causes as part of collective bargaining negotiations.

- The Rutgers American Association of University Professors ("AAUP")-American Federation of Teachers ("AFT"), serving as the exclusive representative of 7,700 faculty, issued a report on "Gender and Race Equity" in January 2018.[5] Among other recommendations, the report proposes "one-time" gender- and race-based salary increases,[6] and hiring faculty based on race so to match the "percentages" given races compose within the New Jersey population.[7] Promoting the report at a campus event, Rutgers AAUP-AFT members also said they want the university to mandate "a diversity requirement in the undergraduate

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[5] *Gender and Race Equity Report,* RUTGERS AAUP-AFT, (August 2018), http://equitysecuritydignity.org/wp-content/uploads/sites/ 2/2018/02/GREreport2018-final-update-6.pdf.

[6] *Id.* at 17.

[7] *Id.* at 12. AFT has recommended its union affiliates use the collective bargaining process to advance issues it acknowledges as raising "political" questions. *See, e.g.*, AFT Higher Education, *Creating a Positive Work Environment for LGBT Faculty: What Higher Education Unions Can Do* 4 (2013) https://www.aft.org/sites/default/files/wysiwyg/gender diversity_lgbt0413.pdf (recommending that faculty unions "[b]argain contract language that is LGBT-inclusive, specifically including: Nondiscrimination clauses that cover sexual identity, gender identity, and gender expression . . . ."); *see also id.* at 6 (acknowledging these recommendations raise "political question[s]").

curriculum."[8] As one person who worked on the report said, achieving such goals is *why* the Rutgers AAUP-AFT union exists: "Our union is what we call a social-movement union. Which means we're not just interested in negotiating salaries and bread and butter issues[.] But we believe in the common good."[9]

- The AAUP chapter of Portland State University, serving as the faculty's exclusive bargaining representative, accused the University of violating state law and university policies by failing to consult with the union on the University's decision to permit access to bathrooms without regard to biological sex.[10] The union's president made clear that it "has no issue with the construction of the all-gender bathrooms, but rather with the university's failure to" condition even bathroom access on the faculty union's approval.[11] As he said, "[b]athrooms

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[8] Ryan Stiesi, *Professors union hosts panel on race and gender discrepancies in academia at Rutgers*, DAILY TARGUM (Mar. 9, 2018, 7:27 PM), http://www.dailytargum.com/article/2018/03/professors-union-hosts-panel-on-race-and-gender-inequality-in-academia-at-rutgers.

[9] *Id.*

[10] Lillie Elkins, *Faculty union claims all-gender restroom construction violated policy*, VANGUARD (Apr. 17, 2018), https://psuvanguard.com/faculty-union-claims-all-gender-restroom-construction-violated-policy/.

[11] *Id.*

are related to conditions of employment, and, by law, policies impacting conditions of employment are mandatory subjects of bargaining."[12]

- The Professional Staff Congress, the exclusive bargaining representative of faculty at the City University of New York ("CUNY"), called on CUNY's Chancellor and Board of Trustees to create a "sanctuary campus" whereby CUNY security officers would be forbidden from working with federal immigration agents to enforce federal immigration laws.[13] "In response" to the union's request, the CUNY Chancellor committed to, among other things, prohibiting federal immigration enforcement officials from entering campus without a court order or warrant, turning over student information to immigration enforcement authorities without a court order, and "tak[ing] . . . action to assist in the enforcement of the immigration laws except as required by law."[14]

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[12] *Id.*

[13] Professional Staff Congress, City University of New York, CLARION, 8 (Jan.-Feb. 2017), https://www.psc-cuny.org/sites/default/files/clarion_pdfs/Clarion%20January-February%202017.pdf.

[14] *Id.*

Using Faculty Unions As Vehicles For Political Activism. Even with diverse political viewpoints among nonmembers, faculty unions with exclusive representation status still use their power and prestige to engage in political advocacy. Rutgers AAUP-AFT, for example, issued a resolution endorsing former Secretary of State Hillary Clinton for President in 2016. In doing so, it claimed that "an executive branch run by [President] Trump would denigrate knowledge, education, and intelligence altogether."[15] Numerous faculty unions pressed their campuses to publicly oppose the Trump Administration's immigration policies,[16] while others issued newsletters with lead articles lambasting state political parties and positions (even if only tangentially related to salaries, benefits, or campus life).[17] Still other faculty unions purport speech on

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[15] *Federal Elections: Statement of the Executive Council of the Rutgers AAUP faculty union regarding the 2016 presidential race*, AAUP-AFT RUTGERS (Oct. 6, 2016), http://rutgersaaup.org/get-involved/political-action/federal-elections.

