No. 18-1492

IN THE

Supreme Court of the United States

KATHERINE MILLER,

Petitioner,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, et al.,

Respondents.

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

BRIEF FOR THE BUCKEYE INSTITUTE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The State of Washington compels individuals who are not public employees, namely individual home-based childcare providers, to accept an exclusive representative for speaking with the State over certain public policies. The questions presented are:

1. Can the government designate an exclusive representative to speak for individuals for any rational basis, or is this mandatory expressive association permissible only if it satisfies heightened First Amendment scrutiny?

2. If exclusive representation is subject to First Amendment scrutiny, is it constitutional for the government to compel individuals who are not government employees to accept an organization as their exclusive representative for dealing with the government?

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INTEREST OF THE *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. Through its Legal Center, the Buckeye Institute engages in litigation in support of the principles of federalism and separation of powers as enshrined in the U.S. Constitution. It currently represents a number of public-sector workers in challenges to state laws that compel them to accept representation by a labor union.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it implicates a government burden on individuals' exercise of their constitutional freedoms of association and expression.

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties were notified of the *amici curiae*'s intention to file this brief pursuant to Rule 37.2(a), and all have consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's decision in *Minnesota State Board for Community Colleges v. Knight* was a modest application of the well-established principle that no one has "a constitutional right to force the government to listen to their views." 465 U.S. 271, 283 (1984). Applying that principle, *Knight* rejected the claim that community college instructors had the right to participate in negotiating sessions between the university and a labor union. *Id*. at 292.

The lower courts, including the court below, have distorted that modest holding beyond all recognition to stand for the proposition that the First Amendment is not even implicated by state laws compelling citizens to accept unwanted representatives to speak on their behalf. Such "exclusive representation" regimes, like the one at issue here, compel public workers and benefit recipients to associate with an unwanted representative, typically a labor union, and suffer it to speak for them. This Court in *Janus v. AFSCME, Council 31* correctly observed that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. 2448, 2478 (2018). Yet the lower courts have adjudged it immune from any degree of constitutional scrutiny, citing *Knight*.

Knight held no such thing. None of the three claims in that case challenged compelled exclusive representation as violating the First Amendment. The one claim that did challenge exclusive representation did so on nondelegation grounds, and the district court's

decision rejecting that claim was summarily affirmed by this Court. The only claim that this Court heard on the merits challenged (as the decision put it) "Minnesota's restriction of participation in 'meet and confer' sessions." 465 U.S. at 288. *Knight* never decided whether compelled exclusive representation comports with the First Amendment because no one disputed the point—indeed, the *Knight* respondents expressly declined to argue it.

The court below, however, took *Knight* to stand for the proposition that state-compelled exclusive representation in no way impinges First Amendment rights. The First, Second, and Seventh Circuits, as well as several district courts, have committed the same error. The result is a striking anomaly: following *Janus*, public workers may not be compelled to subsidize a union's speech but may still be forced to accept that speech, made on their behalf by a state-appointed representative, as their own.

This Court alone has the power to correct the lower courts' mistaken understanding of *Knight* and give "a First Amendment issue of this importance" the consideration it deserves. *Harris v. Quinn*, 134 S. Ct. 2618, 2632, 2639 (2014). It should do so.

ARGUMENT

The appointment of an exclusive representative to speak on behalf of citizens is an obvious impingement on their First Amendment rights, as the Court recognized in *Janus*. Yet the lower courts understand the Court to have held, in *Knight*, that such regimes implicate no First Amendment interests at all. *Knight*,

however, had no occasion to pass on that issue, because it was not raised or argued. As a result, public workers whom *Janus* recognized to have the right to be free from subsidizing a labor union's speech may nonetheless be compelled to enter an expressive association with a union and to suffer it to speak for them, no matter their disagreement with the words it puts in their mouths. In light of the confusion and anomalous results caused by *Knight*, the Court's intervention is required to clarify the First Amendment's application in this area.

