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 Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED FACULTIES OF THE UNIVERSITIES OF MAINE

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QUESTION PRESENTED

For nearly a century, American labor law, in both the public and private sectors, has been grounded in the principle that, if a majority of employees in a bargaining unit elects to be represented by a union, that union bargains on behalf of the entire unit with respect to the terms and conditions of their employment, and any agreement the union negotiates with the employer thus runs to the benefit of all employees in the unit.

The question presented is whether application of this principle of exclusive representation in public-sector employment is prohibited by the First Amendment.

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I. LEGAL AND FACTUAL BACKGROUND

In 1975, Maine enacted the University of Maine System Labor Relations Act ("Act") for the purpose of "improv[ing] the relationship between public employers and their employees." Me. Rev. Stat. tit. 26, § 1021. In furtherance of that purpose, the Act provides that employees of public institutions of higher education may choose, by majority action, to be represented by a union for purposes of collective bargaining with the University "with respect to wages, hours, working conditions and contract grievance arbitration." *Id.* § 1026(1)(C). The University of Maine may voluntarily recognize a union as an exclusive representative on the basis of the union's demonstration of majority support in a particular bargaining unit, or the University may insist on a secret-ballot election, to be conducted by the Maine Labor Relations Board, to determine which labor organization, if any, the members of the bargaining unit wish to select as their representative. *Id.* § 1025(1)-(2).

A union receiving majority support is certified "as the sole and exclusive bargaining agent for all of the employees in the bargaining unit," *id.* § 1025(2)(B), and as such "is required to represent all the university … employees within the unit without regard to membership in the organization certified as bargaining agent." *Id.* § 1025(2)(E). A majority-selected bargaining agent is obligated to meet and negotiate with the University "with respect to wages, hours, working conditions and contract grievance arbitration," and the parties are required to execute in writing any agreement reached with respect to

those subjects. *Id.* § 1026(1)(C), (1)(D). A bargaining agent can be decertified through a secret-ballot election upon petition of 30 percent of the bargaining unit. *Id.* § 1025(2)(C).[1]

The Maine Legislature enacted the Act soon after it had extended similar collective-bargaining rights to municipal and state employees. Me. Rev. Stat. tit. 26, §§ 961 *et seq.* (municipal employees); *id.* §§ 979 *et seq.* (state employees).[2] In enacting this series of statutes,

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[1] The assertion in one amicus brief that there is no mechanism for employees to select "no representative" in a decertification election is incorrect. Cato Inst. Amicus Br. at 9. In a decertification election, each ballot contains the name of the incumbent bargaining agent, the choice of "no representative," and the name of any alternative union supported by at least 10 percent of the bargaining unit. If there are more than two choices on the ballot, and no choice receives a majority of votes on the first ballot, a runoff election is held. Me. Lab. Rel. Bd. R., ch. 11, §§ 47, 57.

[2] When the Legislature first considered giving municipal employees the right to bargain collectively, a supporter of the bill explained that "[w]e have listened in the Labor Committee this winter to situation after situation … where there are incipient strikes in prospect," urging the Legislature to pass the bill to "provide an orderly process for the solution of these problems" instead of "wait[ing] until we are in an aggravated labor situation." June 11, 1969 Floor Debate, 2 Legis. Rec. 3462-63 (1969), *available at* District Court Dkt. 37-2. That bill passed in 1969. Five years later, when the Legislature considered extending collective-bargaining rights to state employees, the Legislature touted the success of the prior legislation for municipal employees, making factual findings that the law "has contributed significantly to the improvement of labor relations" and that "the Act responded to the legitimate aspirations of these public employees to participate more meaningfully in decisions affecting their wages, hours and working conditions." Legis. Doc. No. 2314, Statement of Fact, 12-13 (1st Spec. Sess. 106th Legis. 1974), *available at* District Court Dkt. 37-4.

Maine followed the exclusive-representation model that Congress adopted with respect to private-sector labor relations nearly a century ago. 29 U.S.C. §§ 158(d), 159 (exclusive-representation provisions of National Labor Relations Act, enacted in 1935); 45 U.S.C. § 152 Fourth (exclusive-representation provisions of Railway Labor Act, as amended in 1934). It also is the model that approximately 40 other states, the District of Columbia, and Puerto Rico have adopted for at least some of their public employees. District Court Dkt. 37-1 ¶ 12 & n.3. And it is the model that Congress adopted for federal civil-service employees in 1978, on the basis that "experience in both private and public employment indicates that the statutory protection of the right … to … bargain collectively … safeguards the public interest [and] contributes to the effective conduct of public business." 5 U.S.C. § 7101(a)(1)(A), (B); *see also id.* § 7111.

