

No. 19-847

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IN THE

**Supreme Court of the United States**

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JONATHAN REISMAN,

*Petitioner,*

v.

ASSOCIATED FACULTIES OF THE UNIVERSITY

OF MAINE, ET AL.,

*Respondents.*

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

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**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 designate a labor union to represent and speak for public sector employees who object to its advocacy on their behalf.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

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 associate with unions and let those unions speak for

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms 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*, its members, or its counsel made such a monetary contribution. All parties were timely notified and consented to the filing of this brief.

them, no matter how strongly employees disagree with that speech.

Jonathan Reisman is an employee at the University of Maine. The University of Maine has an agreement with a union which under Maine law provides that the union “represent all the university...employees within the [bargaining] unit without regard to membership in the organization.” Me. Stat. tit. 26, § 1025(2)(E). This means that even if employees like Reisman do not wish to have the union represent them, as evidenced by their choice not to join the union, they are compelled to do so under state law.

Maine goes even further than many states by not even requiring an election before compelling such speech from employees like Reisman. Under Maine law, any “employee organization may file a request” in which it claims that a majority of employees supports that organization. Me. Stat. tit. 26, § 1025(1). If it is accepted by the university or college, no election is required to compel speech from people like Reisman. *Id.* (“Such request for recognition shall be granted by the university, academy or community colleges unless the university, academy or community colleges desire that an election determine whether the organization represents a majority of the members in the bargaining unit.”). It is from employees like Reisman that the union should seek consent to represent, not a third-party like the school.

The issues on which the union’s speech is treated as the Petitioner’s, against his 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 his own on issues of substantial public concern infringes on his First Amendment rights.

Equally troublesome, the state compels the Petitioner to accept the advocacy of an exclusive representative that he 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 Maine statute that establishes exclusive representation is in conflict with First Amendment jurisprudence and warrants review by the Court.

## ARGUMENT

Maine state law compels the petitioner, Jonathan Reisman, to accept the Associated Faculties of the University of Maine (AFUM) as his personal representative. Me. Stat. tit. 26, § 1025(2)(E). The AFUM represents all University of Maine employees, both those who join the union and those who do not. *Id.* The law allows AFUM to speak on behalf of all such employees in determining work terms and conditions for employees. At the very least 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.



Without an election, which is not required under Maine law, it is hard to even tell if a majority actually won 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 even afforded the opportunity to vote on whether they want any union at all, let alone the specific union that would represent them. In the case before the Court, the AFUM was certified as the exclusive representative for University of Maine in 1978. Reisman, and almost all of his colleagues, were not University employees at that time. As such, many employees represented by the AFUM 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 AFUM represents and speaks on behalf of Reisman through collective bargaining sessions, meet and confer sessions, and other venues. This is permitted even though he opposes many of the union’s positions during collective bargaining negotiations and advocacy on political issues. And the AFUM, 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 Maine law, public

employees must accept the speech of the AFUM 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 such as pay, promotion, layoffs, and retirement.

To become certified as representing all employees, all that is required is an assertion of that the organization has the support of a majority of the employees. Me. Stat. tit. 26, § 1025(1). If that assertion, with no evidence of actual consent by those individuals, is accepted by the school administration, then that organization, under state law, is “to represent all the university, academy or community college employees... without regard to membership in the organization certified as bargaining agent.” *Id.* § 1025(2)(E). Only if the assertion of majority support is opposed by the administration is an election required. *Id.* § 1025(1).

Upon certification, all public employees are forced to accept union representation, work under a union negotiated contract, and accept that the union speaks on their behalf. Maine law requires Reisman to accept these conditions despite the fact that he opposes many of the union’s positions during bargaining negotiations and its political stances.

As it stands, Reisman and other employees who are similarly dissatisfied with their union representation are prohibited from seeking representation other than from the AFUM, and from individually negotiating their own work terms and conditions with the Maine universities.

