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

SUPPLEMENTAL BRIEF FOR RESPONDENT ASSOCIATED FACULTIES OF THE UNIVERSITIES OF MAINE

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SUPPLEMENTAL BRIEF

Respondent Associated Faculties of the Universities of Maine ("Union") files this brief in response to Petitioner's supplemental brief, which concerned the Sixth Circuit's recent decision in *Thompson v. Marietta Education Ass'n*, -- F.3d --, 2020 WL 5015460 (6th Cir. Aug. 25, 2020). Far from supporting a grant of certiorari, the *Thompson* decision—in which the Sixth Circuit joined the First, Second, Seventh, Eighth, and Ninth Circuits, along with the Massachusetts Supreme Judicial Court in holding that First Amendment challenges to exclusive representation are foreclosed by this Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)—is yet another nail in the coffin for Petitioner's central argument: that this Court's decision in *Knight* has no bearing on the issue presented here.

I. Petitioner's central argument for certiorari is, as he puts it in his Question Presented, that the lower courts are "mistaken . . . that this Court approved [exclusive representation] arrangements in *Minnesota State Board for Community Colleges v. Knight*." Petition at i. *Knight*, he insists, "has literally nothing to say" on the issue presented in this case. *Id.* at 9. As Petitioner elaborates in his Reply Brief, "*Knight* said nothing about compelled union representation because it addressed only a 'restriction on participation' in meetings with a state employer." Reply Br. for Petitioner at 1.

As we showed in our brief in opposition, the lower courts uniformly and correctly have rejected this reading of *Knight*, instead holding that *Knight* forecloses compelled-speech and compelled-association challenges to exclusive representation.

Union Br. at 12-13 (citing cases). In *Thompson*, where the plaintiff (represented by the same counsel as Petitioner in this case) brought a challenge to exclusive representation, advancing the same arguments as Petitioner makes here, the Sixth Circuit squarely held that "*Knight* controls." 2020 WL 5015460, at *2. The court explained:

> [I]n *Knight*, the Court framed the question presented in broad terms: whether the "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views." 465 U.S. at 273. Even assuming plaintiff's compelled-representation theory is technically distinguishable, such a cramped reading of *Knight* would functionally overrule the decision.

Id.

Thompson is, in sum, yet another authority that rejects Petitioner's strained reading of *Knight*, on which his petition for certiorari is based. The Sixth Circuit's decision thus reinforces that there is no division of authority that merits this Court's attention.

II. Petitioner's supplemental brief hardly mentions the Sixth Circuit's holding that *Knight* controls the disposition of First Amendment challenges to exclusive representation. Instead, the supplemental brief primarily discusses the dicta in *Thompson* that there is a "conflict" between *Knight* and the principles set forth by this Court in *Janus v.*

AFSCME Council 31, 138 S. Ct. 2448 (2018). *See Thompson*, 2020 WL 5015460, at *1.

Even taking this dicta at face value, it provides no support for the Petition, as Petitioner has *not* argued that this Court should grant certiorari to consider overruling *Knight*. Indeed, Petitioner refrained from so arguing even though both the district court and the court of appeals held that *Knight* squarely foreclosed his First Amendment challenge to exclusive representation. Pet. App. 10-11, 20-21. It is simply too late for Petitioner to contend, in his supplemental brief, that this Court should use this case as a vehicle to consider overruling a longstanding precedent. Nor has Petitioner offered any special justification for overruling precedent that forms the basis for the collective bargaining laws used throughout the United States.

Quite apart from that point, moreover, Petitioner and the *Thompson* dicta are simply wrong in suggesting that exclusive representation "is in direct conflict with the principles enunciated in *Janus*." 2020 WL 5015460, at *2. Certainly, as the Sixth Circuit points out, the First Amendment protects the right to speak and associate and to refrain from speaking and associating. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)). But the Sixth Circuit nowhere explains how a system of exclusive representation, in which a union chosen by a majority of employees negotiates terms and conditions of employment for all employees, is inconsistent with this jurisprudence. As we have previously set out, it is not—for exclusive representation does not require non-members of the union (like Petitioner) to say or do *anything*, nor does such a union speak in the

individual interest of every employee it represents. Nor would reasonable outsiders believe that every bargaining-unit employee necessarily agrees with a union's speech. *See* Union Br. at 13-15.

And, as we have further explained, nothing in this Court's *Janus* decision changes that conclusion. *See id.* at 15-19. To the contrary. The sentence from *Janus* upon which both the *Thompson* court and Petitioner principally rely—noting that exclusive representation entails "a significant impingement on associational freedoms that would not be tolerated in *other* contexts," 138 S. Ct. at 2478 (emphasis added)—is taken from a paragraph in which this Court was explaining that exclusive representation, in contrast to compelled financial support for the bargaining representative through an agency-fee requirement, survives constitutional scrutiny under the line of cases pertaining to the government-employment context. *See id.* at 2477-78 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

Indeed, the *Janus* court further reaffirmed that exclusive representation is constitutional when it addressed the dissent's concern that *Janus* would require an "extensive legislative response" from states. *See* 138 S. Ct. at 2485 n.27. In addressing that concern, the Court reiterated that "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." The Court added that "[i]n this way, [states that had authorized agency fees] can follow the model of the federal government and 28 other states" that had authorized exclusive representation *without* agency fees. *Id.*; *see also id.* at 2465-66.

In short, contrary to the Sixth Circuit's conclusory dicta that there exists a "direct conflict" between the *Janus* opinion and exclusive representation, *Janus* in fact makes clear that this fundamental principle of American labor relations is fully consistent with this Court's First Amendment jurisprudence. There is no need for the Court to revisit the well-settled teaching of *Knight*.

* * *

Thompson provides no support for the Petition. For the reasons stated in our brief in opposition, this Court should deny the Petition, just as it has denied the other four petitions raising similar challenges to exclusive representation in the wake of *Janus*.[1]

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[1] *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); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

Respectfully submitted,

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