Pursuant to the Act, the Associated Faculties of the Universities of Maine ("AFUM" or "Union") has been chosen by a majority of faculty employees of the University of Maine System as their exclusive bargaining agent and has been certified as such by the Maine Labor Relations Board. Pet. App. 70. Petitioner Jonathan Reisman, an economics professor at the University of Maine at Machias, has been a member of the bargaining unit represented by AFUM since 2002. District Court Dkt. 37-5 ¶ 2. Petitioner became a dues-paying member of AFUM in 2002, once serving as a local union officer; he resigned his union membership shortly before filing this lawsuit. Pet. App. 38; District Court Dkt. 37-5 ¶¶ 3, 5, 6.

The collective bargaining agreement between AFUM and the University specifically codifies the

right of each individual bargaining-unit member to comment on matters related to his or her professional duties as well as on matters of public concern. Pet. App. 71-72. It also contains detailed procedures concerning the resolution of grievances that may arise regarding the interpretation or application of the agreement, including, for example, permitting individual bargaining-unit members to be represented by their own counsel at an arbitration. Pet. App. 93.

II. PROCEEDINGS BELOW

Petitioner filed his complaint on August 10, 2018, naming as defendants AFUM, the University of Maine at Machias, and the Board of Trustees of the University of Maine System ("Board"). Pet. App. 32-33, 41. Petitioner alleged that AFUM's status as an exclusive bargaining agent under the Act violated his First Amendment rights because it "compels [him] to associate with the Union," "authorizes and requires the Union to speak for him," and "attributes the Union's speech and petitioning to [him]." Pet. App. 39. Petitioner, however, did not allege any instance in which anyone had in fact attributed any speech by the Union to him personally, nor did he allege any instance in which the Union held itself out as his personal agent, or the personal agent of any individual member of the bargaining unit, in the course of dealing with the University or otherwise.

Shortly after filing his complaint, Petitioner moved for a preliminary injunction, requesting that the court "enjoin the Union from holding itself out as Mr. Reisman's representative and agent and enjoin the Board from regarding it as his representative and agent." District Court Dkt. 5 at 4-5. The defendants opposed that motion and moved to dismiss the

complaint, relying substantially on this Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which rejected a First Amendment challenge to Minnesota's system of exclusive representation for college faculty, and the First Circuit's decision in *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (Souter, J.), which rejected a First Amendment challenge to Massachusetts' system of exclusive representation for state-compensated child-care providers. District Court Dkts. 33, 34. The Attorney General of Maine intervened as a defendant and also moved to dismiss the Complaint. District Court Dkts. 24, 30.

On December 3, 2018, the district court granted the defendants' motions to dismiss. Pet. App. 15-27. The district court first addressed Petitioner's contention that *Knight* and *D'Agostino* "are no longer valid in light of the Supreme Court's recent ruling in *Janus* [*v. AFSCME Council 31*, 138 S. Ct. 2448 (2018)]." Pet. App. 21. The district court rejected this contention, observing that *Janus* did not consider the constitutionality of exclusive representation and that, as a result, it "did not … call into question *D'Agostino*'s conclusion that the First Amendment is not violated where a democratically selected union serves as the exclusive bargaining agent for all employees." Pet. App. 23.

The court then addressed Petitioner's interpretation of the Act as "appoint[ing] the Union as [his] unwanted representative and agent so that it can speak on his behalf." Pet. App. 25 (quoting District Court Dkt. 38 at 3 (alteration in original)). The court held that Petitioner's interpretation "rests on a fundamental misconception," explaining that the Act does *not* invest the Union with authority to speak on

behalf of individual employees, nor does the Act appoint the Union as the personal agent for individual employees. Pet. App. 26. The court instead interpreted the statute to provide that "the Union is the agent for the bargaining-unit which is a distinct entity separate from the individual employees who comprise it." *Id.*

Because the court granted the defendants' motions to dismiss, it accordingly denied Petitioner's motion for a preliminary injunction. Pet. App. 26-27.