[16] *University of Vermont Faculty Press for Further Protections Against Trump Executive Order*, UNITED ACADEMICS (Jan. 30, 2017), https://static1.squarespace.com/static/53977c28e4b0ac5be919b750/t/594a9715e3df282fe581c85f/1498060566177/University+of+Vermont+Faculty+Press+for+Further+Protections+Against+Trump+Executive+Order.pdf.

[17] *See, e.g.*, Wayne State University AAUP-AFT Fall 2018 Newsletter, Vol. 8, No. 2. The lead article, entitled "*STOP The Lame Duck*," claims Republicans within the Michigan legislature are "abusing their authority in a blatant power grab to retain control in the New Legislature. Republicans have

behalf of nonmembers by passing a variety of resolutions on controversial political subjects—including denouncing Israel,[18] opposing intellectual diversity on campus,[19] supporting "Occupy Wall Street,"[20] opposing Arizona's attempts to enforce its immigration laws,[21] and endorsing political positions

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aggressively moved legislation to weaken a number of initiatives that have been supported by the people of Michigan (*e.g.*, the minimum wage, paid sick leave, and Prop. 2 on gerrymandering). They have also initiated bills to weaken the authority of the Democratic Governor-elect, Attorney General, and Secretary of State." *Id.*

[18] *AFT 2121 Delegate Assembly Israel/Palestine Resolution*, AFT LOCAL 2121 - CITY COLLEGE OF SAN FRANCISCO FACULTY UNION, AMERICAN FEDERATION OF TEACHERS - CFT/AFT, AFL-CIO (MAY 15, 2018), http://www.aft2121.org/wp-content/uploads/GAZA-AFT-2121-Del-Assembly-resolution.pdf.

[19] One NAS member recalls United University Professionals at the State University of New York in Albany convincing the University's trustees to not adopt an "academic bill of rights" that would defend intellectual diversity on campus.

[20] *UVM faculty union lends support to Occupy Wall Street movement*, UNITED ACADEMICS AAUP/AFT (Nov. 3, 2011), https://static1.squarespace.com/static/53977c28e4b0ac5be919b750/t/53a34292e4b0590c53fcaa4f/1403208338669/PressReleaseOccupyWallStStatemenRevNov3_2011WEB.pdf.

[21] *Executive council of UVM faculty union passes resolution against Arizona racial-profiling law*, UNITED ACADEMICS AAUP/AFT (May 18, 2010), https://static1.squarespace.com/static/53977c28e4b0ac5be919b750/t/53a344bfe4b04c359bf5dd10/1403208895406/PressReleaseResolution+18May2010WEB.pdf.

and legislation on various "hot-button" political questions.[22]

National Unions Have Formed University Affiliates As Part Of National Political Activity. By deeming nonmembers associated with unions they declined to join, nonmembers are—by extension—also associated with national unions that are affiliated with the exclusive representative on

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[22] The California Faculty Association, for example, has taken overt positions on everything from (1) state legislation to protect the children of illegal immigrants (*CFA speaks out for DACA: AB 21 goes to Senate floor, would help immigrant students*, CALIFORNIA FACULTY ASSOCIATION (Sep. 6, 2017) https://www.calfac.org/headline/cfa-speaks-out-daca-ab-21-goes-senate-floor-would-help-immigrant-students), (2) demanding "significant federal investment in public higher education with matching dollars from the states" along the lines of a Senator Bernie Sanders presidential campaign proposal, (Jennifer Eagan, *Back to the Master Plan: Why CFA advocates for accessible, quality, and free public highed education*, CALIFORNIA FACULTY ASSOCIATION PRESIDENT'S COLUMN, (Fall 2017) https://www.calfac.org/magazine-article/back-master-plan-why-cfa-advocates-accessible-quality-and-free-public-higher), and (3) expressing "solidarity with justice-minded organizations and individuals across the nation working to protect the rights and freedom of transgender, two-spirit, nonbinary, intersex, and gender non-conforming persons," (*CFA Supports Transgender, Two-Spirit, Nonbinary, Intersex, and Gender Non-Conforming Faculty, Staff, and Students in the face of potential federal proposal*, CALIFORNIA FACULTY ASSOCIATION (Nov. 8, 2018), https://www.calfac.org/post/cfa-supports-transgender-two-spirit-nonbinary-intersex-and-gender-non-conforming-faculty-staff).

