No. 18-719

In the
Supreme Court of the United States

KATHLEEN URADNIK,
Petitioner,

v.

INTER FACULTY ORGANIZATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

ERIN E. WILCOX
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
ewilcox@pacificlegal.org
dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether it violates the First Amendment to appoint a labor union to represent and speak for public-sector employees who have declined to join the union?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), and *Janus v. American Federation of State, County, and Municipal Employees, Local 31*, 138 S. Ct. 2448 (2018).

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The idea that "there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations" is one of the primary justifications for the addition of the Bill of Rights to the U.S. Constitution. *See* James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military*, June 16, 1788, in *History of the Virginia Federal Convention of 1788*, vol. 1, p. 130 (H.B. Grigsby ed. 1890). The present case, in which a public university professor is forced into unwelcome exclusive representation by a labor union in violation of her rights to free speech and association under the First Amendment, is a prime example of the continuing danger of this dynamic.

Though she is not a union member, Petitioner Kathleen Uradnik is compelled by state law to accept Respondent Inter Faculty Organization (IFO) as her exclusive representative. Minn. Stat. § 179A.03, subd. 8. As the exclusive representative, IFO has the exclusive right to meet and negotiate with Uradnik's state employer on her behalf over the terms and conditions of her employment like working hours, compensation, and personnel policies. Minn. Stat. §§ 179A.06, subd. 5; 179A.03, subd. 19. Because Uradnik is a professional employee, IFO can also negotiate over matters that are *not* classified as terms and conditions of employment. Minn. Stat. § 179A.08. Even though Uradnik disagrees with IFO on many of its positions and does not want it to speak for her, IFO's status as exclusive representative means Uradnik's voice is effectively silenced.

In the last seven years, this Court has repeatedly called into question schemes which compel public-sector workers to associate with labor unions against their will. *See Knox*, 567 U.S. at 310–11; *Harris*, 134 S. Ct. at 2639; *Janus*, 138 S. Ct. at 2483. In *Janus*, the Court made clear that exclusive representation, like the scheme at issue in this case, is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. Despite this, lower courts continue to uphold exclusive representation schemes, relying on the now doctrinally questionable *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).

Uradnik's case squarely presents the "other context[]" this Court alluded to in *Janus*, and affords this Court the opportunity to examine exclusive representation in light of its impact on workers' First Amendment freedoms of speech and association.

This petition also allows this Court to consider whether *Knight* is still good law in light of the Court's recent decisions rejecting compelled funding of labor unions' political speech. The lower courts in this case relied on the Eighth Circuit's recent decision in *Bierman v. Dayton*, where that court concluded in a broad reading of *Knight* that the state had not impinged on the plaintiffs' First Amendment rights in part because they were not compelled to pay a mandatory fee to the union. 900 F.3d 570, 574 (8th Cir. 2018), *petition for cert. filed* Dec. 17, 2018 (No. 18–766). After this Court's line of decisions culminating in *Janus*, however, *Knight* can no longer support such an extensive infringement on Uradnik's constitutional rights.

The petition for writ of certiorari should be granted.

REASONS TO GRANT THE PETITION

I

EXCLUSIVE REPRESENTATION UNCONSTITUTIONALLY SILENCES WORKERS

A. The Intertwined Freedoms of Speech and Association Demand Equally Rigorous Constitutional Protection

Freedom of association, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In large part this is because the right to associate "makes the right to express one's views meaningful." *Knight*, 465 U.S. at 309. The right to associate logically includes a corresponding right *not* to associate. *Knox*, 567 U.S. at 309 ("Freedom of association . . . plainly presupposes a freedom not to associate."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("[F]reedom of speech . . . necessarily compris[es] the decision of both what to say and what not to say.").

The Constitution firmly guards the First Amendment rights of individuals and groups—the state may not prohibit ideas it disfavors or compel endorsement of ideas it approves, *see Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam), or "place obstacles" to a person's exercise of his or her First Amendment freedoms, *see Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549–50 (1983). A governmental interest in favoring one form

of speech over another is constitutionally illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980).

The right to speak and associate and the corresponding right to refrain from speaking and associating are protected by the First Amendment through closely intertwined analyses. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association."). The link between freedom of speech and freedom of association is most commonly seen in the context of political speech. For instance, political parties may determine who is entitled to membership and, conversely, the parties are not presumed to speak for those who may be eligible for membership but choose not to participate. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (An individual voter has the right to associate with the political party of his or her choice and a political party has a right to "identify the people who constitute the association.").

An association takes on the characteristics and preferences of its membership, and by joining together, the membership's speech is amplified. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members."). This premise underlies the concept of associational standing, which recognizes that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union, United*

Auto., Aerospace and Agric. Implement Workers of America v. Brock, 477 U.S. 274, 290 (1986). Labor unions, as one of those "other associations," derive their right to speak from the rights of their union members. In the present case, Uradnik is not a union member, and therefore IFO should have no right—much less an exclusive right—to speak on her behalf.

