No. 24-71

IN THE
Supreme Court of the United States

AVRAHAM GOLDSTEIN, ET AL.,
Petitioners,
V.

PROFESSIONAL STAFF CONGRESS/CUNY, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The State of New York is prohibiting several professors, all but one of whom are Jews, from dissociating themselves from a union's representation to protest its anti-Semitic and anti-Israel conduct and other expressive activities. The question presented is: Whether it violates the First Amendment for a state to prohibit individuals from dissociating from a union's representation to protest that union's expressive activities?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference.

The Buckeye Institute has a particular interest in this case. Following this Court's decision in *Janus v. AFSCME,* 138 S. Ct. 2448 (2018), The Buckeye Institute has represented and continues to represent public sector employees seeking to exercise their First Amendment right not to associate with unions whose

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[1] Pursuant to Rules 37.2(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all the parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

speech they find objectionable.

SUMMARY OF THE ARGUMENT

In *Janus,* this Court held that the First Amendment guarantees public employees the right not to subsidize a union and its speech. *Janus,* 138 S. Ct. at 2486. To protect this right, the Court held that public employers cannot deduct, and unions cannot collect, payments for union speech from employees without clear and compelling evidence that the employees waived their First Amendment rights to refrain from supporting for union speech. *Id.*

But the promise that *Janus* held for dissenting members of public collective bargaining units has often proved illusory. Because even when public employees can opt-out of union membership and payment of union dues or service fees, they still remain bound to the union—and its political speech—through exclusive representation laws. Simply put, while public employees can disclaim union membership and sometimes avoid forced financial support of a union, they are still bound—by statute—to associate with the union as their collective bargaining representative. While the First Amendment, and *Janus*, guarantee citizens the right to disassociate from groups they find disagreeable, these public employees are not free to exercise that right—whether as a matter of conscience or as a form protest.

When public sector unions restricted their advocacy to collective bargaining issues such as working conditions and employee rights, then limited forced personal association—a practice which "in most

contexts, . . . would be universally condemned," 138 S. Ct. at 2463—might be tolerable. But as public sector unions increasingly engage in political expression on topics far afield from their core role as the collective bargaining representative for all employees, non-union bargaining unit members find themselves forced to associate with union speech that they not only find disagreeable, but in cases like this, abhorrent.

That result cannot be squared with this Court's First Amendment jurisprudence The "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). *Janus* considered it beyond debate that the First Amendment bars a state from "requir[ing] all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties." *Id*. at 2464.

The slender thread from which this intrusion on the First Amendment rights of public employees hangs is the interest in "labor peace" articulated in the now overruled *Abood v. Detroit Bd. of Ed*., 431 U.S. 209 (1977), and applied in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984). Despite its limited holding, litigants who have challenged the apparent inconsistency of the practice of forced association with a union and the First Amendment have repeatedly run into the brick wall of *Knight*. Yet, while Knight's concern for labor peace made sense in that case's factual context, labor peace should not prevent Jewish professors from

disassociating themselves from blatantly antisemitic speech. Indeed, *Knight* did not explore the First Amendment issue because the litigants did not raise it. And, in all events, a slew of intervening compelled-speech and association precedents render the doctrine attributed to *Knight* obsolete.

While the circuit courts have acknowledged the tension between *Janus* and *Knight* and questioned labor peace as a continued rationale for forced association, they have declined to find that *Janus* overruled *Knight*.

Accepting this case will allow the Court to address the tension between *Janus* and *Knight* and better define the interplay between First Amendment rights of public employees and the government's interest in labor peace.

ARGUMENT

I. "Labor Peace" is Not a Sufficient Basis to Violate the First Amendment

Subjecting public workers to state-compelled union representation contravenes established First Amendment doctrine. As *Janus* explained, these mandatory association regimes constitute "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478. The justification offered for these infringements is "labor peace"—the interest in orderliness in the collective bargaining process and preventing the government from having to bargain with a variety of competing groups claiming to represent employees. While this interest might have been present in *Knight*, it is unclear how requiring

Jewish professors to associate with a group whose statements they find antisemitic serves that interest.