campus. Below are some examples of prominent national faculty union affiliates:

- ***SEIU***. Many faculty unions have been formed through the Service Employees International Union's ("SEIU") "faculty forward" initiative—boasting more than 54,000 faculty members on more than 60 campuses. Rather than focus solely on faculty salaries, benefits, and working conditions of any given campus, the initiative is quite explicit that it is "also fighting for systemic change." To SEIU, this means that faculty unions should be supporting, among other things, free college for all, opposing President Trump's immigration policies, and opposing aspects of recent federal tax reform legislation.[23]

- ***AFT***. The American Federation of Teachers ("AFT") also engages in nationwide unionization efforts meant to complement its political advocacy. As faculty members at Oregon State University noted when opposing AFT's unionization effort, AFT "spent over $33 million on campaign contributions in 2016," and all "were directed at *a single political party*." *Why we are opposed: AFT and AAUP are the wrong choice for OSU faculty at this time*, OREGON STATE UNIVERSITY EXCELLENCE, https://www.osuexcellence.org/projects/

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[23] *Faculty in Action*, SEIU FACULTY FORWARD, http://seiufacultyforward.org/faculty/faculty-in-action/.

(emphasis in original). This spending accorded with AFT's 2016 national convention, which adopted resolutions endorsing "racial equity," calling for the reversal of *Citizens United v. FEC*, 558 U.S. 310 (2010), supporting public funding for Planned Parenthood, expanding Medicare, raising the minimum wage, and raising taxes.[24] Beyond its political contributions, AFT also directs and promotes ideological activism in its campus affiliates—such as enumerating plans by which universities could build "sanctuary campuses" in opposition to the Trump Administration.[25]

- *UAW*. The United Autoworkers Union ("UAW") "represents the most academic workers of any union in the country."[26] Its university membership includes "about 20,000 academic workers" (*i.e.*, full- and part-time graduate workers, adjunct professors, postdoctoral researchers and others) since 2010 alone. The UAW branched out to

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[24] *AFT Resolutions and Policy July 2016 – July 2018*, https://www.aft.org/sites/default/files/conv18_resandpolicyreport.pdf.

[25] *Creating sanctuary on campus,* AFT (Jan, 11, 2017), https://www.aft.org/news/creating-sanctuary-campus.

[26] Phoebe Wall Howard, *UAW moves beyond auto industry to colleges, expands by nearly 70K members*, DETROIT FREE PRESS (Feb. 19, 2018, 7:00 AM), https://www.freep.com/story/money/cars/2018/02/19/united-auto-workers-college-campuses/315381002/.

building university affiliates to supplement its revenue as the auto industry faced turmoil.[27] And that new revenue has been put to political use. In addition to its faculty unions helping lawsuits that challenged the Trump Administration's Proclamation restricting travel to the United States, *see Hawaii v. Trump*, 138 S.Ct. 2392 (2018), UAW spent more than $13 million in political contributions in 2018—continuing to "throw[] hefty support behind Democratic politicians."[28]

- ***NEA***. The National Education Association ("NEA") calls itself "the largest college and university faculty and staff organization in the United States, representing more than 200,000 higher education employees in public as well as private institutions nationwide."[29] Several university unions that possess exclusive representative status explicitly affiliate with the NEA, including United University Professions (with the State

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[27] *Id.*

[28] Christina Rogers and John D. Stoll, *UAW Political Spending Way Down in 2016*, WALL STREET JOURNAL (Apr. 4, 2017, 5:40 PM), https://www.wsj.com/articles/uaw-political-spending-way-down-in-2016-1491342025.

[29] *Our Members*, NATIONAL EDUCATION ASSOCIATION (NEA), http://www.nea.org/home/1594.htm.

University of New York),[30] the Massachusetts State College Association,[31] the United Faculty of Florida,[32] and the Montana University System.[33] The NEA's campus presence is as robust as its political activism. It currently possesses 150 pages worth of resolutions expressing views on tax reform, counterintelligence activities, the rights of Native Americans, racial preferences, gun control, and U.S. participation in the International Court of Justice and the International Criminal Court—just to name a few topics.[34] It is therefore unsurprising that the NEA's "higher education" webpage devotes considerable space to its positions on federal legislation, "hate speech" on college campuses,

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[30] *Union Representation*, PURCHASE COLLEGE – STATE UNIVERSITY OF NEW YORK, https://www.purchase.edu/faculty-handbook/terms-of-appointment/union-representation/.

