No. 19-847

In The

Supreme Court of the United States

JONATHAN REISMAN,

Petitioner,

v.

ASSOCIATED FACULTIES OF THE UNIVERSITY OF MAINE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael T. Collins
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

February 5, 2020

QUESTION PRESENTED

Whether the First Amendment allows a state to appoint a labor union as the sole and exclusive bargaining agent of public workers who have declined to join the union and object to its speaking on their behalf.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates a government burden on individuals' exercise of their constitutional freedoms of association and expression.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Maine law, public employees are forced to associate and speak through a state-compelled labor union, even if they choose not to join and strongly object to the positions it takes in collective bargaining and other activities. The statute at issue here explicitly states that the certified organization is the "sole and exclusive bargaining agent for all of the employees in the bargaining unit," Me. Stat. tit. 26, § 1025.2.B, and has the exclusive right to bargain on behalf of university employees. *Id.* § 1026.1. Professor Jonathan Reisman is therefore forced to accept the

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation or submission.

Associated Faculties of the University of Maine ("AFUM") as his "sole and exclusive bargaining agent," as a condition of continued employment. The AFUM has the sole and exclusive right to negotiate for him on employment issues and speak with his voice on other "matters of substantial public concern." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2460 (2018). Such arrangements plainly violate Professor Reisman's and other dissenting nonmembers' associational rights.

As the Court recognized in *Janus*, designating a union as the exclusive agent of nonmembers inflicts a "significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 2478. Designation as the exclusive bargaining agency essentially creates an unwelcome relationship between the union and dissenting nonmembers. *See Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74–75 (1991). Exclusive bargaining grants the union a monopoly on work-related expressive association, meaning employees cannot choose to forgo union representation nor elect to be represented by an alternative union. The union can even advance its own political agenda at the expense of dissenting minority members and nonmembers. See *Knox v. SEIU*, 567 U.S. 298, 310 (2012) (noting that "a public sector union takes many positions during collective bargaining that have powerful political and civic consequences"). The union may also negotiate contracts for all employees, even those who fundamentally oppose the union's advocacy. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (concluding that union representation

"extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees").

Along with the right to associate, the Court has long recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463. But in the labor context, courts are reluctant to subject public unions to any degree of scrutiny due to states' purported interest in "labor peace." Exclusive bargaining agency regimes, however, are not supported by any state interest—let alone a compelling one—that might justify the significant impingements on associational rights it imposes. Put simply, there is no labor exception to the First Amendment, and labor laws that violate constitutional principles must be held to heightened judicial scrutiny.

Amicus agree with Prof. Reisman that the question presented is a "profoundly important question that has never received any deliberate consideration by this Court." Pet. at 13. Forcing dissenting nonmembers to associate with and speak through a state-appointed union that they did not vote for is a clear violation of basic First Amendment principles. Courts "do not presume acquiescence in the loss of fundamental rights." *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999). This case presents an ideal vehicle for setting the record straight by reaffirming associational rights in the labor context. The Court should establish once and for

all that public employees do not leave their constitutional rights at the workplace door.

ARGUMENT

I. COMPELLED SOLE AND EXCLUSIVE BARGAINING INFLICTS A SIGNIFICANT HARM ON ASSOCIATIONAL FREEDOMS

A. Sole and Exclusive Bargaining Compels Expressive Association over the Objections of Dissenting Nonmembers

Forcing free and independent individuals to associate with a state-designated union and endorse ideas they find objectionable raises serious First Amendment concerns. As the Court has repeatedly held, the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The government may not "require affirmation of a belief and an attitude of mind," nor may it "force an American citizen publicly to profess any statement of belief." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943). Moreover, "[f]orced associations that burden protected speech are impermissible." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality). An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). "The ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox*, 567 U.S. at 309.