In the exclusive representation context, "labor peace" has meant avoiding the messy results of competing unions with competing views claiming the right to bargain for employees or requiring a public employer to bargain with multiple entities. For example, in touting the benefits of exclusive representation, the *Abood* court pointed to "the confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement . . ." *Abood*, 431 U.S. at 224, *overruled by Janus*, 585 U.S. at syllabus. Scholars have pointed out that Abood's "labor peace interest" was "tied to the problems that were associated with multi-unionism. These problems presupposed the conflict and disruption often associated with interunion rivalries and thus the possibility that an employer could be confronted with conflicting demands from different unions. William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus & the High Court's Anti-Labor Policymaking,* 53 U.S.F.L. Rev. 209, 226 (2019).

But there is no evidence in this case to suggest that allowing the Petitioners to disassociate from the union would result in the loss of labor peace which concerned the *Abood* and *Knight* Courts. There are no rival unions competing for members or competing demands on management. Nor is there any danger that the public employer will be less efficient or hamstring

because it is forced to listen to a multitude of voices on collective bargaining topics.

The extremely specific evil that *Knight* sought to avoid was requiring the public employer to meet and confer with persons other than the exclusive representative. As *Knight* succinctly stated, citizens—particularly in a non-public forum—"have no constitutional right to force the government to listen to their views." *Knight*, 465 U.S. at 283. That danger is simply not present here. The Petitioners do not demand that their public employer listen to them. They ask only to be disassociated from speech that the union is making to the public at large, ostensibly on their behalf.

As for any state interest in "labor peace," it is neither compelling nor served in any tailored fashion by forcing public employees to accept union representation. *Janus* assumed, without deciding, that a state might have a compelling interest in "labor peace"—that is, avoiding "inter- union rivalries" and "conflicting demands from different unions." 138 S. Ct. at 2465 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–21 (1977)). But, like the rest of *Abood*, this "labor peace" concept was borrowed from another area of the Court's jurisprudence—concerning Congress's Commerce Clause power to regulate economic affairs, *e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937). The promotion of labor peace *might* justify congressional regulation of economic affairs, subject only to *Abood's* rational-basis review. However, while *Abood* recognized some impact on employees' First Amendment rights, *Abood* did not examine if labor peace interests suffice to clear the

higher bar of First Amendment scrutiny. They do not. Even if *Abood* had not been overruled, its First Amendment analysis was cursory. The *Abood* Court simply cited *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956)[2] and moved on.

This Court has typically held that infringements on the First Amendment warrant more exacting analysis. For example, the Court's First Amendment jurisprudence recognizes that the First Amendment does *not* permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 791, 795 (1988). Yet that is, in a nutshell, the labor-peace rationale.

Regardless, the labor-peace rationale, to the extent that it is applied in *Knigh*t, does not justify mandatory exclusive union representation in the context of this case. Irrespective of exclusive-representation regimes, the First Amendment affords public workers a near-absolute right to speak out themselves on matters of public concern and to join alternative labor organizations, just like they may enter into any number of private associations free from government retaliation. *See, e.g.*, *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). Even when some other group has been recognized as the exclusive representative, such organizations can still make demands on public employers, spark rivalries, and even foster dissention

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[2] Abrogation recognized by *Hudson v. Chicago Tchrs. Union Loc. No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd sub nom. Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

within the workforce—those potential ills are a consequence of public workers' well-recognized First Amendment rights and are not addressed in any way by exclusive- representation requirements. In this respect, there is a fundamental disconnect between compelling unwilling public workers to accept a labor union as their representative and any claimed interest in labor peace.

Moreover, some states do not permit collective bargaining in the public sector. See*, e.g.*, N.C. Gen. Stat. § 95-98 (1959) (barring collective bargaining by North Carolina government employers); *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292–93 (S.C. 2000) (barring collective bargaining by South Carolina government employers); Tex. Govt. Code § 617.002 (generally barring collective bargaining by Texas government employers). There is no evidence that these states have faced labor strife or even slightly less functional labor relations with public-sector employees than states that utilize exclusive-representation schemes. Because there is no foundation to the contention that labor peace requires collective bargaining, the labor-peace rationale cannot justify severe impingements on First Amendment rights.

II. *Knight* Should Be Clarified or Overruled

The Sixth Circuit and other lower courts have understood *Knight* to hold that state laws compelling public workers to accept an unwanted representative do not even impinge on First Amendment rights. *Knight*, however, involved a claimed right to be heard by the government, not any kind of First Amendment objection to compelled union representation. *Knight*

does not speak to that latter issue. And if *Knight* does immunize forced representation schemes from *all* First Amendment objections, it should be overruled. It "conflicts with the reasoning in *Janus*," and numerous intervening precedents. *Thompson v. Marietta Education Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020).