Petitioner appealed the district court's judgment to the First Circuit, which affirmed in an opinion issued on October 4, 2019. Pet. App. 1-12. The court observed that the premise of Petitioner's First Amendment claim was his interpretation that § 1025(2)(E) of the Act "designated AFUM as his personal representative," which, in turn, authorized the Union to "speak for him" and "compel[led] him to associate with AFUM." Pet. App. 5, 6. In evaluating that contention, the court considered § 1025(2)(E) "in the context of the statute as a whole and not in isolation." Pet. App. 7. In that context, the court agreed with the district court in rejecting Petitioner's interpretation of the Act, holding that "§ 1025(2)(E) is not properly read to designate AFUM as Reisman's personal representative.… 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 in it, and then solely for the purposes of collective bargaining." Pet. App. 8-9.

The court then noted that Petitioner "attempt[ed] to advance an alternative challenge in which he contends that, even if the statute merely makes the union the representative of his bargaining unit for

purposes of collective bargaining, it still impermissibly burdens his First Amendment rights." Pet. App. 10. The court held that "to the extent that Reisman adverted to this alternative theory in his opening brief, as opposed to merely in his reply brief and at oral argument, he has waived it for lack of development on appeal." Pet. App. 12 (citations omitted). The court added that, even if Petitioner had preserved this argument, this Court's decision in *Knight* "would appear to dispose of this contention rather clearly." Pet. App. 10.

REASONS FOR DENYING THE WRIT

For the eighth time in the last four years, this Court is being asked to consider holding unconstitutional what has been, for the past century, the fundamental principle of American labor relations in both the public and private sector: the representation of an entire bargaining unit, for purposes of negotiating terms and conditions of employment and enforcing the agreed-upon terms, by a labor organization democratically selected by the majority of employees in that unit. This Court appropriately has denied certiorari in each case in which the lower courts have rejected constitutional challenges to exclusive representation, and it should do so here as well.

As the court of appeals explained, Petitioner is incorrect that the Maine statute "appoints" the exclusive representative as "*Petitioner's* 'bargaining agent,'" so as to "put[ ] words in his mouth" whenever the union speaks. Petition at 13-14 (emphasis added). Rather, the Maine statute provides that, when a union receives support from a majority of employees in a bargaining unit, that union must represent the bargaining unit *as an entity* with respect to employees'

terms and conditions of employment. This Court upheld a similar statute against a First Amendment challenge in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)—a holding that Petitioner does not challenge and that, in any event, is fully consistent with the Court's treatment of compelled-speech and compelled-association claims outside of the labor-relations context.

Nor was the constitutionality of exclusive representation in any way called into question by this Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Not only was the issue of exclusive representation not before the Court in *Janus*, but the Court made clear that it was "not in any way questioning the foundations of modern labor law." *Id.* at 2471 n.7. No principle is more central to the foundations of modern labor law than exclusive representation.

These considerations, by themselves, would be more than sufficient to counsel denial of the Petition, even if Petitioner were correct that this case is the "ideal vehicle" for a challenge to exclusive representation. Petition at 20. But he is wrong about that as well. The only challenge to the Maine statute that Petitioner has preserved rests on an interpretation of the statute that the court of appeals rejected; this Court does not normally grant certiorari to review a lower court's interpretation of a state statute. Moreover, in an apparent attempt to avoid the far-reaching implications for the American system of labor relations of his attack on the principle of exclusive representation, Petitioner has so watered down the relief he seeks in this case as to make his claim trivial, leaving nothing but a dispute about semantics. Even if the Court were otherwise disposed

to reconsider the constitutionality of exclusive representation, therefore, this case would not be a suitable vehicle for it to do so.

I. THIS COURT'S DECISION IN *KNIGHT* FORECLOSES PETITIONER'S CHALLENGE TO EXCLUSIVE REPRESENTATION, AS THE LOWER COURTS UNIFORMLY HAVE HELD.

As this Court has recognized, the principle of exclusive representation—that, once a majority of employees in a bargaining unit chooses a labor union to represent them, only that union can negotiate terms and conditions with the employer, and the agreement that the union negotiates runs to the benefit of all employees in the bargaining unit—is the "central premise" of American labor law. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009). That is true in the public as well as the private sector. *See, e.g.*, *Lullo v. Int'l Ass'n of Fire Fighters, Local 1066*, 262 A.2d 681, 690 (N.J. 1970) ("Beyond doubt such exclusivity—the majority rule concept—is now at the core of our national labor policy."); *see also supra* p. 3. This Court upheld the constitutionality of this fundamental principle, as applied to public-sector employment, more than 35 years ago in *Knight*—and every lower court to consider compelled-speech and compelled-association challenges to exclusive representation since then has agreed that *Knight* controls such claims. For that reason, and because *Knight* is entirely consistent with this Court's First Amendment jurisprudence outside of the labor-relations context, there is no reason for this Court to grant certiorari.