When a state certifies a union as the sole and exclusive bargaining agent of unwilling public employees and permits it to speak on their behalf, it compels those employees to engage in expressive association. The Maine statute at issue does just that by forcing Prof. Reisman and other dissenting nonmembers to accept the speech of the state-designated union as their own. State law recognizes Associated Faculties of the University of Maine ("AFUM") as the "bargaining agent" with the exclusive bargaining rights of all faculty members throughout the University of Maine system. Agreement Between University of Maine System and Associated Faculties of Maine 2015–2017 ("AFUM Agreement"), art. 1; Pet. App. 70. In this role, AFUM is the "sole and exclusive bargaining agent for all of the employees in the bargaining unit," Me. Stat. tit. 26, § 1025.2.B, with exclusive right to bargain and submit upper-level grievances on behalf of university employees. AFUM Agreement art. 15, ¶ C (Steps 4–6 of the grievance process). Consequently, when AFUM speaks, it puts its own words in the mouths of Prof. Reisman and other dissenting nonmembers.

Any position AFUM takes during collective bargaining is necessarily imputed to all bargaining unit employees, including those who have refused to join the union and vehemently disagree with its positions. Prof. Reisman himself strongly opposes many positions AFUM has taken on issues involving "wages, hours, and conditions of employment." Pet. App. 45. However, "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), so exclusive bargaining

agents are authorized to engage in speech that individual employees oppose. *See Knox*, 567 U.S. at 310.

Importantly, AFUM's speech is not limited merely to economic issues affecting the workplace. *See Janus*, 138 S. Ct. at 2465 (explaining that in the public-union context "it is apparent that the speech is not commercial speech."). Even on controversial political matters, Prof. Reisman is forced to accept AFUM's speech as his own. As the Court recognized in *Harris v. Quinn*, "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." 134 S. Ct. 2618, 2632 (2014). It is undisputed that these topics are "matters of substantial public concern." *Janus*, 138 S. Ct. at 2460. In *Janus*, the Court pointed to numerous positions taken by unions during collective bargaining that involved political issues. *Id.* at 2476–77 (citing examples of "speak[ing] out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions.").

Moreover, AFUM, through its own support of the Maine Education Association (MEA), has associated Prof. Reisman with numerous MEA political causes he opposed, such as the election opponents of Maine's Governor Paul LePage and the 2016 presidential campaign of Secretary Hillary Clinton. Pet. App. 44–45. MEA has also lobbied for minimum wage increases and taxes on upper income households, which Prof. Reisman opposes. Pet. App. 45.

The nature of public unions makes it practically impossible to separate activities that are political

from those that are "germane" to collective bargaining. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 213, 235 (1977). This point underscores why sole and exclusive bargaining agency in the public union context imposes such a serious impingement on associational freedoms. Regardless of their individual stances on political issues, AFUM's speech tars both union members and nonmembers alike. There is simply no justification for Maine to require Prof. Reisman and other dissenting nonmembers to "express[] support for a particular set of positions on controversial public issues." *Janus*, 138 S. Ct. at 2464.

Sole and exclusive bargaining agency regimes like Maine's are nothing more than mandatory expressive associations that force public employees to adopt positions that are contrary to their sincerely held beliefs. *Allis-Chalmers*, 388 U.S. at 180 (quoting *Barnette*, 319 U.S. at 633) (likening exclusive representation to "a law commanding 'involuntary affirmation' of objected-to beliefs"). The Court's jurisprudence on this point is clear: "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Individuals' right to choose who petitions the government on their behalf is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981). If the First Amendment has any meaning, it must mean that the government cannot chose who speaks for employees in their relations with the government. The Maine statute violates these core principles and should be found unconstitutional.

B. Bestowing Sole and Exclusive Bargaining Agents with Monopoly Powers Based on a One-Time Election Violates Dissenting Employees' Freedom of Association

The Court below refers to the "democratically selected union" several times. Pet. App. 6, 21, 23. Yet, as is often the case with the names of dictatorships, the more "democratic" is emphasized, the less it means. *See*, *e.g.*, the Democratic People's Republic of Korea, German Democratic Republic, etc. If a modern government claimed to have legitimate governing power over all citizens—even dissenting ones—based on a single vote that occurred over 40 years ago, international observers would quickly and correctly describe it as a dictatorship that denies to its citizens the basic right to have a voice in their governance. Yet AFUM claims similar power and legitimacy here. And crucially, AFUM is not even a government, but an association that has been illegitimately granted an extraordinary and unique power usually reserved to governments: the power to coerce dissenters.

