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 United States Court Of Appeals For The First Circuit

BRIEF OF GOLDWATER INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the government violate the First Amendment when it designates a labor union to speak as the exclusive representative of public-sector employees who object to its advocacy on their behalf?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, Institute litigators represent attorneys challenging a mandatory association in several cases, including *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019) (challenge to mandatory bar association membership and fees remanded for consideration in light of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)), *petition for cert. filed* (Nov. 26, 2019) (No. 19-670). The Institute has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)

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[1] The parties have consented to the filing of *amicus* briefs. *Amicus curiae* gave counsel of record for all parties notice of its intention to file this brief at least 10 days before the brief's due date. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

(matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different campaign contribution limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as *amicus curiae* in this Court and other courts in free-speech cases. *See*, *e.g.*, *Janus*, 138 S. Ct. 2448; *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

SUMMARY OF ARGUMENT

In designing the Constitution, this country's founders sought to limit the influence of factions—that is, of interest groups that would use the government to serve their own interests rather than the public interest. The founders expected that, in a large and diverse republic such as ours, the great number of factions competing with each other in a system governed by checks and balances would prevent any single faction from obtaining too much power.

Today, public-sector unions exhibit all the characteristics of a faction—but one that is not as constrained by our republican system of government as factions typically are. And they have had outsize success in influencing policy because of the many unique legal privileges they enjoy, particularly the power of exclusive representation. These advantages, unanticipated by

the Constitution's authors, have enabled public-sector unions to unite governing officials into a distinct in-government class, opposed to the citizenry, and which contradicts and at times overwhelms the separation of powers. In other words, statutes like the one Petitioner challenges—which requires public-sector employees like the Petitioner to accept an exclusive representative to speak to the government on their behalf—create and empower dangerous factions in a manner uniquely threatening to our republican system of government.

This Court should grant certiorari, both to protect citizens' First Amendment right *not* to associate with an exclusive representative, and to prevent these factions from attaining undue and undemocratic power.

ARGUMENT

I. The founders sought to limit the harm caused by factions.

The Constitution's authors were well versed in the history of republics and aware of the distinctive threats they faced. Among these was the risk posed by what they called *factions*—that is, organizations among those who exercise government power, which could pursue their own self-interest instead of the public interest. Madison described a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the

permanent and aggregate interests of the community." *The Federalist* No. 10 at 57 (J. Cooke ed., 1961) (James Madison).

The founders were wary of factions because they pursue their own interest, without regard for the public interest, in ways that threaten the freedom of others. As Madison noted, a legislator pursuing the interest of a faction of which he is a member essentially acts as a "judge in his own cause," which naturally leads to unjust results unless checked. *Id.* at 59. Madison gave an example: the power over taxation gives legislators acting on behalf of factions the "opportunity and temptation . . . to trample on the rules of justice" by writing legislation that shifts the tax burden onto different, competing factions. *Id.* at 60. Since "[e]very shilling with which they over-burden the [taxpayer] is a shilling saved to their own pockets," *id.*, legislators are pressured to support bills that impose that burden on people other than his own constituents—which might be clever politics, but violates principles of justice, encourages retaliatory factionalism by other groups, and ultimately undermines citizens' respect for republican institutions.

Madison was not alone in these fears. John Adams warned that when government indulges the "[s]elf interest, private avidity, ambition, and avarice" of a faction, the entire society gradually becomes subservient to that faction's desires and influence. *A Defence of the Constitutions of Government of the United States of America, Vol. III* (1788), *reprinted in John Adams: Writings from the New Nation 1784–1826* at 123

(Gordon Wood ed., 2016). And then, as a result, "[n]o favors will be attainable but by those who will court the ruling demagogues in the house, by voting for their friends and instruments; and pensions and pecuniary rewards and gratifications, as well as honors and offices of every kind [will be] voted to friends and partisans." *Id.* at 124 (spelling modernized).

Worse, once such a faction gained control over the powers of the state, it would perpetuate itself by using those powers to strengthen its hand; the faction's members "will in effect nominate their successors, and govern still." *Id.* at 118. In this way, an association among government officials who used their authority to perpetuate their power and advantage could subvert the checks-and-balances system entirely.