This Court's focus should be on the nonmembers, like Uradnik, forced to associate with IFO through exclusive representation. Unlike individual workers, who have constitutionally protected rights to present their own views on an equal basis with others, "[c]ollective bargaining is not a fundamental right," and a union and its members "are not suspect classes." *Univ. Prof'ls of Ill., Local 4100 v. Edgar*, 114 F.3d 665, 667 (7th Cir. 1997). As a nonmember, Uradnik is not "associated" with IFO in any ordinary meaning of that word. *See*, *e.g.*, *Association*, The American Heritage Dictionary of the English Language (3d ed. 1992) ("associate" defined as "to join as a partner, ally, or friend;" "to connect in the mind or the imagination;" "to keep company;" "a person united with another or others in an act, an enterprise, or a business").

The First Amendment encourages an "open marketplace" where the ideas of individuals and groups are free to compete without government interference. *N.Y. State Bd. of Elections v. Torres*, 552 U.S. 196, 208 (2008). The exclusive representation scheme at issue in this case seizes Uradnik's First Amendment rights and hands them over to a union she does not support and is not a member of. The right to speak and associate are among the most fundamental rights protected by the Constitution, and this Court should take this case to carefully consider

whether exclusive representation is compatible with its strong protection of these individual rights.

B. Exclusive Representation Deprives Nonmembers of the Right to Communicate with the State

Unions designated as exclusive representatives have special privileges not available to individual employees. *See Janus*, 138 S. Ct. at 2467. Under Minnesota state law, IFO, and only IFO, may determine the employment terms and conditions of professors like Uradnik, and purports to represent the entire workforce in its lobbying efforts. *See NLRB v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("[I]ndividual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union."). If unions "have no constitutional entitlement to the fees of nonmember-employees," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007), how can unions be entitled to the forced association of nonmember employees through exclusive representation laws? *See* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After* Chicago Teachers Union v. Hudson, 29 B. C. L. Rev. 857, 870 n.87 (1988) ("One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle.").

The lower courts found it significant that Uradnik is not required to pay mandatory fees to the union.

Pet. App. 8. However, the fact that she is not compelled to financially support IFO does not absolve the state from its constitutional violation. State law prohibits Uradnik from any communication with the state that may "circumvent the rights of the exclusive representative." Minn. Stat. § 179A.06, subd. 1. The collective bargaining agreement between IFO and the state employer requires that the state employer not meet and negotiate about terms and conditions of employment "with any employee groups or organizations composed of employees covered by this Agreement *except through [IFO]*." Pet. App. 73–74 (emphasis added). Even if both Uradnik and her employer wished to engage in dialogue about working hours, benefits, or retirement, the state employer is prohibited from listening. Thus, exclusive 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." *NLRB*, 388 U.S. at 180.

Justice Stevens expanded on this point in his dissent in *Knight*.[2] While the majority in that case rested on a unique theory that the government is not bound to listen just because people choose to speak, *Knight*, 465 U.S. at 283, the dissenting Justices' view reflected the reality that a government communicative prohibition based on the identity of a speaker in favor of a communicative monopoly for a preferred speaker is odious to the First Amendment. *Id*. at 301 (Stevens, J., dissenting). While it is true that the government is under no affirmative duty to

[2] Justices Brennan and Powell joined Justice Stevens in this portion of his dissent.

listen, preventing citizens from competing in the marketplace of ideas renders their speech futile. *Id.* at 308–09 (Stevens, J., dissenting) ("[T]he First Amendment was intended to secure something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views."). By extension, the freedom of association is protected by the First Amendment because it "makes the right to express one's views meaningful." *Id.* at 309 (Stevens, J., dissenting). A government grant of a communicative monopoly stands directly at odds with the well-recognized principle that government endorsing one form of speech over another is illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980); *see also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[I]t is hazardous to discourage thought, hope, and imagination; [the Founders understood] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]").

Even if Uradnik leased local billboards or placed television commercials declaring her opposition to the union's bargaining positions, the state employer is required by statute and the terms of the collective bargaining agreement to ignore her speech in favor of the exclusive representative's positions. Pet. App. 73–74. Whether or not Uradnik joins the union, her voice is effectively silenced, and any attempt to speak contrary to the union would be futile.

Only this Court can provide relief. Particularly in the context of a labor union, dissenters risk retribution from union loyalists. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and nonmembers from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed., 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down their Members and Corrupt American Politics* 44–46 (2004). This is why nonconformists like Uradnik must rely on the Constitution for protection. *See, e.g., W. Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process.). While the First Amendment union cases have thus far focused largely on compelled financial subsidization, *e.g.*, *Janus*, 138 S. Ct. 2448; *Harris*, 134 S. Ct. 2618; *Knox*, 567 U.S. 298, the exclusive representation aspect equally forces nonunion workers to be used as "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

The lower courts in this case held that exclusive representation laws are a carve-out from normal constitutional scrutiny of infringements on First Amendment guarantees like freedom of association. That holding conflicts with this Court's jurisprudence that requires the government to provide compelling justifications for silencing those who would address

their government. As Judge Learned Hand explained, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

II

THIS COURT SHOULD GRANT THE PETITION TO OVERRULE *KNIGHT*

The courts below based their decisions on *Knight*, and found *Janus* inapplicable because Uradnik is not compelled to pay a mandatory fee to the union. Pet. App. 6–8. However, after this Court's decisions in *Knox*, *Harris*, and *Janus*, *Knight* is no longer good law to the extent it supports such an extensive infringement on Uradnik's constitutional rights.