A. The Lower Courts Have Misread *Knight* to Exempt State-Compelled Union Representation from Constitutional Scrutiny

Knight does not exempt state-compelled union-representation schemes from First Amendment scrutiny. It was, to be sure, a challenge to the provisions of a state statute similar to the one challenged here. The plaintiffs, college instructors, brought three claims, the first two of which were subject to summary affirmance by this Court. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983).

The first claim was that the state, by appointing a union as exclusive representative, "impermissibly delegated its sovereign power" in contravention of decisions like *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982). And the second was "that compulsory fair share fees…result in forced association with a political party," a claim that the district court held was controlled by this Court's decision upholding agency-fee arrangements in *Abood*, 431 U.S. 209. The district court rejected both of those claims, 571 F. Supp. at 5, 7, and this Court summarily affirmed, *see Knight*, 465

U.S. at 278–79 (discussing lower court decision and summary affirmance).

The third claim, which this Court heard on the merits, involved the statute's "meet and confer" process in which public employers exchange views with an exclusive representative "on policy questions relating to employment but outside the scope of mandatory bar- gaining." *Id.* at 273. The district court had held that the limitation restricting participation in "meet and confer" sessions to representatives selected by the union violated the plaintiffs' First Amendment rights. 571 F. Supp. at 12.

Accordingly, as this Court stated in reviewing that decision: "The question presented in this case is whether this *restriction* on participation in the non-mandatory-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." *Knight*, 465 U.S. at 273 (emphasis added). In answering that question, the Court held, first, that the First Amendment confers "no constitutional right to force the government to listen to [the instructors'] views" and, second, that "Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" did not infringe "[the instructors'] speech and associational rights." *Id.* at 283, 288. The majority decision does not discuss or even cite compelled-speech or compelled-association precedents other than *Abood*.

That's because there was no First Amendment challenge to compelled representation. The instructors' principal brief recognized that the

"constitutionality of exclusive representation" was undecided, but expressly "pretermitt[ed]" argumentation on that issue. Brief for Appellees, *Minn. State Bd for Cmty. Colls. v. Knight*, No. 82-898 (filed Aug. 16, 1983), at 46–47, *available at* 1983 U.S. S. Ct. Briefs LEXIS 130. A separate brief filed by the instructors did challenge exclusive representation, but only on nondelegation grounds. Brief for Appellants, *Minn. Comm. Coll. Faculty Ass'n v. Knight*, No. 82-977 (filed Aug. 16, 1983), *available at* 1983 U.S. S. Ct. Briefs LEXIS 126. No First Amendment challenge to compelled representation having been raised in the case, the Court had no reason to consider the matter.

This interpretation—as addressing only the right of non-members to participate rather than their right to be free from representation—does not, as the Sixth Circuit believed, "functionally overrule" the *Knight* decision. *Thompson*, 972 F.3d at 814. It is the only fair reading. Applying the principle that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy," 465 U.S. at 283, *Knight* concluded only that non-union faculty members' "right to speak is not infringed when government simply ignores [them] while listening to others [the union]," *Id.* at 288. It should be understood as going no further than that.

Nonetheless, lower courts regard *Knight* as controlling on the question of state-compelled representation. Pet. App.7. The Eighth Circuit, for example, held in *Bierman v. Dayton* that a "State has 'in no way' impinged" on associational rights "by recognizing an exclusive negotiating representative," 900 F.3d 570, 574 (8th Cir. 2018), quoting language

from *Knight* that actually addressed "Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative." 465 U.S. at 288 (emphasis added). The First Circuit committed the same error, conflating *Knight*'s language upholding that *restriction* on participation with the approval of *compelled representation*. *D'Agostino v. Baker*, 812 F.3d 240, 243 (1st Cir. 2016). So too the Seventh Circuit, relying upon the same language. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017); *see also Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) (same); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018); *Mentele v. Inslee*, 2016 WL 3017713, at *4 (W.D. Wash. May 26, 2016). Thus, the lower courts regard themselves as bound by what is, at most, off-hand *dicta*, taken out of context, on an issue the Court had no occasion to consider.

B. Knight Should Be Overruled

To read *Knight* as sanctioning compelled union representation is to read it into conflict with *Janus* and virtually every other decision this Court has issued on compelled speech and association. For example, the Sixth Circuit found that conclusion inescapable: "*Knight*'s reasoning conflicts with the reasoning in Janus." *Thompson*, 972 F.3d at 814. The *Thompson* court recognized that exclusive representation can stand only because of this happenstance that *Janus* "left [*Knight*] on the books." *Id. at 811*.