Jefferson, too, warned of the risks of private associations using political authority to pursue their private ends: he observed that "[t]he public money" could be a "source[] of wealth and dominion to those who hold [it]," and because taxpayer money is both "the instrument, as well as the object of acquisition," government officials could transform the state into a self-perpetuating means of extracting wealth from the public for the benefit of those wielding government power. *Notes on the State of Virginia* (1787), *reprinted in Thomas Jefferson: Writings* 246 (Merrill Peterson ed., 1984). "With money we will get men, said Caesar, and with men we will get money." *Id.* Writing before the Constitution went into effect, Jefferson warned that there could come "a time, and that not a distant one," when a faction "will have seized the heads of

government" and exercise its power to "purchase the voices of the people, and make them pay the price." *Id.*

As Jefferson's reference to Caesar suggests, the foremost historical example of ruinous factionalism that the founders knew was that of ancient Rome. And foremost among the examples of Roman factionalism was the Praetorian Guard. According to Edward Gibbon, whom the founders carefully studied, this organization began as a bodyguard for Roman rulers and then rose in power and influence until it became "the first symptom and cause of the decline of the Roman empire." 1 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 81 (New York: Heritage Press, 1946) (1776). During the reign of Tiberius, the Guard's "pride was nourished by the sense of their irresistible weight," which forced the government to "purchase their precarious faith by a liberal donative." *Id.* at 82. Eventually, the Guard claimed to be the true representative of the people and in all essentials ran the state.

Those events were never far from the founders' concern. In the controversy over Alexander Hamilton's proposed National Bank, for example, Madison wrote to Jefferson that a government-subsidized bank would transform "stockjobbers" into "the praetorian band of the Government, at once its tool and its tyrant; bribed by its largesses, and overawing it by clamours and combinations." Letter to Thomas Jefferson (Aug. 8, 1791), *in* 6 *Writings of James Madison* 59 (Gaillard Hunt ed., 1906) (spelling modernized).

Similar concerns led George Washington, on the advice of Jefferson and Madison, to demand that the Society of Cincinnati, a fraternal organization of Revolutionary War veterans, alter its rules regarding membership. Those rules made membership hereditary, and Jefferson warned that the Society would "probably procure an ingraftment into the government," and its members would become "patrons of privilege and prerogative, and not of the natural rights of the people"—in other words, an incipient Praetorian Guard in the new republic. Letter to George Washington (Apr. 16, 1784), *in Thomas Jefferson: Writings* (Merrill Peterson, ed. 1984).[2]

Because they were so acutely aware of the threat factions posed, the founders sought in designing our system of government to limit factions' ability to exercise power and oppress others.

The framers saw two potential methods for "curing the mischiefs of faction": "removing its causes" and "controlling its effects." *The Federalist* No. 10, *supra*, at 58. The first method was unacceptable: to remove the causes of faction, one could either limit freedom of speech and freedom of association, or take similar steps to ensure that everyone has the same opinions and interests. *Id.* This was not a viable option because

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[2] Although the Society agreed to alter its charter in ways that satisfied Washington, these concerns ultimately proved justified, as the Society did become an institution through which government patronage and privilege were extracted from public resources for private benefit. *See* Gordon S. Wood, *The Radicalism of the American Revolution* 263 (1992).

the "remedy" of restricting freedom would be "worse than the disease" of faction; after all, the whole point of restraining factions is to protect liberty. *Id.* And giving everyone the same opinions and interests is neither desirable nor possible. *Id.* at 58–59.

Madison believed the second method—controlling factions' harmful effects—was in most cases feasible through the Constitution's republican system of government. *Id.* at 60–65. A minority faction would, he expected, be controlled by "the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* at 60. And a large republic, such as the one the Constitution would create, would "take in a greater variety of parties and interests," which would make it "less probable that a majority of the whole will have a common motive to invade the rights of other citizens." *Id.* at 64. In other words, a "greater variety of parties" would protect "against the event of any one party being able to outnumber and oppress the rest." *Id.*

In brief, the founders hoped the cure for the problem of faction would be found in balance. "Divide et impera," wrote Madison, "is under certain qualifications, the only policy, by which a republic can be administered on just principles." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 5 *Writings of James Madison* 31 (Galliard Hunt ed., 1904).

The First Amendment naturally helps, on balance, to limit the power of factions in this way. On the one hand, freedom of speech and association allow factions

to exist in the first place; as Madison put it, such "[l]iberty is to faction, what air is to fire, an aliment without which it instantly expires." *The Federalist* No. 10, *supra*, at 58. But on the other hand, with a proliferation of factions that are all equally free to pursue their political goals "without hindrance or aid from the State," *Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012), factions tend to limit each other's influence, so that none can dominate the government or oppress the people.