I. *Knight* Did Not Address the First Amendment's Application To Compelled Exclusive Representation Schemes

The court below, like others, viewed this Court's decision in *Knight* as controlling on the question of whether public-sector exclusive-representation regimes pass First Amendment muster. *Knight*, however, gave zero consideration to the issue.

Knight was a challenge to several provisions of Minnesota's Public Employment Labor Relations Act ("PELRA"), which is materially similar to the statutory scheme at issue here. The case was brought by twenty instructors who disagreed with positions taken by Minnesota Community College Faculty Association, which had been certified as the exclusive representative for community college faculty in the state. *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982). It was heard, as then required, by a three-judge district court, which issued a published decision following trial disposing of all claims. *Id*.

As the district court explained, PELRA contained a collective bargaining provision that required public employers to "meet and negotiate" with respect to the "terms and conditions of employment" with a certified exclusive representative. *Id*. at 3. The statute also prescribed a "meet and confer" process for soliciting the views of public employees, through their certified representative only, on matters of academic governance, including things like "the college budget, curriculum reviews, new course proposals, college organization and campus facilities." *Id*. at 7–8. Although PELRA did not require faculty members to become members of the union, it did authorize the union to require nonmembers to pay a "fair share fee" for its representational services. *Id*. at 3.

The plaintiffs brought three claims. The first was that PELRA "impermissibly delegated [the state's] sovereign power" to the union in violation of the nondelegation principle recognized in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Id*. at 3–4. The court rejected that claim, doubting the "continuing vitality" of those decisions and reasoning that, even if they were applicable, any reliance on them was "foreclosed" by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Id*. at 4. *Abood*, the district court stated, "squarely upholds the constitutionality of exclusive representation bargaining in the public sector." *Id*.

The plaintiffs' second claim met the same fate. It contended that compulsory fair share fees required nonmembers to fund political speech and "therefore

result in forced association with a political party contrary to" various First Amendment precedents. *Id*. at 5; *see also id*. at 6 ("The plaintiffs' claim is that the [union] and its affiliates are so overwhelmingly engaged in political activity that they must be deemed to be the equivalent of a political party for constitutional purposes."). That claim, of course, was squarely rejected by *Abood*. 431 U.S. at 232. And, on that basis, the district court recognized that the claim was "plainly wrong as a matter of law." 571 F. Supp. at 7.

The plaintiffs' third and final claim challenged the restriction of "meet and confer" sessions over matters of academic governance to union representatives, thereby excluding nonmembers. *Id*. at 9. The First Amendment, the court stated, "has a special significance in higher education," therefore "warrant[ing] a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech." *Id*. Although the state has a legitimate interest in "making the meet and confer process an orderly one," its exclusion of nonmembers from the process "effectively blocks any meaningful expression by faculty members who are excluded from the formal process." *Id*. And a state has no "legitimate interest in excluding nonmembers of the [union] from serving on meet and confer committees." *Id*. at 10. Thus, the court held, the First Amendment generally requires a state, if it establishes a forum to solicit faculty concerns on matters of academic governance, to "afford all faculty members a fair opportunity both to serve as and to participate in the selection of meet and confer representatives." *Id*. at 9.

The court found that PELRA flunked that standard. By empowering the union with "the sole authority to select the meet and confer representatives," PELRA "infringe[d] the First Amendment associational rights of faculty members who do not desire to join the [union]." *Id*. at 10. Accordingly, the court granted judgment to the plaintiffs on that claim, declaring unconstitutional the "practice of having the [union] select all representatives on meet and confer committees." *Id*. at 13.

As was then permitted, both sides filed appeals with this Court. *See Knight*, 465 U.S. at 279. In the plaintiffs' appeal, the Court summarily affirmed the district court judgment on the first two claims. *Knight v. Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983); *see also Knight*, 465 U.S. at 278–79 (discussing lower court decision and summary affirmance).