[31] *Offices, Chapters and Affiliates*, MASSACHUSSETTS STATE COLLEGE ASSOCIATION (MSCA), http://mscaunion.org/officers-chapters-and-affiliates/.

[32] *Affiliate Unions*, UNITED FACULTY OF FLORIDA – UNIVERSITY OF FLORIDA, http://www.uff-uf.org/affiliates/.

[33] *Collective Bargaining Agreement between the University of Montana Western Faculty Association Local 4323, MEA-MFT, NEA, AFT, AFL-CIO and the Board of Regents of Higher Education Montana University System, June 1, 2015 through June 30, 2017* (Aug. 29, 2016) https://mus.edu/ hr/cba/013-CBA.pdf.

[34] NEA, 2016-2017 NEA Resolutions, http://www.nea.org/assets/docs/Resolutions_2017_NEA_Handbook.pdf.

and opposition to Trump Administration policies.

- ***AAUP***. Perhaps no national union more explicitly wrestles with the conflict between individual freedom in the academy and deeming one's views being "exclusively represented" by a union than the American Association of University Professors ("AAUP"). AAUP is more than a century old and was founded to preserve academic freedom. This commitment inspired "AAUP's founders" to go "to great lengths to reject the union label" and unionism generally.[35] AAUP's second president (and a founder) Arthur Lovejoy put the point well in a 1938 speech: "'unionizing' academic teachers is essentially inimical" to the "special and peculiar responsibility" of academics to use "investigation and wide and free discussion" to "increase man's knowledge and understanding."[36] Nevertheless, AAUP became open to unionization during the 1960s and early 1970s—particularly as AAUP's membership was put at risk by "union rivals" working to mobilize faculty against university

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[35] Henry Reichman, *Professionalism and Unionism: Academic Freedom, Collective Bargaining, and the American Association of University Professors*, 1 (AAUP Journal of Academic Freedom 2015) https://www.aaup.org/sites/default/files/Reichman_0.pdf.

[36] *Id.* at 4 (internal citation omitted).

administrations[37]—and now attempts to reconcile its traditional commitment to academic freedom with political activism. For example, AAUP's commitment to academic freedom did not prevent its Collective Bargaining Congress from endorsing former Secretary of State Hillary Clinton for President of the United States in 2016,[38] combatting academic freedom legislation in state legislatures, and giving their political activism the slogan "One Faculty, One Resistance."[39]

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In sum, the rampant and overt political speech by unions with exclusive representation status—done without any regard to the views of nonmembers that are deemed by law to be associated with this advocacy in collective bargaining—undermines a core premise that persists in this Court's precedent, even as the case in which it was articulated has now been overruled: it is possible to separate "activities and programs which are economic, political, and professional, scientific and religious in nature" from those "germane" to collective bargaining. *See Abood*

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[37] *Id.* at 6.

[38] Peter Schmidt, *AAUP Rebukes Universities for Their Boards' Actions*, CHRONICLE OF HIGHER EDUCATION (June 19, 2016) https://www.chronicle.com/article/AAUP-Rebukes-Universities-for/236863.

[39] *Free Speech on Campus,* AAUP, https://onefacultyoneresistance.org/featured-campaigns/freespeech/.

v. Detroit Board of Education, 431 U.S. 209, 213, 235 (1977); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (embracing this distinction). Rather, Justice Frankfurter's reaction to this distinction better reflects modern reality: "rather naïve." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting). In reality, this distinction does not exist. Preserving this artificial distinction in the face of unions possessing exclusive representation status puts the free association rights of nonmembers at risk.

III. EXCLUSIVE UNION REPRESENTATION VIOLATES THE NONMEMBERS' FREEDOM OF ASSOCIATION.

This Court consistently recognizes that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Janus*, 138 S. Ct. at 2463 ("The right to eschew association for expressive purposes is likewise protected."); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion) ("[F]orced associations that burden protected speech are impermissible."). This constitutional principle is violated by affording unions exclusive representation status over everyone—member and nonmember alike.