A. The Courts of Appeals Uniformly Agree that, Under *Knight*, Exclusive Representation Does Not Violate the First Amendment.

1. In *Knight*, this Court addressed a First Amendment challenge to a Minnesota statute, similar to the Maine statute at issue in this case, that "establishe[d] a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit." *Knight*, 465 U.S. at 274. The Minnesota statute required public employers—in that case, a state university board—(1) to negotiate with such an exclusive representative over terms and conditions of employment (known as a "meet and negotiate" requirement), and (2) to confer with the exclusive representative about subjects outside the scope of mandatory negotiations (known as a "meet and confer" requirement). *Id.* at 274, 275. Further, under the statute, "the employer may neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id.* at 275.

The statute did not, however, prevent members of the bargaining unit from submitting advice to their employer or from speaking publicly on matters related to their employment. *Id.* Indeed, as the Court specifically noted, the state university board "considers the [union's] views … to be the faculty's official collective position," while recognizing "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 276.

This Court summarily affirmed the district court's dismissal of the plaintiffs' constitutional challenge to the "meet and negotiate" requirement. *See Knight*, 465 U.S. at 279 (citing *Knight v. Minn. Cmty. Coll.*

Faculty Ass'n, 460 U.S. 1048 (1983)). The Court then gave plenary consideration to the plaintiffs' challenge to the "meet and confer" requirement, concluding that exclusive representation was constitutional in that context as well. *Id.* at 288.

In addressing that latter challenge, this Court, in Part II.A of its opinion, first considered and rejected the plaintiffs' claim that their right to free speech was impaired because they, unlike the exclusive representative, had no "government audience for their views." *Id.* at 280-88. The Court then turned, in Part II.B of its opinion, to the broader issues of speech and association, concluding that "[t]he State has *in no way* restrained appellees' freedom to speak on any education-related issue or their freedom to associate *or not to associate* with whom they please, including the exclusive representative." *Id.* at 288 (emphases added). Plaintiffs were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 289. In sum, the Court held, the plaintiffs' "associational freedom has not been impaired" because "the pressure [they may feel to join the exclusive representative] is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 289, 290.

2. Petitioner does not argue that *Knight* was wrongly decided or that this Court should grant certiorari to consider overruling it. Instead, Petitioner argues that *Knight* has "literally nothing to say" on the merits of his First Amendment challenge to exclusive representation. Petition at 9. Petitioner's proffered interpretation of *Knight*—that *Knight* decided only the narrow question of whether public employees have a "right to be heard by the

government," *id.*—has been rejected by each of the lower courts that, in the last several years, have addressed constitutional challenges to exclusive representation, with this Court denying each ensuing petition for certiorari. *See Branch v. Commonwealth Emp't Relations Bd.*, 120 N.E.3d 1163 (Mass. 2019), *cert. denied sub nom. Branch v. Mass. Dep't of Labor Relations*, 140 S. Ct. 858 (2020); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *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); *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018) (preliminary-injunction denial), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

For example, the Eighth Circuit, in rejecting the plaintiffs' argument that *Knight* only addressed whether public employees have a right to be heard by the government, held that "a fair reading of *Knight* is not so narrow." *Bierman*, 900 F.3d at 574. In so holding, that court pointed to the fact that *Knight* had "summarily affirmed the constitutionality of exclusive representation for subjects of mandatory bargaining" and "discussed more broadly the fact that the State treated the position of the exclusive representative as the official position of the faculty, even though not every instructor agreed, but nonetheless ruled that

the exclusive representation did not impinge on the right of association." *Id.* (citation omitted).[3]

In short, the lower courts are in agreement that, under this Court's decision in *Knight*, exclusive representation does not violate the First Amendment rights of bargaining-unit members who do not agree with positions taken by the union. In the absence of any conflict among the Circuits regarding the proper interpretation of *Knight*, and in the absence of any contention by Petitioner that *Knight* should be reconsidered, this Court should deny certiorari.