AFUM was originally certified as the sole and exclusive bargaining agent for University of Maine employees in 1978. AFUM Agreement art. 1; Pet. App. 70. Prof. Reisman did not begin his employment until 1984 and thus never had a chance to vote for or against AFUM. Even though Professor Reisman opposes the advocacy of the union's affiliates and does not wish to be associated with its speech, he is nonetheless forced to accept AFUM as the "sole and exclusive bargaining agent" that speaks on his behalf. Me. Stat. tit. 26, § 1025.2.B. And Prof. Reisman's situation far from unique. Many public employees never had

the opportunity to refuse representation or vote for the union of their choice.

The process for selecting a perpetual union can only vaguely be described as democratic. To become certified as "sole and exclusive bargaining agent," *id.* § 1025.2.B, an "employee organization may file a request with the university, academy or community colleges alleging that a majority of the . . . employees . . . wish to be represented for the purpose of collective bargaining." *Id.* § 1025.1. Such a request "shall be granted" unless the university "desire[s] that an election" determine whether the organization actually has majority support. *Id.* Once entrenched, the "democratically selected union" can only be ousted by a byzantine process. First, 30 percent of the bargaining unit employees must sign a petition requesting that they be represented by a rival organization.[2] *Id.* § 1025.1.A; *see also* 1.C (requiring the same process even if the 30 percent of employees merely want the current union decertified). The bargaining unit then holds a secret ballot to determine whether this new organization, or any other organization that can prove 10 percent support, can secure the support of a majority of employees. *Id.* Although the process allow employees to vote for no union, no mechanisms appear to support that eventuality. Instead, run-off elections are held until one union receives a bare majority. *Id.*

AFUM's exclusive status restricts employees' rights to bargain with their employer, engage in work-

[2] How a rival organization is supposed to develop when the certified union enjoys exclusive power remains a mystery.

stoppages or other negotiation techniques, or bring their grievances to the university chancellor without the consent and forced representation of AFUM.[3] *Id.* § 1027.2; AFUM Agreement art. 15.C; Pet. App. 92. This effectively gives the designated union a monopoly on workplace associations and employment-related communications with the employer.

Conferring monopoly power to a union designated by a majority of employees based on a one-time election impermissibly denies freedom of association to those who did not have a chance to vote for that sole and exclusive bargaining agent. "[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." *Roberts*, 468 U.S. at 618.

This Court has clearly stated that "[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment." *BOA*, 530 U.S. at 658. That is precisely what is happening in this case—and in many others around the nation. Instead of voluntarily selecting a union representative of his choice, Prof. Reisman is compelled to accept one that was chosen before his time with no term limits. The right to choose one's own representative is "crucial in preventing the majority from imposing its views on groups that would

[3] The agreement between AFUM and the University of Maine System provides for a tiered, union-dominated, grievance resolution system. The system allows only the AFUM to take grievances through steps 4, 5, or 6. In all stages AFUM is allowed to intervene. AFUM Agreement art. 15 ¶ C; Pet. App. 91–92.

rather express other, perhaps unpopular, ideas." *Id.* at 648. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

The Court below relied extensively on to *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984), to refute this position. *See* Pet. App. 10–11. But *Knight* did not raise a First Amendment challenge to exclusive bargaining. The plaintiffs challenged their own exclusion from "meet and confer" sessions with their exclusive agents. *Knight*, 465 U.S. at 288. The case did not implicate the compelled speech and association problems raised when individuals are forced to accept an association speaking for them. *Knight* concerned whom the government must listen to. Prof. Reisman is concerned with whom he must allow speak for him.

C. Sole and Exclusive Representation Denies Nonmembers the Right to Negotiate and Contract with Their Employer

"[D]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not . . . negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. The state-designated bargaining agent has the exclusive right to contract for and legally bind all employees in the bargaining unit. *See Allis-Chalmers*, 388 U.S. at 180. This practice "extinguishes the individual employee's power to order his

own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Id.* Under Maine law, public university employees, "without regard to [their] membership," must bargain and mediate grievances with the university through the sole and exclusive prerogative of AFUM. Me. Stat. tit. 26, §§ 1025.2.B, 1026.