The Court noted probable jurisdiction in the appeals filed by the community college board and the union regarding the third claim and set those cases for merits briefing. *Id*. The Court's description of the claim as challenging the *restriction* on participation in "meet and confer" sessions closely tracked the district court opinion. That claim, it stated, was a challenge to PELRA'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 bargaining." *Id*. at 273. Accordingly, "[t]he question presented in this case is whether *this restriction* on participation in the nonmandatory-subject exchange process vio-

lates 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 (emphasis added).

In answering that question, the Court looked at the restriction from two different angles. First, it held (in § II.A of its opinion) that the First Amendment confers "no constitutional right to force the government to listen to [the instructors'] views." *Id*. at 283. That rule, it explained, applies equally to public employees and others who wish to be heard on public policies that affect them in particular, *id*. at 286–87, and its application is unaltered by the "academic setting of the policymaking at issue in this case," *id*. at 287. Minnesota, it explained "has simply restricted the class of persons to whom it will listen in its making of policy," and that was permissible. *Id*. at 282.

Second, the Court held (in § II.B) 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 288. The "restriction of participation in 'meet and confer' sessions," it reasoned, had not "restrained appellees' freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please." *Id*. And it made no difference that the union's unique status "amplifies its voice" or that the restriction might cause nonmembers to "feel some pressure to join" the union. *Id*. at 289–90.

Nowhere does the Court's merits opinion opine on the constitutionality of compelled exclusive representation, as opposed to the restriction excluding nonmembers from any participation in "meet and confer" sessions. In fact, the majority decision does not discuss or even cite compelled-speech or compelled-association precedents other than *Abood*.

That's because neither issue was raised. The instructors filed two merits briefs, one for each of the board's and the union's appeals. Their principal brief, in the board's appeal, recognized that the "constitutionality of exclusive representation" was undecided, but expressly "pretermit[ed]" any discussion of it. Brief for Appellees, *Minnesota State Board for Community Colleges v. Knight*, No. 82-898 (filed Aug. 16, 1983), at 46–47, *available at* 1983 U.S. S. Ct. Briefs LEXIS 130. Instead, it argued (along the lines of the district court decision) that the state "may not constitutionally grant them, as 'professional employees,' a statutory right to 'meet and confer,' and then discriminatorily withdraw that right simply because they choose to remain nonmembers" of the union. *Id*. at 8. Rather than contest the constitutionality of exclusive representation, the instructors' brief declared it "irrelevant to 'meet and confer'" and therefore to their claim. *Id*. at 12.

The instructors' other brief, filed in the union' appeal, did mount a constitutional challenge to exclusive representation, but only on nondelegation grounds, just as in the claim subject to summary affirmance. Brief for Appellees, *Minnesota Community College Faculty Ass'n v. Knight*, No. 82-977 (filed Aug. 16, 1983), at 8, *available at* 1983 U.S. S. Ct. Briefs

LEXIS 126 (identifying nondelegation as the "question presented"). The thrust of their argument was that the Court must enforce the nondelegation principle of *Schechter* and *Carter*, otherwise "the United States could soon find itself, once again, aping the *opera buffa* political economy of fascist Italy!" *Id*. at 59. For whatever reason, the Court declined to address this line of argumentation.

No First Amendment challenge to compelled representation having been raised, the Court had no reason to consider the matter, and so it didn't, as its opinion reflects.

II. *Knight* Has Woefully Confused the Lower Courts

Notwithstanding *Knight*'s modest holding—that the government may restrict to whom it listens—the lower courts have come to regard it as a landmark precedent disposing of any First Amendment challenge to compelled exclusive representation.

