No. 18-719

IN THE

Supreme Court of the United States

KATHLEEN URADNIK,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICI CURIAE* PUBLIC POLICY RESEARCH ORGANIZATIONS AND ADVOCACY GROUPS IN SUPPORT OF PETITIONER

THOMAS R. MCCARTHY
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

January 3, 2019

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are public policy research organizations and advocacy groups that seek to promote limited and effective government and individual freedom. *Amici* have extensive experience with issues involving public unions and education reform, and believe that unions should be supported through employees' free choice rather than government coercion. *Amici* have appeared in courts across the country—including this Court—in important cases involving public unions. *See, e.g.*, *Friedrichs v. California Teachers Assoc.*, No. 14-915.

Amici curiae have a strong interest in this case, which implicates matters of substantial public concern, including public-sector wages and the governance of public institutions.

A full list of *amici* and their interest in this case is set forth in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Kathleen Uradnik is a tenured political science professor and has worked for 19 years at St. Cloud State University, a public university within a system

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amici curiae*'s intent to file and consented to the filing of this brief.

of seven Minnesota State Colleges and Universities. Pursuant to Minnesota law, Respondent Board of Trustees of the Minnesota State Colleges and Universities (the "Board") has recognized Respondent Inter Faculty Organization (the "Union") as the "exclusive bargaining representative" for "all faculty members"—including Petitioner. Pet. App. 71.

As a function of state law, the Union has the exclusive right "to meet and negotiate with the employer on behalf of all employees." Minn. Stat. § 179A.03, subd. 8. Public employers have the concomitant obligation "to meet and negotiate in good faith with the exclusive representative" over "the terms and conditions of employment." Minn. Stat. §§ 179A.13, subd. 2(5); 179A.03, subd. 11. "Terms and conditions of employment" means "the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees." Minn. Stat. § 179A.03, subd. 19. As a practical matter, then, the Union is the sole mouthpiece speaking on behalf of all public employees regarding nearly all aspects of employment, including "tenure, promotions, wages, benefits, grievances, the school year, workload, coaching assignments, office hours, severance, retirement, leaves of absence, professional development and evaluation, and so on." Pet. at 6 (citing Pet. App. 71 *et seq.*). In the context of public employment, it is undisputed that these topics are "matters of substantial public concern." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2460 (2018); *id.* at 2460-62; Pet. at 14.

By appointing the Union as Petitioner's exclusive representative in this manner, state law compels her speech. Pet. at 14. Petitioner has no right to meet and negotiate directly with her employer regarding the terms and conditions of her employment. Minn. Stat. § 179A.07, subd. 4 ("If an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative."). The Union is her sole means of speaking with her employer about the terms and conditions of her employment. *Id.*; *see also id.* § 179A.06, subd. 5 (providing that the right of public employees to meet and negotiate with their employer exists only "through their certified exclusive representative"). As she has put it, Petitioner is "restricted from speaking on [her] own behalf by virtue of the Union's designation as [her] exclusive bargaining agent." Pet. App. 36. The Union's speech is thus her own. Pet. at 14.

If Petitioner agreed with the Union, there might be no problem here; however, Petitioner wants nothing to do with the Union. She opposes "many of the positions the Union has taken" on the "wages, hours, and conditions of employment," "the cutting of academic programs," and the establishment of seniority as the sole criterion in layoff decisions (to the exclusion of merit factors). Pet. App. 34-36. And she objects to the fact that the Union maintains the right to control hundreds of thousands of public dollars for "faculty research and professional development." Pet. App. 35. Unsurprisingly, Petitioner has chosen not to join the Union. Pet. App. 34.

Though Petitioner "refus[es] to associate with the Union," Minnesota law compels her to do so by making her accept the Union as her sole and exclusive representative. Pet. App. 35; *id.* ("My unwanted association with the Union is forced upon me by Minnesota law."). And though she disagrees with the Union's position on innumerable topics concerning the terms and conditions of her employment, state law forces Petitioner to adopt the words the Union puts in her mouth as if they were her own.

The question presented here is whether Respondents' compelled-representation regime violates Petitioner's free speech and associational rights under the First Amendment. *Amici* agree with Petitioner that this is a "question of profound importance." Pet. at 9. *Amici* further agree that this question "has never received careful attention by this Court," *id.*, and that the lower courts have erred in reading *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), as having answered it. In other words, the petition presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

Amici write separately to underscore a point the Court made in *Janus*—that a state requirement that a labor union "serve as exclusive bargaining agent for its employees" is "a significant impingement on [First Amendment] freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478.