As discussed above, many employees decline to join unions out of a desire to avoid being associated with a union's ideological activity. Despite this

Court's attempts to ensure unions with exclusive representation status respect nonmembers' rights, many unions are routinely invoking their collective bargaining power to take positions on all sorts of controversial matters of public concern—*regardless* of whether a nonmember agrees with them or not, *regardless* of whether avoiding those very positions was why the employee chose not to join the union in the first place.

Equally troubling, as suggested by some of the examples of union advocacy above, unions could condition the resolution of bargaining disputes on (to use the words of the Rutgers AAUP-AFT union representative) the achievement of "social-movement" causes. When unions are, as the Rutgers union said, "not just interested in negotiating salaries and bread and butter issues," *see supra* p. 9, it is no stretch to imagine that a nonmember's employment contract could be subjected to a strike, unreasonably delayed, or end up with less favorable terms because a union chose to privilege ideological aims over "bread and butter" issues. All the while, none of those "social-movement" messages were the nonmember's. Such a scenario gives credence to petitioner Janus's rebuke of the "free-rider" label, recognized by this Court. By being bound to a union's exclusive representation status, the nonmember "is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466. It is hard to imagine a more

obvious violation of the First Amendment's freedom of association guarantee.

Of course, as *Janus* recognized, even traditional collective bargaining concerns (*e.g.*, salaries, health benefits, and working conditions) "may be of substantial public importance and may be directed at the public square." *See id.* at 2476-2477 (citing an example of "the Union respondent . . . fil[ing] a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase"). The fact that "union speech" in the public sector, like with public universities, can often be "overwhelmingly of substantial public concern," *id.* at 2477, underscores why exclusive representation designations should be subjected to strict judicial scrutiny—"it is apparent that the speech" deemed on behalf of everyone, member and nonmember alike, "is not commercial speech." *See id.* at 2465 (internal quotation marks and citations omitted).

This Court has not clarified whether the burden exclusive representation status imposes on nonmembers must satisfy either "strict" or "heightened" judicial scrutiny. *See id.* This case is the right one to resolve that question. The deep tension between the "special" First Amendment concern for academic freedom, *see, e.g.*, *Keyishian v. Board of Regents of University of New York*, 385 U.S. 589, 603 (1967), and the use of collective bargaining to campaign for ideological causes evidences why the government interest underlying

exclusive representation cannot survive either standard.

Exclusive representation is purportedly justified by the desire to preserve "labor peace" (*i.e.*, "avoidance of the conflict and disruption" *Abood* "envisioned would occur if the employees in a unit were represented by more than one union," *Janus*, 138 S. Ct. at 2465). But, as *Janus* noted, "*Abood* cited no evidence" supporting that conclusion, "and it is now clear that *Abood*'s fears were unfounded." *Id.* Indeed, far from creating or preserving "labor peace," exclusive representation status breeds labor *discontent*. Any nonmember that declined to join a union precisely to avoid associating with its ideological predilections is deemed associated by law. In the university faculty context, otherwise free and autonomous professionals—hired and expected by virtue of their vocation to be unafraid, reasonable, independent, and civil when taking informed positions on salient issues—must sit idly by as their "exclusive representative" does all the talking. This renders exclusive representation at odds with the independent thought and speech that are at the core of academia.

Moreover, despite more than forty years passing since *Abood*'s speculation about "labor peace," this Court has never explained why "labor peace" should be considered a compelling interest in all employment contexts, or whether there are alternatives to achieving "labor peace" in a given

employment context that are less restrictive to free association than exclusive representation. This silence reinforces why this Court should grant certiorari.

As members of this Court have recognized in other free speech cases, "[i]f affixing the commercial [speech] label permits the suppression of any speech that may lead to political or social 'volatility,' free speech would be endangered." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (opinion of Alito, Thomas, and Breyer, JJ. & Roberts, C.J.). Whatever other purpose it might serve, the freedom of speech "is essential to our democratic form of government, and it furthers the search for truth." *Janus*, 138 S. Ct. at 2464 (citations omitted). Exclusive union representation puts those purposes at risk. This restriction on free association is permitted to masquerade as one affecting mere commercial speech. The reality is that this designation creates coerced association on matters of public concern. Especially in the context of the university, where self-governing citizens are formed and open debate by faculty on important questions is not merely encouraged but expected, exclusive union representation is a troubling anomaly. NAS respectfully asks that the Court grant certiorari to address this issue.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

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