That prerogative prevents workers from negotiating directly with their employers to develop contracts that fit their individual needs. Employees with different preferences—such as parents who may value shift flexibility or paid leave over other benefits—are unable to negotiate different terms of employment through another agent or on an individual basis. Once an exclusive bargaining agent is designated, then all bargaining unit employees must accept the contracts negotiated by AFUM. This inevitably leads to one-size-fits-all contracts that ignore the needs and desires of individual employees.

Unions can even enter into binding contracts and make other decisions that harm employees' interests. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 339–40 (1953). After all, unions have institutional interests of their own that may not coincide with the interests of individual members—and could directly contradict the interests of nonmembers. For example, an exclusive bargaining agent can waive nonconsenting individuals' rights to bring discrimination claims in court. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2009). And only the exclusive bargaining agent has the power to escalate a grievance proceeding. AFUM Agreement art. 15, ¶ C; Pet. App. 92. When a union controls the levers of workplace relations it may

subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 58, n.19 (1974).

Under exclusive representation, nonmembers have no right to order their affairs with their employer and are subject to the whims and interests of the unions, even when those interests are contrary to their own. Such a system contradicts basic First Amendment principles.

II. THE VIOLATION OF ASSOCIATIONAL FREEDOM IMPOSED BY EXCLUSIVE REPRESENTATION WOULD NOT BE TOLERATED IN OTHER CONTEXTS

A. There Is No Labor Law Exception to the First Amendment

The Constitution places a high value on freedom of association. It has even been recognized as an independent constitutional right because it is indispensable to protecting other First Amendment guarantees. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (recognizing a "close nexus between the freedoms of speech and assembly"). Labor unions themselves have historically relied on the concept of freedom of association to protect their right to engage in organizing activities and resist state laws limiting their ability to do so. Indeed, the right of workers to band together to improve their relative bargaining power is a straightforward implication of freedom of association, and exactly the type of voluntary association envisioned by the Founders. Having recognized the right to organize unions as part of the

protected freedom of association under the First Amendment, it would logically follow that the right not to join a union is a necessary corollary. But this has not been the case.

Modern unions (as well as courts) have abandoned associational freedom in the labor context in favor of state-compelled exclusive representation. While the concept of public unions themselves would certainly shock the Founders, it would be even more astounding to them that public employees could be compelled by law to associate with and speak through state-designated unions. Such coerced association is the very antithesis of the freedom of association that lies at the heart of constitutional liberty. Even "prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Janus*, 138 S. Ct. at 2471. Thomas Jefferson himself denounced "the propagation of opinions which he disbelieves and abhor[s]" as "sinful and tyrannical." *Id.* at 2471 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

As the Court pointed out in *Janus*, exclusive representation is a "significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478 (emphasis added). The Court has long recognized that this type of mandatory association restricts individual liberties. *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950)

(under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"); *Janus*, 138 S. Ct. at 2460 ("Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees.").

Freedom of association must mean the freedom to associate only with those whom we affirmatively choose. Without voluntary association on both sides, freedom of association is nothing more than a hollow right. Although courts have given differential treatment to labor laws in the past, exclusive bargaining agency regimes can no longer be reconciled with the Court's jurisprudence. There is simply no legitimate reason to exempt exclusive representation regimes from the normal operation of the First Amendment.

B. Labor Laws That Violate Core First Amendment Rights Are Subject to Heightened Judicial Scrutiny

The lower courts have refused to subject exclusive representation schemes to heightened scrutiny, primarily because of this Court's holding in *Knight*. Pet. App. 10–11. *Amicus* agrees with Prof. Reisman, Pet. at 9–13, that *Knight*'s holding does not support subjecting exclusive representation arrangements to anything but this Court's normally exacting standard of scrutiny. Such a conclusion cannot reasonably be squared with *Janus*, nor is it in line with established First Amendment precedents. Either way, this Court has not clarified whether the burdens imposed by state-compelled exclusive representation must satisfy

heightened judicial scrutiny. This case is the right vehicle to resolve that question.

This Court has already recognized that exclusive representation inflicts a "significant impingement on associational freedoms." *Janus*, 138 S. Ct. at 2478. In *Janus*, the Court averred that "exacting scrutiny" has typically been applied in other cases involving significant impingements on First Amendment rights. *Id.* at 2483. It went on to note that cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. *Id.*; *see*, *e.g.*, *Roberts*, 468 U. S. at 623; *United States v. United Foods*, 533 U. S. 405, 414 (2001). Exclusive representation regimes like Maine's implicate fundamental associational and speech rights protected by the First Amendment. They must therefore be subject to—at a minimum—exacting scrutiny.

Under exacting scrutiny, laws that force individuals to join expressive associations are permissible only when they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 567 U.S. at 310; *see also Roberts*, 468 U.S. at 623 (citing earlier cases). The state must "emplo[y] means closely drawn to avoid unnecessary abridgment." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Even when pursuing a legitimate interest, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Forcing public workers to associate with and speak through an exclusive bargaining agent fails exacting scrutiny because it is unsupported by any compelling state interest. The First Amendment simply does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 791 (1988). It also does not allow the government to "sacrifice speech for efficiency." *Id.* at 795. As the Court recently held in *Janus*, public employees may not, consistent with the First Amendment, be compelled to subsidize union advocacy. 138 S. Ct. at 2460. Like the public-sector agency fees at issue in Janus, state-compelled exclusive representation imposes a similar impingement on First Amendment rights. The rationales that have historically been offered to justify the impingement on individuals' associational freedoms—namely labor peace and free rider problems—are insufficient to justify exclusive bargaining agency. As this Court rightly pointed out in *Janus*, avoiding the risk of free riders is not a compelling state interest—and neither is "labor peace." Any state interest in "labor peace" can be achieved through means significantly less burdensome on associational freedoms than exclusive bargaining agency.

The district court here held that the Maine law survives exacting scrutiny. Pet. App. 23–24. The court reasoned that, as the Maine statute lacked mandatory agency fees, it was "significantly less restrictive of associational freedoms." Pet. App. 24 (quoting *Janus*, 138 S. Ct. at 2466). But whether a state's exclusive bargaining agency scheme is less restrictive than alternatives is irrelevant. The state must "emplo[y]

means closely drawn to avoid unnecessary abridgment." *Buckley*, 424 U.S. at 25. Even when pursuing a legitimate interest, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). It cannot seriously be argued that exclusive bargaining agency is the least restrictive means to achieving an interest in regulating public labor. The state could, for example, simply limit state entities from bargaining with rival unions. *See Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (stating that "the First Amendment does not impose any affirmative obligation on the government to listen").

In the wake of *Janus*, public employees are now free from compelled subsidization of union speech. But they continue to be forced to associate with state-designated unions via exclusive representation. It does not make sense that public employees cannot be obligated to *fund* union advocacy but are still compelled to *associate* with a union to facilitate that advocacy. If anything, compelled association through a sole and exclusive bargaining agent could be considered a more severe impingement of First Amendment freedoms than that disapproved of in *Janus*. The Maine statute at issue here serves no governmental interest, let alone a compelling one, nor is it closely drawn to avoid unnecessary abridgment.

C. "Labor Peace" Is Not a Sufficient Justification for Exempting Unions from First Amendment Scrutiny

The district court put forward "labor peace" as a rationale for exempting Maine's labor laws from First

Amendment scrutiny. Pet. App. 24 n.2. The court assumed but did not decide that the statute at issue met exacting scrutiny because it promotes the compelling state interest of "labor peace." *Id.* But modern developments in labor law make the vague concept of "labor peace" an insufficient justification for the unconstitutional impingements that representation imposes on nonmembers' associational rights. Just as the backdrop of economic factors was important to the Court's analysis in *Abood* and *Janus*, so should it be here.

