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 *AMICUS CURIAE* NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Scholars ("NAS") is a non-profit 501(c)(3) organization, with no political affiliation. A large majority of the members of the NAS are current and former faculty members. NAS has more than 3,000 members, organized into 42 state affiliates, and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines. The NAS supports the right to teach and learn in an environment free of politicization and coercion, to nourish the free exchange of ideas and the virtue of true tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to encourage the creation of general education policies which further the goal of liberal education.

The NAS has a particularly strong interest in the First Amendment issues raised in this case, as the issues involve the abridgment of the rights of free speech and association of faculty members. The NAS believes that it is vitally important to safeguard these rights in the university context, where intellectual diversity and the freedom of every

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

individual faculty member to explore issues of public concern and to choose to comment (or not to comment) on them as they see fit, is highly valued and should be the norm.

The NAS has previously appeared as *amicus curiae* before this Court in cases involving questions relating to the First Amendment. *See e.g.*, Brief of The National Association of Scholars as *Amicus Curiae* in Support of Petitioners, *Uradnik v. Inter Faculty Org., et al.*, 139 S. Ct. 1618 (2019) (No. 18-719); Brief of The National Association of Scholars, *et. al.,* as *Amicus Curiae* in Support of Petitioners, *Manning, fka Wagner v. Jones and Agrawal*, 135 S. Ct. 1529 (2015) (No. 17-1355); Brief of The National Association of Scholars, *et. al.,* as *Amicus Curiae* in Support of Petitioners, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377).

SUMMARY OF ARGUMENT

A statutory regime that forces *all* faculty members—including faculty members who choose *not* to be members of a union—to accept a given union as their exclusive representative invariably comes into intractable tension with the First Amendment.

Whatever the rationales for, or intended consequences of an exclusive representation union regime may be, its *actual effects* are clear. *First*, unions like Respondent Associated Faculties of the University of Maine ("AFUM") act in an exclusive representation regime as though they are the voice of all faculty members—indeed, AFUM publicly proclaims on its website that it is the faculty's

"voice," even while the district court and the First Circuit in this case held, counterfactually, that AFUM is *not* the "spokesperson" of faculty members like Petitioner.

Second, the range of matters on which unions like AFUM speak for faculty in an exclusive representation regime is *unrestricted*—and, in reality, unions speak for faculty on a vast range of matters, including some of the most sensitive political and social issues of our time. On some of these matters, the country is divided—sometimes deeply—and it is not surprising that some faculty members vehemently disagree with statements made on these matters by unions acting as the faculty's voice (whether those statements are formal or informal, public or non-public, and made in direct connection with a specific instance of collective bargaining or with only a loose connection to one).

Although the lower courts have refused to subject exclusive representation schemes to *any* meaningful degree of constitutional scrutiny, these schemes warrant *heightened* scrutiny, because their effects raise serious constitutional concerns, which include, among others: (1) these schemes impinge upon the First Amendment right of faculty members to decide what *not* to say on the controversial matters of public concern on which unions like AFUM act as faculty's voice, and (2) these schemes distort public discourse and undermine the very purposes of the rights of free speech and association that led the Framers of the Constitution to give those rights special protection in the first place.

The National Association of Scholars respectfully files this brief to draw particular attention to the two foregoing constitutional concerns posed by exclusive representation regimes. The National Association of Scholars respectfully submits that, in view of these concerns (among others), this case presents a constitutional question that urgently calls for review by this Court.

ARGUMENT

*AFUM "is **not** Reisman's agent, representative, or spokesperson . . ."*

--*Reisman v. AFUM*, 356 F. Supp. 3d 173, 179 (D. Me. 2018).

*"The faculty is the heart and soul of the university and **AFUM is its voice**"*

--AFUM Website, http://afum.info/

I. AFUM Acts As the "Voice" of the Faculty—AFUM Itself Proclaims That, But the Lower Courts Failed to Account For It.

If one wants to know what role AFUM understands the University of Maine System Labor Relations Act, Me. Rev. Stat., Ann. Tit. 26 § 1025(2)(E) (the "Act") to confer upon AFUM, who better to find out from than AFUM itself. AFUM has made it clear what authority it believes that it possesses under the statute, and, consequently, that AFUM seeks to exercise pursuant to the statute: the authority to act as spokesperson for the entire faculty of the University of Maine (including

Petitioner, a professor of economics and public policy at the University).