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.” *Id.* § 1025(2)(C). Decertifying an exclusive representative is an arduous process. Maine law erects several hurdles to removing an exclusive representative. First, for a year after certification, “no question concerning representation may be raised.” *Id.* § 1025(2)(D). Second, for up to three years after the initial year, “no question concerning unit or representation may be raised except during the period not more than 90 nor less than 60 days prior to the expiration date of the agreement.” *Id.* § 1026(1)(D).

Instead of voluntarily selecting a specific union representative, employees are compelled to accept, as a condition of employment, representation by a union 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 that 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 one percent of current teachers were employed in the year that the union representative was elected. *Id.*

In the instant case, AFUM was elected and certified as the exclusive representative in 1978 for teachers at Maine’s public universities. For this reason, Reisman, whose employment at the University of Maine began in August, 2015, never had the opportunity to vote on whether he desired union representation or not. Reisman is not alone.

An analysis of the University of Maine’s Faculty and Staff webpage, <https://peoplesearch.maine.edu/index.php>, could not find any professors whose tenure at the University of Maine began prior to 1978, when the only vote for certification of this union occurred. University of Maine System, UMS PEOPLESEARCH (last accessed Dec. 17, 2018), <https://peoplesearch.maine.edu/index.php>.

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

As a result of Maine 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 beyond the important political issues that arise during collective bargaining negotiations.

Technically, the contract with the University of Maine officially recognizes the “Associated Faculties of the Universities of Maine / Maine Education Association / National Education Association” as the exclusive bargaining agent. AFUM, Agreement between University of Maine and Associated Faculties of the University of Maine, MEA/NEA (last accessed Jan. 28, 2020), <http://afum.info/wp-content/uploads/2018/08/AFUM-CBA-2017-2019-1.pdf>. While AFUM focuses on a variety of important public policy issues concerning the faculty (which Reisman should not be forced to support), it doesn’t directly focus on political issues at the state and national levels. Instead, AFUM is part of the larger Maine Education Association and the National Education Association, which directly take a variety of political positions as the exclusive representatives of Mr. Reisman.

Public-sector unions such as the Maine Education Association, in their capacities as exclusive representatives, speak out on a variety of political matters. Here is how the Maine Education Association describes its recent political work, which Mr. Reisman is required to support despite the fact that he objects to it:

“Because of MEA’s presence, in the last few years, some of the success include:

- Hundreds of Millions more in education funding
- Elimination of the testing mandate tied to teacher evaluations
- Changes to the Rules of Restraint and Seclusion to make them manageable/realistic for educators

“Why is the MEA involved in politics? Why should educators worry about who gets elected? Here are three good answers:

1. Protection of public schools is a fundamental task of the Association. With repeated political attacks on our schools at the state and national level, educators must defend their programs and MEA has led the way in proclaiming the success of Maine schools and defeating attempts to displace public schools as the cornerstone of our democracy.
2. Funding for K-12 schools, the University of Maine, and Technical College Systems is largely dependent upon the good will of state legislators. The health and prosperity of your program, salary, and benefits is directly tied to votes on school funding. MEA is a strong proponent for more funding and is often the only voice for student needs.
3. What you teach and how you do your job is the result of political decisions. If MEA isn't involved, decisions about school curricula, teaching methodologies, student assessment, and graduation requirements will be made without regard for educator interests.”

Maine Education Association, Legislative Lobbying (last accessed Jan. 28, 2020), <https://maineea.org/take-action/>. Another example of the MEA's political activities is its endorsement of candidates for Maine Governor, Senate, and House seats. National Education Association, How to Support Public Education in Maine, (last accessed Jan. 28, 2020)

<https://web.archive.org/web/20181128192515/https://educationvotes.nea.org/state/maine/>.

The Maine Education Association and the National Education Association are not alone in political advocacy while representing people who do not consent to that advocacy. For example, the published proceedings of the American Federation of State, County, and Municipal Employees (AFSCME) 2018 convention record the advocacy that non-members 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 Reisman.

### CONCLUSION

For the foregoing reasons, this Court should grant this petition to consider whether the exclusive representative requirements in Me. Stat. tit. 26, § 1025(2)(E) violate the First Amendment.

Respectfully submitted,

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