Before the Revolution, wrote Madison, the means of limiting factionalism had been to empower some "will in the community independent of the . . . society itself," such as an unelected king, to limit interest group influence without falling prey to it. *The Federalist* No. 51 at 351 (J. Cooke ed., 1961) (James Madison). But this had proven ineffective and counterproductive. A better alternative was to encourage a diversity of rivalrous interests and to establish a government structure of checks and balances whereby power was separated and put into a kind of competition against itself. "Ambition must be made to counteract ambition." *Id.* at 349. By "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments," the founders hoped, the checks-and-balances system would divide those who govern into different groups, thereby hindering their tendency to unite around schemes that might threaten the rights and interests of the citizenry *without* creating any dangerously undemocratic power within the government. *Id.*

Madison famously illustrated this idea with the example of the many different religious groups in the American colonies. Living in a society in which established religion was the norm, he was aware that sects both within and outside the established church often exploited their authority—or struggled to gain such authority—with consequences that were adverse to the people's freedom and the community's safety. "In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects." *Id*. at 351–52.

That, at least, is the constitutional plan. Today, however, public-sector unions are not only an especially prominent faction, but they are a uniquely dangerous one because of the legal privileges they enjoy, privileges that undermine the separation-of-powers system.

II. Legal privileges such as exclusive representation make public-sector unions an especially dangerous faction.

In pursuing their goals, public-sector unions, like any faction, have acted in their own interest and contrary to the interests of rival groups. As this Court has recognized, their pursuit of self-interest has been successful: the "ascendance of public-sector unions has been marked by a parallel increase in public spending"

in which "the mounting costs of public-employee wages, benefits, and pensions" that unions obtained through collective bargaining "undoubtedly played a substantial role." *Janus*, 138 S. Ct. at 2483.

Indeed, the wages and benefits public-sector unions manage to obtain for government employees often exceed the compensation received by their private-sector counterparts. *See* Jeff Jacoby, *What Public-Sector Unions Have Wrought*, Commentary (October 2010).[3] All that spending must, of course, be paid for by taxpayers. And spending on things that unions want limits the government's ability to spend on things that other groups prefer. Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L. J. 1156, 1162–63 (1974). In fact, "[u]nsustainable collective-bargaining agreements have . . . been blamed for multiple municipal bankruptcies," *Janus*, 138 S. Ct. at 2483, and in some jurisdictions government spending on pension benefits obtained by unions threatens to crowd out spending on core government services. *See*, *e.g.*, Adam Schuster, Ill. Policy Inst., *Tax Hikes vs. Reform: Why Illinois Must Amend Its Constitution to Fix the Pension Crisis* 6–9 (2018).[4]

Public-sector unions have had such great success—even though they represent a minority of citizens, often advance political positions their own

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[3] http://www.jeffjacoby.com/8035/what-public-sector-unions-have-wrought.

[4] https://files.illinoispolicy.org/wp-content/uploads/2018/08/Tax-hikes-vs.-reform1.pdf.

members do not share, and frequently advocate for or against policies contrary to the interests of the majority—in part because of the legal privileges they enjoy, and which other kinds of interest groups do not enjoy, such as the power of exclusive representation.

Unlike other factions, public-sector unions have unique access to the political process through collective bargaining; they are not compelled, as private entities are, to achieve their goals exclusively or even primarily by normal democratic means, such as lobbying legislators and persuading the public. Instead, their exclusive-representation power enables them to force the government to the bargaining table, and to compel public officials to negotiate with them until they reach an agreement or an impasse, which leads to further procedures and (where authorized[5]) creates the potential for a strike. *See Janus*, 138 S. Ct. at 2467 (because government must bargain with an exclusive representative, "[d]esignation as exclusive representative . . . 'results in a tremendous increase in the power' of the union" (citation omitted)); Summers, *Political Perspective, supra*, at 1164.

Still more remarkably, the public employees who appear on the other side of that bargaining table are *themselves* often members of the same public-sector union, rendering any truly adversarial or arms-length negotiation illusory. R. Theodore Clark, Jr., *Politics & Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 684

[5] And even where unauthorized, as discussed below.