ARGUMENT

I. State-Compelled Exclusive Representation Impinges on the First Amendment Rights of Objecting Public Employees.

As explained above (and in the Petition), Minnesota's compelled-representation regime forces Petitioner to associate with the Union and to accept the Union's advocacy as her own even though she objects to the Union and opposes its speech on her behalf. The Court has recently acknowledged that this type of regime "substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460; *id.* at 2469 ("[D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights.").

The lower courts that have addressed the issue thus far have ignored this impingement of free speech and associational rights. *Amici* thus outline the incompatibility of compelled-representation regimes with fundamental First Amendment principles.

A. Compelled-representation laws impinge on the free speech rights of objecting public employees.

The First Amendment forbids the abridgment of the freedom of speech. As the Court has "held time and again," this freedom "'includes 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)); *see also Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

"[M]easures compelling speech are at least as threatening" as those barring speech and may in fact be even more constitutionally suspect because they coerce free and independent individuals "into betraying their convictions." *Janus*, 138 S. Ct. at 2464. Indeed, the Court has suggested that "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). This is why state-compelled speech is subject to strict scrutiny. *See Riley*, 487 U.S. at 800-01.

Under these basic principles, it cannot seriously be questioned that compelled representation—by which the State of Minnesota puts words into Petitioner's mouth that she disagrees with—impinges upon her free speech rights. *See Janus*, 138 S. Ct. at 2460, 2469. Indeed, such a regime not only impinges on speech rights but is almost certainly unconstitutional. *See id.* at 2463 ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command [against coerced speech], and in most contexts, any such effort would be universally condemned."). The Founders certainly would have thought so. *See id.* at 2471 ("[P]rominent members of the founding generation condemned laws requiring

public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as 'sinful and tyrannical.'") (quoting *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Given that speech about public-sector wages and the governance of public institutions clearly implicates matters of substantial public concern, there is no reason why a compelled-representation regime should be treated any differently than a state law "requir[ing] all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 138 S. Ct. at 2464.

B. Compelled-representation laws impinge on the associational rights of objecting public employees.

Just as it protects free speech, the First Amendment also protects associational rights. "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). As this Court has emphasized, "[t]his right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Thus, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be

curtailed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

"[A] corollary of the right to associate is the right not to associate." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *see also Roberts*, 468 U.S. at 623 ("Freedom of association ... plainly presupposes a freedom not to associate."); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 680 (2010) (same). Just as with speech, then, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (citing *Roberts*, 468 U.S. at 623).

Compelled association is, at a minimum, subject to "exacting scrutiny." *Janus*, 138 S. Ct. at 2483 ("Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard."); *id.* at 2465. Even under this lighter standard, state laws compelling associations are "permissible only when they serve a 'compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts*, 468 U.S. at 623).

As with free speech rights, the Court has already made clear that a compelled-representation regime impinges on associational rights. *Janus*, 138 S. Ct. at 2478 ("[R]equir[ing] that a union serve as exclusive bargaining agent for its employees [is] a significant impingement on associational freedoms."). And by forcing Petitioner to associate with a group she objects to and does not wish to associate with, it is virtually certain that Minnesota law not only impinges on Petitioner's free association rights but violates the First Amendment. *See id.* (explaining

that this coerced association "would not be tolerated in other contexts"). This is especially so given that compelled representation harms Petitioner's speech rights, because "forced associations that burden protected speech are impermissible." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986).

II. Public-sector labor law should not be exempt from these fundamental First Amendment principles.

Compelled-representation regimes constitute "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478. The rationales previously offered to justify differential treatment of labor-relations law—*e.g.*, labor peace and free rider problems—are no longer persuasive (if they ever were). In other words, there is no reason that the First Amendment should apply with less force in the context of labor relations.

This Court in *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in light of factual and legal developments that left it an outlier among the Court's First Amendment cases. The same reasoning leads to the conclusion here that compelling public workers to accept union representation with which they disagree runs afoul of ordinary First Amendment principles.

This Court in *Janus* rejected the dubious arguments as to why compulsory exclusive representation should be permitted in the context of labor unions. In particular, the state's interest in "labor peace" has been offered as a rationale for exempting labor law from fundamental First Amendment principles.

The *Abood* Court assumed that conflict and disruption would occur if employees in a unit were represented by more than one union, and the Court predicted that "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." 431 U.S. at 220-21. Moreover, the Court feared that confusion could ensue if an employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment," and a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.*

As an initial matter, this Court previously assumed without explanation that "labor peace" as described in *Abood* is a compelling state interest. *See Janus*, 138 S. Ct. at 2465. In light of the fact that *Abood* has been overruled, this assumption should no longer be taken for granted.