B. *Knight* Is in Accord with This Court's First Amendment Cases Outside the Labor Context.

Petitioner also is incorrect that *Knight* and the recent lower-court decisions rejecting First Amendment challenges to exclusive representation are "at odds with ordinary First Amendment doctrine." Petition at 13. On the contrary, this Court's cases make clear that a plaintiff cannot base a claim

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[3] Petitioner erroneously asserts that the Ninth Circuit's decision in *Mentele*—one of the court of appeals cases that recently has rejected an exclusive-representation challenge—"recognized that this prevailing view of *Knight* is untenable." Petition at 12. *Mentele*, like *Bierman*, pointed to this Court's statement in *Knight* "acknowledg[ing] that exclusive bargaining required the State to treat the union representatives as expressing 'the faculty's official collective position' *even though* 'not every instructor agrees with the official faculty view on every policy question.'" 916 F.3d at 788 (quoting *Knight*, 465 U.S. at 276). The court then held that "[i]n this way, *Knight* addresses [Mentele]'s objection" to exclusive representation. *Id.* at 788-89. Thus, as even Petitioner's supporting amici acknowledge, *Mentele* held that *Knight* foreclosed the First Amendment challenge to exclusive representation in that case. *See, e.g.*, Nat'l Right To Work Legal Defense Found. Amicus Br. 6-7, 9.

of compelled speech on the assertion that speech of another person or entity would be attributed to him unless such attribution would be objectively reasonable. For example, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court addressed whether it violated the First Amendment for a state to require that a privately owned shopping center allow the distribution of petitions on its property. The Court held that such a requirement did not violate the shopping center's First Amendment rights because, as relevant here, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition … will not likely be identified with those of the owner." *Id.* at 87. Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), the Court held that a federal law requiring law schools to allow military recruiters on campus did not impute the recruiters' speech to the law schools:

> We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so …. Surely students have not lost that ability by the time they get to law school.

Id. at 65 (citing *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (students understand that speech of student groups is not school-endorsed)). The *FAIR* Court rejected the law schools' compelled-association claim on similar grounds. *Id.* at 69.

This case is no different. Although Petitioner repeatedly asserts the Union speaks for him by "putting words in his mouth," *e.g.*, Petition at 14, no reasonable observer could infer that every individual

member of the bargaining unit agrees with every position taken by the exclusive representative—just as no reasonable observer could infer that every constituent agrees with every position taken by her congressional representative. *See Knight*, 465 U.S. at 290 (analogizing exclusive representation to representative democracy).

That is because it long has been understood that a union certified as an exclusive representative to negotiate with an employer concerning terms and conditions of employment is speaking in the *collective interest* of the bargaining unit, not speaking in the *individual interest* of every employee who is part of that bargaining unit. As Justice Souter put it, writing for the First Circuit in *D'Agostino*, "when an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority." 812 F.3d at 244, *quoted in* Pet. App. 11. And, as Justice Harlan likewise observed in the context of mandatory bar membership: "[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual." *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (internal quotation marks omitted).

C. This Court's Decision in *Janus* Does Not Undermine *Knight*.

Finally, although the Petition is laden with citations to this Court's decision in *Janus*, that decision in no way undermines *Knight*'s holding that exclusive representation is constitutional. The issue before the Court in *Janus* was the constitutionality of statutory and contractual provisions requiring

members of a bargaining unit who declined to become dues-paying union members to pay an "agency fee" consisting of their proportionate share of the union's costs of collective bargaining and contract administration. This Court, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that the First Amendment prohibits such agency-fee requirements in public-sector employment. *See Janus*, 138 S. Ct. at 2486.

In holding compelled-fee requirements unconstitutional, however, the Court explicitly *distinguished* exclusive representation:

> It is … not disputed that the State may require that a union serve as exclusive bargaining agent for its employees .... We simply draw the line at allowing the government to go further still and require all employees to support the union [financially] irrespective of whether they share its views.

Id. at 2478.

Indeed, in addressing the dissent's concern that the *Janus* decision would require states that had authorized agency fees to undertake an "extensive legislative response," the Court emphasized that those states "can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27. "In this way," the Court explained, "these States can follow the model of the federal government and 28 other States" that provided for exclusive representation but had *not* authorized agency fees. *Id.*; *see also id.* at 2466. By expressly holding out the labor-law regimes in the federal government and these 28 states as a "model" for the remaining states

to follow in the wake of *Janus*, the Court was reaffirming—not criticizing—exclusive representation.

Janus also emphasized that the Court was "not in any way questioning the foundations of modern labor law," *id.* at 2471 n.7—and, as we have noted, no principle is closer to the "foundations of modern labor law" than exclusive representation.

Even the single remark in the *Janus* opinion on which Petitioner relies—that exclusive representation constitutes "a significant impingement on associational freedoms that would not be tolerated in other contexts," *id.* at 2478—cannot be read as anything other than an acknowledgment that the principle of exclusive representation in collective bargaining was *not* being called into question. The necessary implication to be drawn from the Court's recognition that such an impingement might not be allowed in *other* contexts is that it was understood that, in *this* context, whatever impingement was occasioned by a system of exclusive representation is constitutionally permissible. And that is doubly so, given that the Court bracketed this comment by affirming "[i]t is … not disputed that the State may require that a union serve as exclusive bargaining agent for its employees," and that the Court would "simply draw the line at allowing the government to go further still and require all employees to support the union." *Id.*[4]

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[4] In the same vein, the Court made clear that it had no quarrel with *Abood*'s conclusion that "labor peace," meaning the avoidance of conflicts resulting from the presence of multiple competing unions within the workforce, was a "compelling state interest." 138 S. Ct. at 2465. Rather, the Court took issue only

One important reason for the distinction between exclusive representation in collective bargaining and any similar arrangement in "other contexts" is the presence, in *this* context, of the union's "duty of fair representation." That duty requires the union to represent all employees in the bargaining unit on equal terms, without regard to union membership. *See* Me. Rev. Stat. tit. 26, § 1025(2)(E). As *Janus* explained, the duty of fair representation is a "necessary concomitant" of exclusive representation. 138 S. Ct. at 2469; *see also D'Agostino*, 812 F.3d at 244 ("[I]t is not the presence but the absence of a prohibition on discrimination that could well ground a constitutional objection.").

Thus, the lower courts that have addressed the impact of *Janus* on the constitutionality of exclusive representation uniformly have agreed that *Knight* continues to control the disposition of these claims. Pet. App. 11-12; *Branch*, 120 N.E.3d at 1174-75; *Mentele*, 916 F.3d at 789-90; *Bierman*, 900 F.3d at 574; *Bennett v. AFSCME Council 31*, 2020 WL 1549603, at *6 (C.D. Ill. Mar. 31, 2020), *appeal pending*, No. 20-1621 (7th Cir.); *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1027-28, (D.N.M. 2020), *appeal pending*, No. 20-2018 (10th Cir.); *Thompson v. Marietta Educ. Ass'n*, 2019 WL 6336825, at *8 (S.D. Ohio Nov. 26, 2019), *appeal pending*, No. 19-4217 (6th Cir.); *Oliver v. SEIU Local*

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with *Abood*'s understanding that agency fees were necessary to that end. *Id.*

668, 418 F. Supp. 3d 93, 99 (E.D. Pa. 2019), *appeal pending*, No. 19-3876 (3d Cir.).[5]

II. THIS CASE IS NOT A SUITABLE VEHICLE FOR RECONSIDERING THE CONSTITUTIONALITY OF EXCLUSIVE REPRESENTATION.

Even if there were justification for this Court to reconsider the constitutionality of exclusive representation, this case is not, as Petitioner claims, the "ideal vehicle" for such a challenge. Petition at 20. There are at least two reasons why this case is not a suitable vehicle for the Court to reconsider this issue. First, Petitioner's First Amendment challenge is based on an interpretation of the Maine statute that was rejected by the court of appeals, and Petitioner has waived any First Amendment challenge to the statute as so interpreted. Second, Petitioner has watered down the relief he seeks in this case such as to leave nothing but a semantic dispute that, should he prevail, would have no practical effect.

A. This Court Should Not Grant Certiorari To Consider Whether the First Circuit Correctly Interpreted Maine's Exclusive-Representation Statute, Which Is the Only Claim Petitioner Has Preserved.

Petitioner's First Amendment claim is premised on the supposition that the Maine statute, by designating AFUM "as the sole and exclusive bargaining agent for all of the employees in the bargaining unit," Me. Rev. Stat. tit. 26, § 1025(2)(B),

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[5] In the absence of any conflict among the lower courts, the continued percolation of this issue in the Third, Sixth, Seventh, and Tenth Circuits is further reason to deny certiorari here.