(1975). This is not a mere accusation—public sector unions often openly brag about the fact that "[t]hrough political action . . . [w]e have the ability to help hire and fire our bosses . . . [who] negotiate our pay raises, our pensions and our health benefits." *Cf.* AFSCME, *Bargaining for Political Power* (2000).[6]

Public-sector unions commonly negotiate with, or have their agreements ratified by, officials whose campaigns those same unions supported or funded. Not only may union-backed officials accede to union demands for greater spending, but they can also authorize unionization of additional government employees—and, in recent years, even people who *are not* government employees, such as the personal assistants who in *Harris v. Quinn*, 573 U.S. 616 (2014), were freed from compulsory union fees, but not from compulsory union representation. This gives the union more members and even more money to fuel its agenda. *See* Jacob Huebert, Harris v. Quinn*: A Win for Freedom of Association*, 2014 Cato S. Ct. Rev. 195, 208–09 (2014)[7]

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[6] http://web.archive.org/web/20110119210735/http://www.afscme.org:80/publications/9722.cfm. Another way unions undemocratically perpetuate their power is through collective bargaining agreement provisions requiring "release time"—that is, funding for government employees who are assigned exclusively to *union* business. *See* Jon Riches, *Union Time on Taxpayers' Dime*, Nat'l Rev., Mar. 6, 2018, https://goo.gl/9o8Q2m; *Cheatham v. DiCiccio*, 379 P.3d 211, 221 ¶ 45 (Ariz. 2016) (Timmer, J., dissenting). These employees receive their salaries from public money but work solely for the union, which means they can pursue the union's political agenda at taxpayer expense.

[7] https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2014/9/huebert.pdf.

(describing Illinois' cycle of unions contributing to the campaigns of officials who, in turn, unionize more groups, including non-employee childcare business owners like Petitioner).

Thus, public-sector unions become political perpetual-motion machines, funded by taxpayer money to demand more taxpayer money for the union and its members.

Also adding to their uniquely privileged status, public-sector unions' exclusive representation powers prevent individual employees from "negotiat[ing] directly with their employer" or "be[ing] represented by any agent other than the designated union," *Janus*, 138 S. Ct. at 2460, which means that any "[d]issonance or indifference in the employee group is submerged, giving the employees' [supposed] voice increased clarity and force," Summers, *Political Perspective, supra*, at 1164. And the negotiations typically occur behind closed doors, which means that outside voices are excluded. "Other groups interested in the size or allocation of the budget are not present during negotiations and often are not even aware of the proposals being discussed." *Id.* As a result, these groups are not able to present their views or create political pressure to affect the outcome. *Id.*

What's more, the parties in public-sector collective bargaining do not have a strong incentive to limit the costs of their bargain, as parties to a private-sector labor-management negotiation do. Private-sector unions are checked in their power by competition among

consumers; if a union's demands force a business to sell at too high a price, consumers will shop elsewhere, and both labor and management will suffer. Private-sector labor and management therefore face an incentive structure that works like a checks-and-balances system and cannot violate the rights of others or harm society. But in government, where taxpayers must bear the cost in any event, consumer choice plays no role, and a combination among employees leaves the consumer—i.e., the citizen—at the mercy of the combination's leadership. Unions and management can pass on the costs of their bargain to taxpayers, who have no choice but to bear the cost. *Cf. Harris*, 573 U.S. at 635 ("[A] public employer 'lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases.'" (citation omitted)).

True, the legislature must ultimately authorize any spending agreed to in collective bargaining, but that does not negate unions' special advantages. "Once an agreement, even a merely tentative one, is reached at the bargaining table, the opposing interests are placed at a substantial political disadvantage. The issue becomes whether the agreement should be repudiated"—and whether it is worth suffering the consequences of that repudiation—"rather than what agreement should be made in the first place." Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 674 (1975). The cost of rejecting even the worst of bargains is thus

made prohibitive, with the result that *nobody* effectively represents the citizenry in the entire deal.

The costs of rejecting a public-sector union's bargain are especially high—and unions' adversity to the public interest is especially apparent—where employees can strike,[8] legally or illegally, and thus hold the state and the entire taxpaying public hostage for private gain. Indeed, disruptive public-sector strikes have occurred throughout U.S. history. *See generally* David Ziskind, *One Thousand Strikes of Government Employees* (1940). Navy Department employees struck in 1835, and Government Printing Office employees struck in 1863. During the early twentieth century, police and fire officials refused to show up for work on several occasions, threatening the public safety until their demands were met. *See* Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 233–34 (5th ed. 2014).

That is the context for Calvin Coolidge's famous pronouncement that "[t]here is no right to strike against the public safety by any body, any time, any where." Calvin Coolidge, *The Autobiography of Calvin Coolidge* 134 (1929). Coolidge, then governor of Massachusetts, made that statement when the Boston Police Department walked off the job. *Id.* at 127. When officers refused to report for work, there ensued looting and rioting in which eight people were killed. Francis

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[8] Maine law prohibits the union that represents Petitioner from striking. Me. Rev. Stat. § 26-1027(2)(C).

Russell, *A City in Terror: Calvin Coolidge and the 1919 Boston Police Strike* 170 (1975).

When Coolidge mobilized the National Guard, President Woodrow Wilson expressed his support for the decision, telling an audience that "a strike of the policemen" that left the populace "at the mercy of an army of thugs, is a crime against civilization." *Id*. He continued:

> [T]he obligation of a policeman is as sacred and direct as the obligation of a soldier. He is a public servant, not a private employee, and the whole honor of the community is in his hands. He has no right to prefer any private advantage to the public safety. I hope that that lesson will be burned in so that it will never again be forgotten.

Id. After order was restored, Coolidge refused to rehire the terminated strikers on the ground that "if voluntary associations were to be permitted to substitute their will for the authority of public officials the end of our government was at hand." Coolidge, *supra*, at 134.

For some time, Americans remembered the lesson of the Boston Police Strike. President Franklin Roosevelt had it in mind when he wrote his famous 1937 letter rejecting the idea of a unionized government workforce. "The desire of Government employees for fair and adequate pay, reasonable hours of work, [and] safe and suitable working conditions" was legitimate, he wrote, but the distinction between the public and private sector imposed a "distinct and insurmountable

limitation[]" to the use of collective bargaining in the public sector. Letter from Franklin Roosevelt to Luther Steward (Aug. 16, 1937).[9]

"[M]ilitant tactics," Roosevelt continued, "have no place in the functions of any organization of Government employees" because government employees must "serve the whole people" rather than employees' own private interests. For a labor organization of government employees to take action against a government employer would be "unthinkable and intolerable" because it would "look[] toward the paralysis of Government by those who have sworn to support it." *Id*. Fears of public work stoppages during wartime highlighted the conflict between public-sector unions' private interests and the public interest. In May 1943, the United Mine Workers went on strike, prompting the Roosevelt Administration to seize control of the mines involved. For the workers to strike was an example of the dangerous factionalism the founders had warned of: "There can be no one among us," said Roosevelt, "no one faction powerful enough to interrupt the forward march of our people to victory." White House Statement and Executive Order on Seizure of Coal Mines, Executive Order No. 9340 (May 1, 1943), *in* 12 *Public Papers of the Presidents of the United States: Franklin Roosevelt* 194 (1950).

Unfortunately, since public-sector unions became common later in the twentieth century, illegal strike tactics have continued. For example, in 1975, police

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[9] https://goo.gl/hnue4g.

and firefighters in San Francisco engaged in an illegal strike for a raise even though they were already among the nation's highest paid. Brent Appel, *Emergency Mayoral Power: An Exercise in Charter Interpretation*, 65 Cal. L. Rev. 686, 688–89 (1977). Police established a picket line manned by armed officers, and strikers simply ignored a court order declaring the strike illegal and ordering officers to return to their jobs. *Id*. at 689. People began shooting at picketing officers, who returned fire; another person tried to run strikers over with a car. *Id*. at 690 n.26. Someone detonated a bomb near the mayor's office. *Id*. When a court ordered striking officers to surrender their guns, they ignored the order. *Id*. The city's mayor decided to capitulate to the strikers' demands, but the city council rejected that proposal, whereupon the mayor declared an emergency and surrendered to the strikers anyway. *Id.* at 691. When the legality of the mayor's pay increase agreement was later challenged as the product of duress, state courts upheld it regardless. *Verreos v. City & Cnty. of S.F.*, 133 Cal. Rptr. 649 (Cal. App. 1976).