More than four decades ago, this Court's decision in *Abood* struck a balance between public employees' First Amendment rights and states' interest in ensuring "labor peace." 431 U.S. 209. But in *Janus*, the Court overruled *Abood* in light of contemporary developments in the labor context that left the case as an outlier compared with the Court's other First Amendment cases. *See Janus*, 138 S. Ct. at 2483–84. This divergence was unsurprising given that the concept of "labor peace" was originally rooted in ideas of "industrial relations" common during the New Deal era. *Abood*, 431 U.S. at 220. Labor law changed drastically in the subsequent century—and even during the four decades since *Abood* was decided. Unlike the early days of the labor movement, it is now undeniable that "labor peace" can readily be achieved through means significantly less restrictive of associational freedoms. *Janus*, 138 S. Ct. at 2457. As *Janus* noted, "[t]he *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded." *Id.* at 2456.

Indeed, far from creating or preserving "labor peace," exclusive bargaining agency has only exacerbated labor disruption by forcing unwilling public employees to associate with and speak through state-designated unions. There is a clear disconnect between forcing public employees to accept a labor union as their representative and a state's claimed interest in "labor peace." This case presents an ideal vehicle for this Court to clear up that discrepancy.

III. REAFFIRMING SPEECH AND ASSOCIATIONAL RIGHTS IN THE LABOR CONTEXT WOULD HELP VOLUNTARY UNIONISM

After *Janus*, unions would benefit from being released from exclusive representative status. As it currently stands, unions are required to provide free representation services to nonmembers who do not pay union dues. Maine public employers, for example, are required to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration," with AFUM as the sole and exclusive bargaining agent. Me. Stat. tit. 26, § 1026.1. Many unions contend that exclusive bargaining is unfair because nonmembers get the benefits of collective bargaining without having to pay for them. Indeed, the question presented could reasonably be rewritten to read: "why should unions be forced to provide services to those who don't pay for them?"

Allowing competition between unions can actually improve union effectiveness. Economic theory suggests that competition promotes efficiency, and there is no reason to think that workplace representation is

any different in this regard. Giving unions the incentive to compete for members would encourage unions to negotiate the best possible terms for their members and maintain good member relations. Minority unions could negotiate terms that protect its members while simultaneously conveying to all employees that unionization results in various benefits, such as better pay, working conditions, and fairer disciplinary processes. Workers who support their union and its priorities could continue to select it as their representative. Research also suggests that if minority unionism was allowed by law, union membership could increase by 30 percent or more. Mark Harcourt, Helen Lam, *How Much Would US Union Membership Increase under a Policy of Non-Exclusive Representation?*, 32 Emp. Relations, Issue 1 (2010), at 89–98, https://bit.ly/2GZiYDZ.

Voluntary unionism would allow workers to negotiate contracts better tailored to their particular situations. Employees commonly have differing preferences about employment benefits, such as paid leave, wages, hours, job duties, and the like. Without exclusive bargaining agency imposed on dissenting employees or union nonmembers, each employee would be free to negotiate contracts through a union of their choice or individually.

Eliminating exclusive representation would also reduce the cost of organizing campaigns and elections. Public employees who wish to form unions and bargain collectively could do so without imposing the cost of collective representation on employees who do not

want union representation. This would reduce the resources expended on union representation elections by both employers and unions.

Any claims that unions would discriminate against nonmembers or members of other competing unions are unfounded. Unions are already legally prohibited from negotiating a bargaining agreement that discriminates against nonmembers. *See Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–03 (1944). As Justice Alito aptly pointed out in *Janus*, "it is questionable whether the Constitution would permit a public sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers." 138 S. Ct. at 2468. *Cf. Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that the government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive").

As Friedrich Hayek once claimed, unions "are the one institution where government has signally failed in its first task, that of preventing coercion of men by other men—and by coercion I do not mean primarily the coercion of employers but the coercion of workers by their fellow workers." F.A. Hayek, *Unions, Inflation, and Profits, in The Public Stake in Union Power* 46, 47 (Philip D. Bradley ed., 1959). The Court can set the record straight by reaffirming speech and associational freedoms in the labor context. Doing so would allow public-sector unions to thrive and ensure associational rights are protected. This case presents an ideal vehicle for the Court to clarify once and for all

that public employees do not leave their constitutional rights at the workplace door.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the petition should be granted.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael T. Collins
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

February 5, 2020