"authorizes and requires the Union to speak for him" and "compels [him] to associate with the Union." Pet. App. 39, ¶¶ 41 & 42. The court of appeals rejected Petitioner's interpretation of the statute in favor of the Attorney General's interpretation, thus reading the statute to provide 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." Pet. App. 8-9. The court of appeals went on to hold that Petitioner had waived his "alternative challenge" that the statute was unconstitutional even under the Attorney General's interpretation. Pet. App. 10, 12.

Petitioner does not argue that the court of appeals' holding on waiver was in error. Nor could he. Petitioner's only argument in his opening brief to the court of appeals was that the Act was unconstitutional because it authorized the Union to "speak for Professor Reisman" and "place[d] Mr. Reisman in an agency relationship with the Union." *See, e.g.*, Appellant's Opening Br. at 11 (1st Cir. Apr. 4, 2019). It was not until his reply brief and oral argument that Petitioner took on the Attorney General's interpretation of the statute by arguing, in the alternative, that the distinction between the bargaining unit as a whole and individual members of the bargaining unit was "immaterial" for purposes of his First Amendment claim. *See* Appellant's Reply Br. at 9-10 (1st Cir. May 22, 2019); Oral Arg. Recording at 27:03-28:06 (1st Cir. July 25, 2019), *available at* http://media.ca1.uscourts.gov/files/audio/18-2201.mp3.[6] The court of appeals therefore was correct

[6] Petitioner was on notice of the Attorney General's reading of the statute at the time he filed his opening brief with the court of appeals, as the district court had granted the defendants'

to conclude, once it rejected Petitioner's construction of the Maine statute, that there was nothing left of his First Amendment claim.

This Court, of course, is not in the business of granting certiorari to consider whether a court of appeals correctly interpreted a state statute. *See* Sup. Ct. R. 10. Nor does this Court typically address contentions that have been waived below. *See, e.g.*, *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957) ("The Court of Appeals, however, held that this contention had been waived…. We, accordingly, do not recognize this contention here."). As a result, even if the Court believed that the constitutionality of exclusive representation merited its renewed attention, this case would not be the proper vehicle for such reconsideration.

B. This Court Should Not Grant Certiorari in a Case in Which the Relief Sought Would Have No Practical Effect.

Finally, in an apparent attempt to sidestep the sweeping implications of his First Amendment challenge for the American system of labor relations, Petitioner has so watered down the relief he is seeking as to leave nothing but a trivial, semantic dispute.

In fact, if Petitioner were to prevail on his claim in this lawsuit, it would have no practical effect whatsoever—either on the parties or on anyone else. That is because Petitioner has conceded that the University could continue to "bargain with the Union, impose terms it reaches on all employees, and decline

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motions to dismiss in substantial part by agreeing with the Attorney General's reading of the statute and rejecting Petitioner's reading. Pet. App. 25.

to bargain with rival unions"—all without violating the First Amendment. Appellant's Reply Br. at 20; *see also* District Court Dkt. 38 at 2; Petition at 18 (public employer could "declin[e] to bargain with rival unions"). Indeed, Petitioner has expressly conceded that, were he to prevail in this lawsuit, "the State can continue to bargain with the Union in the same way that it has been bargaining." Oral Arg. Recording at 3:32-3:37. Petitioner also has acknowledged that the supposed constitutional problem with the Maine statute would be cured simply by substituting the phrase "exclusive bargaining *partner*" for "exclusive bargaining *agent*." *Id.* at 2:01-2:26, 3:47-4:22; *see also* Appellant's Reply Br. at 20.

The upshot of Petitioner's claim is therefore that, even if this Court granted certiorari and reversed the court of appeals' decision, (1) the Union and the Board could continue to act as they have been acting under the Maine statute; and (2) any state could cure whatever constitutional problem may exist with its labor-law statute by substituting the phrase "exclusive bargaining partner" for "exclusive bargaining agent," leaving the remainder of the statute unchanged.[7] This Court should not expend its resources to consider the merits of a case that, whatever the outcome, would have no practical effect on the parties before it or on anyone else. *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977)

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[7] Petitioner also has acknowledged that, under his preferred system of labor relations, a union serving as the "exclusive bargaining partner" for a unit of employees still would have a duty of fair representation to all members of the bargaining unit, just as a union serving as an "exclusive bargaining agent" has such a duty. *See* Appellant's Reply Brief at 20-21.

("The reason for attaching constitutional significance to a semantic difference is difficult to discern.").

For this reason, as well, the Petition is not worthy of this Court's review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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