A. Compelled Speech is the Same as the Compelled Funding of Speech

Compelled speech, like the kind inflicted on Uradnik by IFO's exclusive representation, presents the same dangers as the compelled funding of speech. *Harris*, 134 S. Ct. at 2639; *Knox*, 567 U.S. at 309. The compelled funding of union speech by public employees was definitively struck down in *Janus*, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to a union may be deducted from a nonmember's wages, nor any other attempt made to collect such a payment, unless the employee affirmatively consents to pay."). The lower courts in the instant case erroneously distinguished compelled

speech from the compelled *funding* of speech, allowing exclusive representation to survive the sea-change in this Court's conception of an employee's First Amendment rights after *Janus*. This Court should grant certiorari in this case to squarely consider the effects of *Janus* on *Knight* in particular and exclusive representation more generally.

This Court's decision in *Knight* was based largely upon *Abood*, 431 U.S. at 209. *Abood* was the first time in American history that the Court held that the state had no affirmative obligation to show a compelling interest when a state law intruded upon protected speech, *Abood*, 431 U.S. at 263, and was based upon a misreading of precedent, *Harris*, 134 S. Ct. at 2632 ("The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union."). *Abood* relaxed First Amendment protections based on two justifications: the preservation of "labor peace" and the prevention of "free riders." *Harris*, 134 S. Ct. at 2631. These justifications were held to be insufficiently compelling in *Janus*, 138 S. Ct. at 2466–69 (noting that labor peace can be achieved "through means significantly less restrictive of associational freedoms," and that "avoiding free riders is not a compelling interest"), and *Abood* was overruled. *Janus*, 138 S. Ct. at 2486. If the justifications for impinging on the First Amendment are not present, then the case advancing those justifications is inapplicable. And if the *Abood* foundation is removed, the entire structure of *Knight* as applied to this case must fall. *Knight*, based on the false premises of *Abood*, must be reconsidered and overruled. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016)

(Only this Court has the "prerogative . . . to overrule one of its precedents.").

B. *Knight* Cannot Support Infringement on Freedom of Association

Although lower courts addressing exclusive representation rely heavily upon it, *Knight* only briefly touches upon the question of freedom of association, which is central to the instant case. In *Knight*, the Court likens the pressure to join a public-sector union with the pressure to join a majority political party, which is "inherent in our system of government." 465 U.S. at 290. This brief comment, addressing a tangential issue to the main question of the case, has been seized upon and advanced by pro-unionization advocates in recent years.

Nowhere does *Knight* suggest that this limited observation was intended to apply across the board to all nonunion members at all possible times. Since it was decided in 1984, *Knight* has been overwhelmingly cited for the proposition that the right to speak does not guarantee a commensurate right to be heard by the government. *See*, *e.g.*, *Bridgeport Way Cmty. Ass'n v. City of Lakewood*, 203 F. App'x 64, 66 (9th Cir. 2006) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). The D.C. Circuit's rationale in *Autor v. Pritzker* explicitly recognizes this limited scope. 740 F.3d 176, 181 (D.C. Cir. 2014) ("[T]he Supreme Court recognized [in *Knight*] that the government may choose to hear from some groups at the expense of others . . . ."). This application of *Knight* to infringe on the First Amendment freedoms of Uradnik does not represent *Knight* as traditionally applied, but rather constitutes an unwarranted

interpretation that this Court should reject in light of its recent cases applying the First Amendment to instances of union compulsion.

Stare decisis should not deter this Court from reconsideration of *Knight*. An exceptionally important constitutional issue is presented in this case: whether the exclusive representation of quasi-public employees by a public employee union impinges on their First Amendment rights. Stare decisis is a high bar to overcome, but "not an inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The doctrine applies "with perhaps least force of all to decisions that wrongly denied First Amendment rights: 'This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one).'" *Janus*, 138 S. Ct. at 2478 (quoting *Fed. Election. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)). It is particularly appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In this case, *Harris* and *Janus* have significantly weakened the concepts underpinning *Knight*, and this Court should review *Knight* in light of those intervening changes.

With the compelled funding of speech now firmly dismantled, the tenuous distinction between compelled speech and the compelled funding of speech must fall. It does not matter that Uradnik is not forced to financially support IFO; as a public employee, her forced association with IFO as a bargaining unit

member and the union's speech on her behalf as the exclusive representative is unconstitutional. To the extent *Knight* supports such state intrusion on individual rights, it should be overruled.

CONCLUSION

This Court is fully cognizant of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Exclusive representation severely infringes on these rights of workers who would use their own voice to state their employment preferences. This Court should grant the petition for a writ of certiorari and uphold all public employees' First Amendment rights.

DATED: February, 2019.

Respectfully submitted,

ERIN E. WILCOX
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: ewilcox@pacificlegal.org
Email: dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation