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 IN OPPOSITION FOR RESPONDENTS UNIVERSITY OF MAINE AT MACHIAS AND BOARD OF TRUSTEES OF THE UNIVERSITY OF MAINE SYSTEM

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QUESTION PRESENTED

Maine law requires the University of Maine System to bargain collectively with a labor organization that has been democratically elected (or certified without objection) by a bargaining unit of employees. The law further provides that, once certified, the labor organization shall be the "sole and exclusive bargaining agent for all employees in the bargaining unit" to negotiate with the University of Maine System on matters within the scope of the law.

By designating the organization as the sole and exclusive bargaining agent, does Maine law violate any speech or association rights of non-members, even if they are not required to join or support the union?

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STATEMENT OF THE CASE

A. Background and Purpose of University of Maine System Labor Relations Act

In 1975, the Maine Legislature enacted the University of Maine System Labor Relations Act (the "Act"), extending collective bargaining rights previously granted to state, municipal, and other public employees to employees of the University of Maine System ("UMS"). L.D. 827, Statement of Fact (Me. 107th Legis. 1975); Me. Rev. Stat. Ann. tit. 26 §§ 1021 *et seq.* In extending collective bargaining to UMS employees, the Legislature sought to "provide centralization to the university's bargaining functions," L.D. 827, Statement of Fact (Me. 107th Legis. 1975), and to "improv[e] the relationship between public employers and their employees," Me. Rev. Stat. Ann. tit. 26 § 1021.

To carry out these goals, the Act separated UMS employees into six occupational groups: faculty, professional and administrative staff, clerical, office, laboratory and technical staff, service and maintenance personnel, supervisory classified staff, and police, each of which became a separate, system-wide bargaining unit. Me. Rev. Stat. Ann. tit. 26 § 1024-A(1). Each unit has the right to choose a representative bargaining agent to negotiate on its behalf with UMS over "wages, hours, working conditions and contract grievance arbitration." Me. Rev. Stat. Ann. tit. 26 § 1025.

The Act provides two ways in which the bargaining unit of employees may choose and certify a labor organization to represent it. First, the organization may seek voluntary recognition by filing a request with

UMS, alleging and showing evidence of support by a majority of unit employees. Me. Rev. Stat. Ann. tit. 26 § 1025(1). Alternatively, if at least 30% of unit employees petition to be represented, a secret ballot election is held in which a majority of voting unit employees elect (or reject) representation by a particular labor organization or no representation. Me. Rev. Stat. Ann. tit. 26 § 1025(2). Once recognized or elected, the organization is certified by the Maine Labor Relations Board as the bargaining agent for matters within the scope of the Act, unless or until it is decertified. Me. Rev. Stat. Ann. tit. 26 § 1025(2)(B).

The Act provides that a certified labor organization is the "sole and exclusive bargaining agent" for all employees in the unit. Me. Rev. Stat. Ann. tit. 26 § 1025(2)(B). The Act defines a "bargaining agent" as "any lawful organization, association, or individual representative of such organization or association, which has as one of its primary purposes the representation of employees in their employment relations with employers, and which has been certified." Me. Rev. Stat. Ann. tit. 26 § 1022(1-B). The Act then imposes a duty on UMS to bargain collectively and in good faith with the bargaining agent-representative on wages, hours, working conditions, and contract grievance arbitration. Me. Rev. Stat. Ann. tit. 26 § 1026(1)(C).

The Act also guarantees certain rights to unit employees, including the right not to join the union or participate in union activities, Me. Rev. Stat. Ann. tit. 26 §§ 1023, 1027; the right to be free from coercion, restraint, or any form of discrimination based on union membership or non-membership, § 1027 (1)(A)-(D); and the right to present grievances directly to UMS, without intervention from the union, if the resolution

is consistent with existing collective bargaining agreements, § 1025(2)(E).

The collective bargaining agreement between UMS and the union representing Petitioner's bargaining unit also outlines unit employees' rights to academic freedom and free expression. (Pet.App.71). The agreement expressly guarantees employees the rights "to comment on matters of public concern" as citizens; "the right to comment as faculty on matters related to their professional duties, and the functioning of the University, subject to the need for courteous, professional and dignified interaction [as employees]"; and the right to meet with the UMS Board of Trustees to express views on any matter. (Pet.App.71-73).

B. Background of Petitioner and Labor Relations at UMS

In 1978, a unit comprised of all full-time faculty positions at UMS certified Respondent, Associated Faculties of the Universities of Maine ("AFUM"), as their bargaining agent through secret ballot election. Petitioner, Jonathan Reisman, is a professor of economics and public policy at the University of Maine at Machias. (Pet.App.43). UMS is Maine's largest educational enterprise, educating more than 32,000 students per year. (Dist. Ct. Doc. 36, ¶ 3). The University of Maine at Machias is one of seven universities that comprise UMS, which also includes a law school and eight outreach centers throughout the state. *Id.* A sixteen-member Board of Trustees governs UMS. *Id.* By virtue of his position as a full-time Associate Professor, Mr. Reisman is in the faculty bargaining unit. (Pet.App.44). Although the faculty bargaining unit is represented by AFUM, Mr. Reisman is not a member

of AFUM. *Id.* at 44. He opposes many of the union's positions, including on matters relating to wages, hours, terms, and conditions of employment. *Id.* at 45.

C. Proceedings Below

In August 2018 Petitioner filed a complaint and motion for preliminary injunction, requesting a declaratory judgment and an injunction barring UMS from recognizing AFUM as Petitioner's "exclusive representative or representative," and from "affording preferences" to union members. *Id.* at 40-41. AFUM and UMS, the two named defendants, and the Maine Attorney General, as intervenor, moved to dismiss the complaint and opposed the injunction on the grounds that Petitioner's claim was foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) and *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016). The District Court granted the motion to dismiss and denied Petitioner's preliminary injunction motion. (Pet.App.15-27). As the court reasoned, "[u]nder the Act, the Union was not, as [Petitioner] asserts, appointed by the Board as his representative and agent" but rather was an elected representative by majority vote of the employees. (Pet. App.26). The Court found that Petitioner remains free "to speak out in opposition to the Union and its position as he sees fit," to belong to or not join the union. Accordingly, there is no First Amendment violation. (Pet.App.22-26).

Petitioner appealed to the First Circuit, seeking summary affirmance of the District Court's decision, conceding that *Knight* foreclosed his claims because of its binding effect on the circuit. App. Mot. for S. Disp. (1st Cir. Dec. 14, 2018). As indicated in the motion,

"Professor Reisman has filed this appeal in hopes of persuading the Supreme Court to overturn that binding precedent." App. Mot. for S. Disp. (1st Cir. Dec. 14, 2018). The motion for summary affirmance was denied.

On the merits, the First Circuit disagreed with Petitioner's contention that AFUM's relationship as the exclusive certified bargaining agent makes the union a "personal representative" of Petitioner. (Pet.App.7). Putting Petitioner's challenge to the exclusive representation provision in the Act in context, the Court below concluded that the Act did not designate AFUM as Petitioner's personal representative. *Id.* at 8. Rather, the Act, read as a whole, requires the bargaining agent to "represent the unit as an entity," and not individual employees within it. *Id.* at 8-9.

The court below did not reach any alternative argument that an organization's representation of the unit as an entity rather than of Petitioner individually constitutes a First Amendment violation. The First Circuit found that Petitioner, having failed to raise that argument in his brief, had waived the argument for lack of development on appeal. *Id.* at 12. The First Circuit affirmed the District Court's dismissal of Petitioner's remaining claims. *Id.*

REASONS FOR DENYING THE PETITION

There are no compelling reasons to grant certiorari in this case. *Cf.* Sup. Ct. R. 10. The question raised by Petitioner has been presented numerous times to this Court and to circuit courts of appeals, with the same outcome: a decision that a state labor relations

law that gives exclusive representation to an elected bargaining agent for matters within the scope of the state law does not, without more, violate the rights of free speech or association of nonmembers. *See, e.g.*, *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2018), *cert. denied sub nom. Miller v. Inslee*, 140 S.Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S.Ct. 2043 (2019). Consistent with *Knight*, lower courts have reasoned, in part, that the labor relations laws at issue also enshrine the rights of dissenters to refrain from joining or speaking out against union positions without fear of discrimination or retaliation in their employment. Like others who have challenged similar laws, Petitioner has not articulated a violation of the First Amendment in his claim that AFUM's speech is attributed to him because of his position in the bargaining unit.

Finally, this case is before the Court on a motion to dismiss, with no record evidence upon which the Court can review the issues and potential impact of granting Petitioner's requested relief. This is an inappropriate posture from which to challenge a bedrock principle of United States labor law. Moreover, the Petitioner's primary argument—that exclusive representation of the bargaining unit infringes the speech and associational rights of dissenting employees—was not preserved for appellate review. (Pet.App.12). *See City of Springfield, Mass. v. Kibbe*, 489 U.S. 378, 383-84 (1989) ("We ordinarily will not decide questions not raised or litigated in lower courts."). These circumstances make this case an inapt vehicle in which to review the issue presented.

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS BY ANY OTHER CIRCUIT COURT OF APPEALS.

The First Circuit's decision in this case does not conflict with any of the numerous decisions in other circuits that have considered the question presented in this case.

1. In 2014, this Court held that the mandatory collection of agency fees in the Illinois Public Relations Act violated First Amendment rights of in-home healthcare assistants who were not members of and did not support the union. *Harris v. Quinn*, 573 U.S. 616, 656-57 (2014). Following *Harris*, several circuit courts rejected similar First Amendment challenges to statutory requirements of exclusive representation. The First Circuit addressed a challenge from in-home childcare providers to the exclusive representation requirement for Massachusetts public employees. *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016). *D'Agostino* rejected the constitutional challenge on the grounds that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *Id.* at 244 (citing *Knight*, 465 U.S. at 286-89). This Court denied certiorari. 136 S.Ct. 2473 (2016).

Similarly, the Second Circuit in *Jarvis v. Cuomo*, 660 Fed. App'x 72, 75-76 (2d Cir. 2016), followed *Knight* in concluding that the exclusive representation requirement challenged by home child-care providers in New York did not implicate any constitutional interest. Quoting *Knight*, the Second Circuit held that where unit members were not required to become members of the union, "any resulting pressure to join the union

was 'no different from the pressure to join a majority party that persons in the minority always feel.'" *Id.* at 75 (quoting *Knight*, 465 U.S. at 289-90). The plaintiffs in that case petitioned for certiorari, which this Court denied. 137 S.Ct. 1204 (2017).

The Seventh Circuit rejected a challenge from home-healthcare and childcare providers to the exclusive representation provisions of Illinois statute. *Hill v. Service Emps. Int'l Union*, 850 F.3d 861, 864-66 (7th Cir. 2017). Relying on *Knight* and agreeing with *D'Agostino*, the Court found no First Amendment violation in the exclusive representation requirement. *Id.* at 864. This Court denied certiorari. 138 S.Ct. 2473 (2017).

2. Petitioner claims that this Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), changed the law. But *Janus* does not support that claim. The Eighth Circuit Court of Appeals held that *Janus* did not supersede *Knight* and that exclusive representation did not impinge the rights of free speech or association of bargaining unit members who disagreed with the union. *Bierman v. Dayton*, 900 F.3d 570, 574 (2018), *cert. denied sub nom. Bierman v. Walz*, 139 S.Ct. 2043 (2019).

The Ninth Circuit rejected a similar First Amendment challenge to the exclusive representation requirement in a Washington statute. *Mentele v. Inslee*, 916 F.3d 783, 791 (9th Cir. 2019). The Ninth Circuit distinguished this Court's holding in *Knight* from its earlier decision in *Abood v. Detroit Board of Education*, 431 U.S. 232 (1977). *Knight*, which followed just a few years after *Abood*, did not follow *Abood*'s logic that exclusive representation (like agency fees) could

be justified by the state's compelling interest in maintaining labor peace. *Id.* at 786-87 (citing *Abood*, 431 U.S. at 232-37). Rather, this Court in *Knight* concluded that exclusive representation did not infringe any constitutional rights of the dissenting bargaining-unit members as they could continue to speak freely, associate, or not associate, with whom they please. *Id.* at 787 (citing *Knight*, 465 U.S. 291 n.13). Therefore, the Ninth Circuit determined that *Janus* did not supersede *Knight*, which foreclosed the First Amendment claims. *Id.* at 788. This Court denied certiorari. *Miller v. Inslee*, 140 S.Ct. 114 (2019).

3. Other district court decisions have held, on similar reasoning, that a statute providing for exclusive representation of the bargaining unit, without more, does not violate First Amendment free speech or association. *See Hendrickson v. AFSCME Council 18*, __F. Supp. 3d__, 2020 WL 365041 (D.N.M., Jan. 22, 2020) *appeal pending*, No. 20-2018; *Oliver v. Service Emps. Int'l Union, Local 668*, 418 F. Supp. 3d 93, 98-100 (E.D. Pa., Nov. 12, 2019) *appeal pending*, No. 19-3786; *Sweet v. Cal. Ass'n. of Psychiatric Technicians*, Docket No. 2:19-cv-349, 2019 WL 4054105 (E.D. Cal. Aug. 28, 2019); *Grossman v. Haw. Gov. Emps. Ass'n/ AFSCME Local 152*, 382 F. Supp. 3d 1088 (D. Haw. May 21, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 888 (C.D. Cal. May 8, 2019); *Akers v. Md. State Edu. Ass'n*, 376 F. Supp. 3d 563, 573 (D. Md. April 18, 2019), *appeal pending* No. 19-1524; *Crockett v. Nat'l Ed. Assoc.–Alaska*, 367 F. Supp. 3d 996, 1009-11 (D. Alaska, Mar. 14, 2019), *appeal pending* No. 19-35299; *Thompson v. Marietta Edu. Assoc.*, 371 F. Supp. 3d 431, 436 (S.D. Oh. Jan 14, 2019) *appeal pending* No. 19-4217; *Uradnik v. Inter Faculty Org.*,

No. 18-cv-1895, 2018 WL 4654751 (D. Minn. Sep. 27, 2018) *cert. denied*, 587 U.S. ___. To date, counsel for University Respondents has not identified a single court that has disagreed with *Knight*'s holding that a labor organization's exclusive representation of the members of a bargaining unit unconstitutionally impinges on freedom of speech or association under the First Amendment.

II. THE LOWER COURTS HAVE NOT MISREAD *KNIGHT*.

1. This Court's decision in *Knight* forecloses Petitioner's claims. In *Knight*, faculty members of Minnesota community colleges mounted a similar constitutional challenge to the Public Employees Labor Relations Act in Minnesota as Petitioner brings here. 465 U.S. 271 (1984). In that case, however, this Court focused on the Minnesota statute's obligations for the exclusive representative to "meet and confer" with the employer on matters outside the scope of mandatory negotiations. *Id.* at 274-75. In the lower courts, the district court found the meet and negotiate aspects of the statute constitutional, which the parties did not challenge on appeal. *Id.* at 278; *see also Thompson v. Marietta Edu. Assoc.*, 371 F. Supp. 3d 431, 436 (S.D. Oh. Jan 14, 2019). With respect to the meet and confer aspects, this Court reversed the District Court's decision, holding that those provisions of the statute were constitutional. *Knight*, 465 U.S. at 280. The *Knight* Court concluded that the employees had no First Amendment right to be heard at those meetings, that it was not a public forum, and, relevant to Petitioner's claims in this case, "[t]he state has in no way restrained [the dissenters'] freedom to speak on any education-related issue or their freedom to

associate or not associate with whom they please, including the exclusive representative." *Id.* at 288.

By focusing on the distinction between meet-and-confer obligations of an exclusive representative and the obligation to collectively bargain, Petitioner misconstrues and erroneously limits this Court's holding in *Knight*. In particular, Petitioner contends that the plaintiff-employees in *Knight* pretermitted their arguments on exclusive representation. (Pet.11). Petitioner contends that the *Knight* court had no First Amendment challenge to compelled representation before it, and therefore "had no reason to consider the matter." (Pet.11). This is incorrect.[1] Moreover, there are no facts or circumstances unique to the meet-and-confer sessions at issue in *Knight* that would meaningfully distinguish *Knight*'s holding from the nature of exclusive representation challenged in this case. Where a statute designates an exclusive representative for collective bargaining only or collective bargaining together with meet-and-confer sessions, there is no distinction in the First Amendment analysis.

Applying *Knight*, as here, the courts have found no constitutional violations. As the *Knight* Court concluded, the employees had no First Amendment right to be heard at the meet-and-confer meetings. Relevant

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[1] Contrary to Petitioner's contention, in the Brief for the AFL-CIO as Amicus in Support of the Appellants raises an extensive discussion both of compelled association and compelled speech, citing many of the same cases that Petitioner relies upon that existed at the time of *Knight*, including *Smith v. Ark. State Highway Emps.*, 411 U.S. 463 (1979); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). *Minn. State Bd. for Cmty. Coll. v. Knight*, No. 82-898, *available at* 1983 U.S. S.Ct. Briefs LEXIS 129, at *13-22.

to Petitioner's claims in this case "[t]he state has in no way restrained [the dissenters'] freedom to speak on any education-related issue or their freedom to associate or not associate with whom they please, including the exclusive representative." *Id.* at 288. Moreover, bargaining unit members were "free to form whatever advocacy groups they like," and were "not required to become members of [the union]." Laws providing for exclusive representation do not impinge First Amendment rights of a dissenting employee, simply because the employee is a member of the represented bargaining unit. *Id.* at 291.

The reasoning in *Knight* applies with equal force here. Petitioner has provided no evidence that he has been forced to adopt or promote AFUM's positions, or that he may not freely espouse his own opinions, which can include submitting grievances directly to UMS. *See* Me. Rev. Stat. Ann. tit. 26 § 1025(2)(E). To the extent he claims that AFUM's views are somehow misattributed to him, Petitioner's recourse is to correct that view by freely expressing his dissent – a right that he has under the Act and in the governing collective bargaining agreement. Nor does Petitioner provide evidence that the Act impedes his freedom to associate or not to associate. He is free to refuse to join the union, and neither AFUM nor UMS may discriminate against him—or any other employees—for freely exercising this choice. *See* Me. Rev. Stat. Ann. tit. 26 § 1027.

2. *Knight* is still good law. Petitioner's claim that *Janus* calls *Knight* into question is not supported by the *Janus* decision. In *Janus*, this Court confined its holding to forced payment of agency fees, noting that exclusive representation and agency fees were not "inextricably linked." 138 S.Ct. at 2465. Further,

Janus specifically noted that "[s]tates can keep their labor-relations systems exactly as they are," without exacting agency fees. *Id.* at 2478.

3. The First Amendment cases that Petitioner cites in support of his request for review are distinguishable from this case. Petitioner contends that the lower courts' decisions "cannot be reconciled" with those cases in which the challenged laws force dissenting speakers to print or mouth the objected-to words, *e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1 (1986), *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 629-30 (1943), or to bring into private associational groups individuals whom "affect in a significant way the group's ability to advocate for public or private viewpoints," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). In this case, it is not Petitioner individually that AFUM speaks for, it is the unit as an entity. UMS is aware that not all employees represented by AFUM share the same views, and the representative is instead "answerable to the majority." *D'Agostino v. Baker*, 812 F.3d at 244. Petitioner's claims that AFUM's representation of the bargaining unit does not implicate the same First Amendment concerns as those in the First Amendment jurisprudence that he cites.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE TO REVIEW THE ISSUE PRESENTED.

Far from being "ideal," as Petitioner contends, this case is a poor vehicle for the Court to review the constitutionality of the exclusive representation principle, a principle that is ubiquitous and fundamental in both state and federal labor law.

1. This case comes to the Court on appeal of a motion to dismiss. Unlike other cases that have presented the question here, the Court will not have the benefit of depositions, discovery, or other evidentiary record upon which to ground its decision. Without the benefit of a factual record on which to determine whether Petitioner has actually been restrained in his free speech or association or alternatively has exercised his opposition, this Court must base its decision on the assumed truth of Petitioner's allegations. *See Sykes v. United States*, 564 U.S. 1, 31 (2011) (*Scalia, J.*, dissenting) ("Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally . . . leav[e] important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery."), *overruled by Johnson v. United States*, 135 S.Ct. 2551 (2015).

2. Moreover, the legal arguments by Petitioner are similarly undeveloped. Petitioner's central claim in this case is that exclusive representation of the bargaining unit violates his rights to speech and association under the First Amendment. The First Circuit determined that Petitioner had waived this claim for lack of development on appeal. *See, e.g.*, *Howell v. Mississippi*, 543 U.S. 440, 441-46 (2005) (dismissing writ as improvidently granted where petitioner failed to raise federal constitutional question to state supreme court); *City of Springfield, Mass. v. Kibbe*, 489 U.S. 378, 383-84 (1989) (dismissing writ as improvidently granted where petitioner failed to preserve question in federal courts below). Because Petitioner did not develop the theory and legal question in the courts below that he now posits to this Court, this case is far from an "ideal" vehicle for this Court

to review the constitutionality of exclusive representation. *See United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to resolve an issue on which the courts below did not focus).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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