AFUM has made that clear by its actions—and it has also proclaimed it on its public website, http://afum.info. There, at the top of the home page, prominently displayed for all to see, AFUM crystalizes its view that it can and does speak for all faculty of the University of Maine: "The faculty is the heart and soul of the university ***and AFUM is [the faculty's] voice***." Associated Faculties of the Universities of Maine, http://afum.info (last visited: Feb. 5, 2020) (emphasis added). In short, AFUM not only regards itself as the voice of the faculty, but publicly promotes that view to the entire world, so that when AFUM speaks, its speech is construed by others through that lens.

The district court and the First Circuit did not grasp this essential role that AFUM plays (and acknowledges that it plays)—and, not surprisingly, the district court and the First Circuit proceeded to decide the First Amendment issues presented by this case in a manner untethered from reality.

To begin with, the decision of the District Court for the District of Maine rested on the misconception that the Act, which designates AFUM as the Petitioner's exclusive representative and spokesperson for collective bargaining and disciplinary appeals, was *not* the Petitioner's "agent, representative, or spokesperson." *Reisman v. AFUM*, 356 F. Supp. 3d 173, 179 (D. Me. 2018), *aff'd*, 939 F.3d 409 (1st Cir. 2019) ("*Because* the Union is not Reisman's agent, representative, or

spokesperson, the Act does not compel him, in violation of the First Amendment, to engage in speech or maintain an association with which he disagrees.") (emphasis added).

The district court reached this conclusion by reasoning that,

> Under the Act, the *Union* was not, as Reisman asserts, appointed by the Board as his representative and agent. Instead, it was selected by a majority vote of the employees to serve as their bargaining-unit's agent. 26 M.R.S.A. § 1025. And by authorizing the Union, in its role as the agent for the bargaining-unit, to negotiate with the Board on matters related to the terms and conditions of employment, *id.* at § 1025(2)(B), the Act does not cloak the Union with the authority to speak on issues of public concern on behalf of employees, such as Reisman, who do not belong to the Union.

Id.

The district court's reasoning was faulty. Although the statute may "not cloak the Union with the authority to speak on issues of public concern on behalf of employees," the court ignored the actual *effect* of AFUM becoming the exclusive representative of the faculty—the effect that AFUM itself grasps when it describes itself as the "voice" of the faculty. *See United States v. O'Brien*, 391 U.S. 367, 385 (1968) (noting that "the purpose of the

legislation is irrelevant" where the "inevitable effect . . . abridge[s] constitutional rights"); *Citizens United v. F.E.C.*, 558 U.S. 310, 329 (2010) (noting that the process of deciding the constitutionality of a statute on First Amendment grounds "requires full consideration of the *continuing effect*" of the law, and declining to delve into the intent of the Congressional drafters) (emphasis added); *Commercial Bank of Cincinnati v. Buckingham's Ex'rs*, 46 U.S. 317, 322 (1847) ("It is not the terms of the law, *but its effect*, that is inhibited by the constitution.") (emphasis added).

In affirming the district court's ruling, the First Circuit perpetuated the district court's faulty reasoning:

> § 1025(2)(E) *is not properly read to designate AFUM* as Reisman's personal representative, as he contends. Rather, that provision merely makes clear that a union, once it becomes the exclusive bargaining agent for a bargaining unit, must represent the unit as an entity, and not only certain of the employees within it, and then *solely for the purposes of collective bargaining*.

Reisman v. AFUM, 939 F.3d 409, 413 (1st Cir. 2019) (emphasis added).

The crux of the First Circuit's error was failing to grasp that while the Act gives AFUM the role of "exclusive bargaining agent" of faculty members, the Act does not limit the scope of AFUM's activities in fulfilling that role, and in particular, the

Act does nothing to exclude from AFUM's collective bargaining activities the role of speaking for the faculty on any matters on which AFUM chooses to speak.

II. When Unions Like AFUM Speak For Nonmembers on Political and Social Matters, It Infringes Upon Their Fundamental Right to Decide What *Not* to Say, and Distorts Public Discourse.

a. Unions Like AFUM Speak—As Nonmembers' Voice, but Often Against Their Wishes—on Matters of *Public Concern*.

As this Court indicated in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), in addressing issues concerning the rights of free speech and association, it is important "to recognize what actually occurs"—*e.g.* "what actually occurs in public-sector collective bargaining." *Janus*, 138 S. Ct. at 2476. When AFUM (and other unions like it) act as the voice of the faculty, under authority of statutes such as the Act, what "actually occurs" is that they invariably speak for nonmembers like Petitioner on matters of public concern, including political and social issues. This Court has recognized as much.

In *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), the Court observed that "a public sector union takes many positions during collective bargaining that have powerful *political and civic consequences*." *Id.* at 310 (emphasis added). And in *Janus*, the Court recognized that

"unions can also speak out" on "sensitive political topics" that are "undoubtedly matters of profound 'value and concern to the public.'" *Snyder v. Phelps*, 562 U. S. 443, 453 (2011). Noting the "prevalence of such issues," the Court observed that the political topics that unions can speak on include everything from "climate change . . . the Confederacy . . . sexual orientation . . . gender identity . . . evolution and minority religions." *Janus*, 138 S. Ct. at 2476-77.

AFUM and other faculty unions like it, prove this Court's point—they invariably speak on issues of political and social concern, often of a sensitive nature. Thus, for example, on AFUM's public Facebook page—available to anyone in the world to see—AFUM is critical of a University of Maine student organization for its particular political leanings.[2] Regardless of the student group that AFUM was attacking, it is not difficult to understand why a member of the faculty who is not a member of the union may not want AFUM to act as the "voice" of the faculty on a matter of this kind.

Unions other than AFUM provide myriad other similar instances of union speech on political or social topics. For example, the American Association of University of Professors ("AAUP") chapter of Portland State University, serving as the faculty's exclusive bargaining representative, issued public statements on the University's decision to permit access to bathrooms without regard to

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[2]AFUM, FACEBOOK (Jan. 7, 2020, 7:59 AM), https://www.facebook.com/AFUM5onTwitter/.

biological sex.[3] The union's president said, "[b]athrooms are related to conditions of employment, and, by law, policies impacting conditions of employment are mandatory subjects of bargaining."[4]

The Professional Staff Congress, the exclusive bargaining representative of faculty at the City University of New York ("CUNY"), made public statements regarding whether CUNY should create a "sanctuary campus" whereby CUNY security officers would be forbidden from working with federal immigration agents to enforce federal immigration laws.[5]

The Rutgers AAUP-AFT issued public statements regarding the 2016 presidential candidates.[6] Numerous faculty unions have made public statements regarding the federal immigration

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

[4] *Id.*

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

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

policies,[7] while others have issued newsletters with lead articles lambasting state political parties and positions that they take.[8] Still other faculty unions have issued public statements regarding matters as far ranging as the State of Israel[9] and "Occupy Wall Street."[10]

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

[8] *See, e.g.*, Wayne State University AAUP-AFT Fall 2018 Newsletter, Vol. 8, No. 2. https://drive.google.com/file/d/1BDEPCN0BLZ7XUKDlhc31Zl1JEInqhORt/view. The lead article, entitled "*STOP The Lame Duck*," claims Republicans within the Michigan legislature are "abusing their authority in a blatant power grab to retain control in the New Legislature." *Id.*

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

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

b. Because a Union's Speech Invariably Involves Public Matters and Infringes on Nonmembers' Right to Decide What *Not* to Say on Such Matters, It Raises Heightened First Amendment Concerns.

This Court recognized in *Janus* that matters of public concern on which unions like AFUM speak "occupies the highest rung of the hierarchy of First Amendment values, and [are] entitled to special protection."[11] *Janus*, 138 S. Ct. at 2476 (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011)). While an abridgment of one's right to speak on matters of public concern warrants heightened scrutiny, an abridgement of the right *not* to speak—including the right *not* to have someone speak on one's behalf, against one's will—is no less significant an infringement of one's First Amendment rights.

"'Since all speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston.*, 515 U.S. 557,

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[11] Speech deals with matters of "public concern" when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news." Such speech is "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 758–759 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 776 (1978)).

573 (1995) (quoting *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)). A "private speaker [has the right] to shape its expression by speaking on one subject while remaining silent on another." *Id.*

"[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced; the speaker's right to autonomy over the message is compromised." *Id.* at 576. "Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* at 573 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–342 (1995); *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797–798 (1988)).

The issue, then, is not whether faculty unions' publicly-stated positions on political and social issues have any merit. The point is that these unions invariably hold forth, as the voices of their respective faculties of whom they are statutorily-authorized representative, on matters of public concern of the kind on which there is bound to be disagreement.

Indeed, the issues on which unions speak include some of the most sensitive political and social issues of our time. On some of these matters, the country is divided—sometimes deeply—and it is not surprising that some faculty members vehemently disagree with statements made on these matters by unions acting as the faculty's voice.

Nonmembers who do not share the views of the unions who act as their voices, have a fundamental right to not have a union speak for them on such issues. Faculty members must be permitted to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573. In fact, rarely is the right to decide "what not to say" more important to an individual—and rarely, then, is the corresponding need for heightened scrutiny on abridgments of that right so vital—as when the matters in question involve political or social topics of a highly sensitive, controversial, or partisan nature.

c. When Unions Like AFUM, Acting as Faculty's Voice, Make Statements on Public Matters That Nonmembers Do Not Want Said For Them, It Distorts Public Discourse and Undermines Basic Purposes of Free Speech.

When AFUM and other unions like it —acting as the "voice" of faculty, including faculty members who choose not to be union members—make statements on political or social topics with which nonmembers disagree, the union creates the illusion that nonmembers hold views that they actually do not, and, conversely, that the union's position is more broadly held than it actually is. This distorts public discourse and undermines the highest purposes of free speech.

Speech concerning public affairs is "self-expression" as well as the "essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Unions that, acting as the voice of

nonmembers against their wishes, inject into the public arena views on matters of public concern with which nonmembers disagree, effectively usurp those nonmembers' right of self-expression and take on an outsized role in the discussion of public issues that is "integral to the operation of [our] system of government." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (quoting *Roth v. United States*, 354 U.S. 476 (1957)).

The value of public discourse to the democratic process lies, in large part, in the ability of individuals to freely choose *when* to voice ideas that they themselves hold, *which* of those ideas to voice, and *how* and in what fora to voice them. In this way, "[f]ree speech . . . is essential to our democratic form of government, *Janus,* 138 S. Ct. at 2464, *see, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964), and it furthers the search for truth, *see, e.g., Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 84 S. Ct. 1093 (1940). Whenever individuals are prevented "from saying what they think on important matters" *or are associated with ideas "with which they disagree, it undermines these ends*." *Id*. (emphasis added).

* * *

In sum, whereas the lower courts have refused to subject exclusive representation schemes to *any* meaningful degree of constitutional scrutiny, these schemes warrant *heightened* scrutiny, because (1) these schemes impinge upon the First Amendment right of faculty members to decide what *not* to say on matters of public concern for which unions like AFUM act as their voice, and (2) these schemes

distort public discourse and undermine basic purposes of the rights of free speech and association that led the Framers of the Constitution to give those rights special protection in the first place. The National Association of Scholars respectfully submits that, in view of these concerns (among others), this case presents a constitutional question that calls urgently for review by this Court.

CONCLUSION

The NAS respectfully submits that the Court should grant the Petition for a Writ of Certiorari.

February 5, 2020

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