The decision below is a case in point. This is a challenge to Washington's recognition of a labor union as the "exclusive representative" to speak for publicly subsidized childcare providers. Pet.App.4a. As the court below recognized, the petitioner contends that being forced to accept an unwanted representative infringes "her First Amendment rights of free speech and association." Pet.App.4a. That argument, the decision below holds, is foreclosed by *Knight*, Pet.App.12a, despite that *Knight* did not address it. In support of that conclusion, the decision quotes *Knight*'s statement that the statutory provision chal-

lenged in that case "'in no way restrained'" the instructors' "'freedom to associate *or not to associate* with whom they please, *including the exclusive representative*.'" Pet.App.12a (quoting *Knight*, 465 U.S. at 288) (emphases added by decision below). But *Knight*'s preceding sentence makes clear that the statutory provision on which it was opining was "Minnesota's restriction of participation in 'meet and confer' sessions," not the requirement that instructors submit to an exclusive representative. 465 U.S. at 288. As described above, *Knight* did not address that.

In support of that mistaken understanding of *Knight*, the decision below cites a raft of lower-court precedents committing the same error. Pet.App.8a–9a. Even a cursory review of those and other cases suffices to demonstrate that this mistaken view of *Knight* has become entrenched in the lower courts.

Take, for example, the First Circuit's decision in *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016). That case was a First Amendment challenge by home-care providers to a state law requiring them to accept an exclusive representative. *Id*. at 242. The First Circuit rejected the claim. *Knight*, it explained, held that public workers "could claim no violation of associational rights by an exclusive bargaining agent speaking for their entire bargaining unit when dealing with the state," and it therefore recognized *Knight* as controlling the home-care providers' claim. *Id*. at 243. The opinion cites and relies upon the same inapplicable portion of *Knight* as does the decision below. *Id*. (citing *Knight*, 465 U.S. at 288).

The Seventh Circuit committed the same error in *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017). In its view, *Knight* broadly sanctioned state laws that impose exclusive representatives on the unwilling, and, on that basis, it rejected another First Amendment challenge by home-care workers. *Id*. at 864. It, too, cited and relied upon the same inapplicable portion of *Knight* that addressed "Minnesota's restriction of participation in 'meet and confer' sessions." *See id*. (citing *Knight*, 465 U.S. at 288).

The Second Circuit considered *Knight*'s controlling status to be so well established that it consigned its disposition of a similar challenge by home-care providers to unpublished status. *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016). Once again, it relied on the same portion of *Knight*, finding that it "foreclosed" any First Amendment challenge to compelled exclusive representation. *Id*. at 74 (citing *Knight*, 465 U.S. at 288–89).

District courts, too, have also come to regarding *Knight* as approving compelled exclusive representation. *See, e.g.*, *Reisman v. Assoc. Faculties of the Univ. of Maine*, No. 18-cv-307, 2018 WL 6312996, at *2 (D. Me. Dec. 3, 2018); *Uradnik v. Inter Faculty Organization*, No. 18-cv-1895, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018); *Clark v. City of Seattle*, No. C17-0382, 2017 WL 3641908, at *3 (W.D. Wash. Aug. 24, 2017), *aff'd*, 899 F.3d 802 (9th Cir. 2018); *Mentele v. Inslee*, No. C15-5134, 2016 WL 3017713, at *1 (W.D. Wash. May 26, 2016).

Although entrenched, this understanding of *Knight* is obviously wrong. As described above, *Knight* did not

involve any First Amendment challenge to compelled exclusive representation, and its reasoning does not reach so far. In addition, the proposition that forcing a person to accept an unwanted representative that speaks on their behalf does not so much as implicate the First Amendment beggars belief. Whether or not such schemes pass constitutional muster, they indisputably impinge the First Amendment rights to be free from compelled speech and compelled association. Indeed, this Court's recent decision in *Janus* had no trouble recognizing that compelled exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. And yet the constitutionality of such schemes has never been considered, much less resolved, because the lower courts regard themselves as bound by what was, at most, offhand *dicta* on an issue the Court had no occasion to consider.

Because of confusion over the meaning of *Knight*, the lower courts have declined to subject compelled exclusive-representation regimes to any degree of constitutional scrutiny, taking off the table a profoundly important question that has never received any deliberate consideration by this Court. Unless and until this Court clarifies the scope of its holding in *Knight*, the constitutionality of exclusive representation will never receive meaningful review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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