In addition, there is no reason to believe today that compelled exclusive representation remains necessary to achieve "labor peace." For example, *Abood* assumed without citing evidence that "pandemonium … would result if agency fees were not allowed," and this Court concluded in *Janus* that "it is now clear that *Abood*'s fears were unfounded." 138 S. Ct. at 2465. So too here. There is no basis to retain the baseless assumption that forcing public employees to accept union representation is necessary for "labor peace."

Moreover, any purported interest in "labor peace" previously relied on in *Abood* cannot be reconciled with First Amendment doctrine. The promotion of labor peace in the context of regulating commerce, *see Abood*, 431 U.S. at 220-21, is subject to rational-basis review. It does not answer the question whether an interest in labor peace

would satisfy the higher burden of strict or exacting scrutiny for impingements on First Amendment rights. The First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley*, 487 U.S. at 791, 795.

In short, *Janus* held that public employees may not, consistent with the First Amendment, be compelled to subsidize union advocacy on "matters of substantial public concern." 138 S. Ct. at 2460. It follows directly from this reasoning that public employees may not be compelled to accept that same union advocacy as their own and be compelled to associate with a union for the purpose of facilitating that advocacy.

Similarly, compelled-representation regimes cannot be justified as a way to prevent free-riding—*i.e.*, preventing nonmembers from enjoying the benefits of union representation without shouldering the costs. As a logical matter, nonmembers have declined the benefits of union representation and may not be compelled to subsidize union activities with which they may disagree, so free riding is hardly at issue. In any event, this Court has made clear that "avoiding free riders is not a compelling interest." *Janus*, 138 S. Ct. at 2466 (citing *Knox*, 567 U.S. at 311 ("[F]ree-rider arguments ... are generally insufficient to overcome First Amendment objections.")). Thus, preventing free-riders cannot justify compelled-representation regimes.

In sum, the past rationales for sustaining compelled-representation regimes cannot justify the harms those regimes impose on First Amendment rights. There thus is no basis for exempting labor law from the normal operation of First Amendment principles.

* * *

Minnesota's compelled-representation regime unquestionably and substantially impinges on Petitioner's free speech and associational rights. Although it is almost certain that this regime violates the First Amendment, how the Court would ultimately decide that question is beside the point at this stage. The point is that the Court should take up the question and decide it; otherwise, "the constitutionality of exclusive representation will never receive meaningful review." Pet. at 13. Such a "serious[] impinge[ment] on First Amendment rights … cannot be casually allowed." *Janus*, 138 S. Ct. at 2464.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

THOMAS R. MCCARTHY
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

January 3, 2019

APPENDIX

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Center of the American Experiment is a non-partisan educational organization dedicated to the principles of individual sovereignty, private property, and the rule of law. It advocates for creative policies that limit government involvement in individual affairs and promotes competition and consumer choice in a free-market environment. Center of the American Experiment, located in Golden Valley, Minnesota, is a non-profit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

The Alaska Policy Forum is a non-partisan non-profit organization which works to empower and educate Alaskans and policymakers by promoting policies that grow freedom for all. Under Section 501(c)(3) of the Internal Revenue Code, it is a tax-exempt educational organization.

Americans for Lawful Unionism (ALU) exists for the purpose of defending human and civil rights secured by law for individuals whose legal rights are threatened by unlawful and/or corrupt practices by governmental entities in coordination with or in support of labor unions. ALU is a non-profit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

Americans for Tax Reform (ATR) is an advocacy organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates

citizens and government officials about sound tax policies to further these goals. ATR is a non-profit, tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code (IRC).

The Beacon Center is a nonprofit organization classified as an IRC 501(c)(3) based in Nashville, Tennessee that advocates for limited government, constitutional fidelity, and free-market policy solutions. In particular, the Beacon Center advocates for the protection of our First Amendment rights. The Beacon Center has long advocated policies that guarantee all individuals the free choice as to how to spend their money to promote particular speech. The Beacon Center believes that union-mandated financial contributions constitute government compulsion of speech.

The Center for Worker Freedom (CWF) is a non-profit, educational organization dedicated to educating the public about the causes and consequences of unionization. CWF supports freedom of association and believes all workers should have the right to decide for themselves whether or not they belong to a labor organization. CWF is a tax-exempt educational organization under Section 501(c)(3) of the IRC.

The Freedom Foundation is a 501(c)(3) nonprofit, nonpartisan organization that works to promote individual liberty, free enterprise, and limited, accountable government at the state and local level. Founded in 1991 and based in Olympia, Washington, the Freedom Foundation maintains additional offices in Salem, Oregon and Redwood City, California. A key component of the

Freedom Foundation's work in recent years has involved providing free legal representation to public employees who have had their rights violated by government employers or labor unions.

The Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom in Illinois, funded by the voluntary contributions of its supporters. The Illinois Policy Institute's policy work includes budget and tax policy, labor policy, good government, and jobs and economic growth – each of which could be affected by this case. Not only does the challenged exclusive-representation scheme restrict the freedom of public employees by forcing nonmember workers to associate with a union, but it also makes the union the mandated mouthpiece for those employees. Furthermore, this case involves allegations of discrimination against nonunion employees, which also implicates both labor policy and good government practices.

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation center that fights to protect economic liberty, private property rights, free speech and other fundamental rights. First and foremost, the Liberty Justice Center seeks to ensure that the rights to earn a living and to start a business – which are essential to a free and prosperous society – are available not just to a politically-privileged few, but to all. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To this end, the Liberty Justice Center is currently litigating multiple cases around the country raising the same or similar claims as petitioners in this case.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The Maine Heritage Policy Center (MHPC) is a 501(c)(3) non-profit, tax-exempt educational organization dedicated to the promotion of public policy solutions that will free people from dependency, create lasting prosperity, and redefine the role of government in the lives of Maine citizens. MHPC conducts detailed and timely research, develops public policy solutions, educates the public, and engages with legislators to foster a greater sense of liberty in Maine.

The Montana Policy Institute (MPI) is a non-partisan education and research organization dedicated to the principles of economic and individual freedom. MPI provides research, commentary, and training to policymakers and citizens alike in order to grant them the tools to enact policies that support our principles. MPI is a non-profit, tax-exempt organization under Section 501(c)(3) of the IRC.

The Nevada Policy Research Institute (NPRI) is a non-partisan education and research organization dedicated to

the principles of economic and individual freedom based in Las Vegas, Nevada. The Institute's primary areas of focus are education, labor, government transparency and fiscal policy. The challenged exclusive-bargaining scheme discourages talented, prospective educators who prefer to negotiate their own terms of employment from entering the profession, thus reducing the quality of education provided to Nevada children. NPRI is a non-profit, tax-exempt organization under Section 501(c)(3) of the IRC.

The Oklahoma Council of Public Affairs (Council) is a non-partisan educational organization seeking to create environments where people are free to flourish, workers enjoy a growing and diversifying economy, children receive a great education, and the burden of government is light. To do this, the Council advances principles and policies that support free enterprise, limited government, personal responsibility and individual initiative. The Council is a non-profit, tax-exempt educational organization under Section 501(c)(3) of the IRC.

The Rhode Island Center for Freedom & Prosperity is Rhode Island's premiere pro-family, pro-growth research and advocacy organization. The nonprofit and nonpartisan center is funded entirely by private tax-deductible donations and never accepts public funding. The mission of the 501(c)(3) organization is to return government to the people by opposing special-interest politics and advancing proven market-based solutions that can transform lives by restoring economic competitiveness, increasing educational opportunities, and protecting individual freedoms.

The Rio Grande Foundation is a free market think tank that undertakes to educate the public and policymakers on the importance of free markets and individual liberty in New Mexico. Among the most important areas of freedom is the right to earn a living. The Rio Grande Foundation believes that individuals, not government officials or unions, can best negotiate terms of employment. In the area of "exclusive representation," both union supporters and those who wish to work without being involved in unions should find themselves on the same side as workers who wish to not pay union dues and who may not wish to have their pay and benefits negotiated on their behalf by a third party to which they owe no allegiance (and vice versa). Simply put, ending "exclusive representation" as currently in place in New Mexico and other states is the logical extension of greater individual freedom as advocated by the Rio Grande Foundation.

The Stephen Hopkins Center for Civil Rights (the "Hopkins Center") pursues a mission of protecting the rights that Americans recognize as fundamental. The Hopkins Center litigates in such areas as fiscal responsibility and transparency, school choice, free speech, and property rights to assist individuals the government has harmed, and ensure all citizens enjoy their constitutional rights. The Hopkins Center recognizes that a lack of personal resources to fund legal action often deprives citizens of their ability to challenge unconstitutional laws, unlawful regulations, and out of control bureaucrats. When it comes to defending themselves against overreaching government, too many citizens are indigent. Therefore, the Hopkins Center has,

as one of its primary purposes, the goal of representing the indigent to enforce their constitutional rights to free speech, property, and economic liberty. The Hopkins Center is a non-profit, tax-exempt educational organization under Section 501(c)(3) of the IRC.

The Wyoming Liberty Group is a non-partisan education and research organization dedicated to government efficiency, transparency and individual freedom. The Wyoming Liberty Group is a non-profit, tax-exempt organization under section 501(c)(3) of the IRC.