In a more recent example, Arizona public-school employees organized a statewide shutdown of schools for an entire week shortly before the end of the 2017–18 school year. Public-school employees have no legal right to strike in Arizona, *see Communications Workers of America v. Arizona Board of Regents*, 498 P.2d 472, 474 (Ariz. App. 1972); Ariz. Att'y Gen. Op. No. 71-12 (R-40) (Apr. 5, 1971),[10] and the state's constitution

[10] http://azmemory.azlibrary.gov/digital/collection/agopinions/id/165/rec/4.

guarantees all children the right to a government-funded education, *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973). Nevertheless, dissatisfied with funding levels that the democratically elected legislature had set, and upset over enactment of a law that would have allowed parents greater ability to choose private schooling for their children, government employees across the state chose to coordinate their time-off days in order to reduce the number of employees available to staff schools. Rather than discipline lawbreaking teachers or seek substitutes, district officials encouraged and facilitated the unlawful strike by closing entire school districts, even where teachers chose not to participate in the strike and were willing to report to work. *See* Timothy Sandefur, *Hardworking Arizona Teachers Want to Teach Students—But Districts Won't Let Them*, In Defense of Liberty (May 1, 2018).[11] Teachers then massed on the state capitol grounds, disrupting legislative hearings and shouting down speakers, demanding the lawmakers capitulate to their demands for more funding. *See*, *e.g.*, Ray Stern, *Teachers in Red Rally at Arizona Capitol, Protest Tax Credits for Private Schools*, Phoenix New Times (Mar. 14, 2018).[12] Neither the state Superintendent of Schools nor the Attorney General took any action to restore lawful order or ensure that public schools remained open. On

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[11] https://indefenseofliberty.blog/2018/05/01/hardworking arizona-teachers-want-to-honor-their-promise-to-teach-students/.

[12] https://www.phoenixnewtimes.com/news/teachers-inred-rally-at-arizona-capitol-fight-progress-of-new-tax-credit-bill-10232389.

the contrary, the state rewarded the unlawful activity with a 20 percent pay increase to teachers.

In these details, one sees in full all the problems of faction the founders tried to avoid with the Constitution—and worse, because the faction in question is one which, by definition, exercises the power of the state: as with any union, all that a public-sector union does is in the pursuit of its self-interest. But because public-sector union members serve the *taxpaying public*, instead of *voluntary customers*, and because the union members wield government authority, this pursuit of self-interest is uniquely adverse to the public interest. With union-negotiated spending and pension benefits dominating state and local government budgets, the whole public becomes subservient to a powerful minority; in the special legal advantages public-sector unions enjoy, there is a unification of the interests of government employees that contradicts the "divide et impera" concept animating the separation of powers; and in unions' political activity, there is a faction using its political power to maintain and increase its political power—and even to use its strength to override the decisions made by the democratic process.

Because of their unique legal privileges, public-sector unions have not been constrained in their pursuit of power as Madison expected factions to be. In many jurisdictions where the law has empowered them, they have not been reined in by the majority or counteracted by the various other factions competing for power. That is by design: evading our system's natural constraints on factions—i.e., obtaining more

taxpayer money for government unions and employees than they could obtain through the democratic process alone—is the *purpose* of public-sector collective bargaining. *See* Edwin Vieira, Jr., *To Break and Control the Violence of Faction: The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* 22 (1980) (describing how public-sector unions are factions designed to circumvent the democratic process).

During the rise of public-sector unionism, a leading academic advocate argued that public-sector collective bargaining was "particularly appropriate for decisions where the employees' interests in increased wages and reduced work load run counter to the combined interests of taxpayers and users of public services"; public-sector collective bargaining, he argued, would "balance the massed political resistance of taxpayers and users of public services" by giving public-sector employees—or at least their unions—"a larger voice than the ordinary citizen" in government decision-making. Summers, *Political Perspective, supra*, at 1192–94. Unfortunately, these predictions have proven correct.

III. The Court should grant certiorari to protect workers' First Amendment rights and mitigate the problem of faction.

When the government forces public-sector employees such as Petitioner to accept an exclusive representative to speak to the government on their behalf, it not only commits an unprecedented violation of First

Amendment rights (*see* Petition at 13–18), but it also artificially empowers factions, giving rise to the problems discussed above associated with factions in general and legally privileged public-sector unions in particular. That undermines an important purpose of our Constitution and republican government itself.

Conversely, eliminating public-sector unions' power of exclusive representation would reduce those unions to the status of the kinds of factions anticipated by the Constitution—still potentially dangerous, but limited by the political process so that their pursuit of self-interest is democratically legitimate. *See The Federalist* No. 10, *supra*, at 60–61; *see also* Summers, *Political Perspective, supra*, at 1165–67 (without collective bargaining, public employees would have difficulty prevailing over, or forming coalitions with, other interest groups).

A grant of certiorari is therefore essential, not only to protect individuals' First Amendment right *not* to associate with an exclusive representative, but also to ensure that the problem of faction will be curbed as the founders intended, rather than worsened at the cost of the democratic process.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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