Because the lower courts have uniformly adopted this mistaken reading of *Knight*, the choice before the Court is to either reject that reading or reject *Knight*. This case provides the Court with that opportunity to

clarify *Knight's* scope, or barring that, overrule it entirely.

"*Stare decisis* is not an inexorable command," and it is "at its weakest when [this Court] interpret[s] the Constitution." *Janus*, 138 S. Ct. at 2478. And *stare decisis* applies with "least force of all to decisions that wrongly denied First Amendment rights." *Id.* Because all of the considerations that inhere in the Court's traditional *stare decisis* analysis weigh against standing by *Knight*, the case should be overruled.

The argument for overruling *Knight* is strong. First, *Knight* offered no sound basis to conclude 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." 465 U.S. at 288. Indeed, it seems more akin to "stray [a] 'remark' [which] must not be elevated above the [First Amendment]." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2279 (2024) (Gorsuch concurring).

Knight's holding failed to consider the fact (which the Court had no occasion to consider) that state law itself compels association with the representative by assigning its speech to all members of the bargaining unit on a take-it-or-leave-it basis. *Knight* posited only that "amplification" of a union's voice under an exclusive-representation scheme "is inherent in government's freedom to choose its advisers." 465 U.S. at 288. Although that is a reasoned basis for denying non-union members' access to private meetings between a union and administration, it does not explain why attributing the union's speech to non-

members in those meetings honors non-members' First Amendment rights. Stated differently, the state's necessary prerogative to listen to some private persons and not others does not in any way require the state to attribute the union's speech on topics unrelated to collective bargaining to employees who find that speech objectionable—or in this case—abhorrent. *Knight* did not answer, or even consider, this enigma.

And since *Knight* did not address the specific issue now before the Court, the Court should not apply its holding beyond the narrow fact pattern of that case. "A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome." *Id*. at 2281. And now that the issue of the First Amendment is squarely before the court in this case, stare decisis should not bar the Court from reconsidering *Knight's* holding.

Notably, those courts that have considered the compelled-representation issue from first principles, rather than through the lens of an expanded view of *Knight*, have recognized that compelled representation is incompatible with this prevailing view of *Knight See Mentele v. Inslee*, 916 F.3d 783, 790–91 (9th Cir. 2019) (holding that compelled representation impinged First Amendment rights, but that the state's interest in "labor peace," as recognized by *Abood* (now overruled), justified the intrusion). The *Thompson* court emphatically joined that view. See *Thompson*, at 814 ("to be sure, *Knight's* reasoning conflicts with the reasoning in *Janus*.").

Further, developments in the Court's First Amendment jurisprudence have further "eroded"

whatever "underpinnings" *Knight* may have had when it was decided, leaving it an "outlier among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482. Since 1984, this Court has issued a series of First Amendment cases that establish the precise contours of its modern compelled-speech and association jurisprudence. *See, e.g.*, *Riley,* 487 U.S. at 796–797; *Janus*; 138 S. Ct.at 2463 (collecting cases).

That jurisprudence does not treat a person's right *not* to speak and *not* to associate as honored merely because the state has chosen not "to suppress any ideas," as *Knight* reasoned. 465 U.S. at 288. This intervening precedent clarifies both that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,'" *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (citation omitted), and that this right is impinged when the state requires objecting persons to "*associate* with speech with which [they] may disagree," *Pac. Gas & Elec. Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 15 (1986) (emphasis added). Thus, whatever credence *Knight* might have found in First Amendment doctrine as it existed in 1984 is obsolete.

Janus provides merely the exclamation point to this series of decisions. Its observation that the "significant impingement" of compelled representation "would not be tolerated in other contexts" shows how far First Amendment doctrine has been clarified since *Knight*, which failed to address the anomaly. *Janus*, 138 S. Ct. at 2478. Furthermore, *Janus* indicated that the validity of exclusive representation would rise or fall

not on the question of impingement— which is obviously present—but on the question of state *justification*. *Knight*, however, did not reach the question of justification but found no impingement in the first place. *Knight*, 465 U.S. at 288 (“Appellees’ speech and associational rights…have not been infringed….”).

CONCLUSION

For all the forgoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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