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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether it violates the First Amendment to designate a labor union to represent and speak for public-sector employees who object to its advocacy on their behalf.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016); and *Janus v. Am. Fed. of State, Cty., and Mun. Employees, Counsel 31*, 138 S. Ct. 2448 (2018).

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[1] Pursuant to this Court's Rule 37.2(a), Petitioner and Respondents have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Professor Jonathan Reisman is an Associate Professor of Economics and Public Policy at the University of Maine. Pet. App. 43. Reisman is not a member of the Associated Faculties of the University of Maine (AFUM) because he disagrees with their positions and policies. Pet. App. 44–45. Even though Reisman has done everything possible to disassociate himself with AFUM, state law still allows the union to speak on his behalf as his exclusive representative, in violation of his First Amendment rights. Pet. App. 44.

The idea that "there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations" is one of the primary justifications of the addition of the Bill of Rights to the U.S. Constitution. *See* James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military*, June 16, 1788, *in History of the Virginia Federal Convention of 1788*, vol. 1, p. 130 (H.B. Grigsby ed. 1890). The present case, in which a public university professor is forced into unwelcome and unwanted exclusive representation by a labor union in violation of his rights to free speech and association under the First Amendment, is a prime example of the danger Madison warned against.

As the exclusive representative of all University of Maine faculty members, AFUM has the exclusive right to meet and negotiate with Reisman's employer on his behalf over the terms and conditions of his employment, like wages, hours, and working conditions. Me. Rev. Stat. tit. 26 § 1026(1)(C); Pet. App. 58. Although Reisman strongly disagrees with

AFUM on many of its positions and does not want its representation, the union's status as exclusive representative means Reisman's voice is effectively silenced.

Over the last eight years, this Court has repeatedly called into question schemes which compel public-sector workers to associate with labor unions against their will. *See Knox*, 567 U.S. at 310–11; *Harris*, 573 U.S. at 647–48; *Janus*, 138 S. Ct. at 2483. In *Janus*, the Court made clear that exclusive representation, like the scheme at issue in this case, is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. Despite this, lower courts continue to uphold exclusive representation schemes, relying on the now doctrinally questionable *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).

Reisman's case squarely presents the "other context[]" this Court alluded to in *Janus*, and affords this Court the opportunity to examine state-mandated exclusive representation in light of its impact on public workers' First Amendment freedoms of speech and association.

The Petition also presents the pressing issue of whether *Knight* is still good law, given the Court's recent decisions rejecting the compelled funding of labor unions' political speech. This recurring issue continues to come before this Court because *Janus* neither explicitly addressed the constitutionality of exclusive representation statutes nor overruled *Knight*. As a result, the lower courts in this case held that Maine's compelled representation scheme was permissible under *Knight* and did not violate

Reisman's First Amendment rights. Pet. App. 10–12, 20–21. However, after this Court's line of decisions culminating in *Janus*, *Knight* can no longer support such an extensive infringement on Reisman's constitutional rights. Only this Court can bring the exclusive representation cases in line with recent First Amendment jurisprudence.

The petition for writ of certiorari should be granted.

REASONS TO GRANT THE PETITION

I

EXCLUSIVE REPRESENTATION UNCONSTITUTIONALLY SILENCES WORKERS

A. The Intertwined Freedoms of Speech and Association Demand Equally Rigorous Constitutional Protection

Freedom of association, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In large part this is because the right to associate "makes the right to express one's views meaningful." *Knight*, 465 U.S. at 309. The right to associate logically includes a corresponding right *not* to associate. *Knox*, 567 U.S. at 309 ("Freedom of association . . . plainly presupposes a freedom not to associate."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("[F]reedom of speech . . . necessarily compris[es] the decision of both what to say and what not to say."). Yet Maine law mandates that all university faculty be associated with the speech of the faculty union, regardless of individual preferences. Pet. App. 16, 70, 73.

The right to speak and associate and the corresponding right to refrain from speaking and associating are protected by the First Amendment through closely intertwined analyses. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association."); Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 870 n.87 (1988) ("One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle."). Moreover, the Constitution firmly guards the First Amendment rights of individuals and groups—the state may not prohibit ideas it disfavors or compel endorsement of ideas it approves, *see Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam), or "place obstacles" to a person's exercise of his or her First Amendment freedoms, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549–50 (1983).

An association takes on the characteristics and preferences of its membership and, by joining together the membership's speech, is amplified. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members."). This premise underlies the concept of associational standing, which recognizes that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union, United Auto.,*

Aerospace and Agric. Implement Workers of America v. Brock, 477 U.S. 274, 290 (1986). Labor unions, as one of those "other associations," derive their right to speak from the rights of their union members. In the present case, Reisman is not a union member, and therefore AFUM should have no right—much less an exclusive right—to speak on his behalf.

B. Exclusive Representation Deprives Nonmembers of the Right To Communicate with the State

The state of Maine has granted to public employee unions special privileges not available to individual employees. Namely, AFUM, and only AFUM, negotiates the employment terms and conditions of Reisman and his colleagues, and has the state's mandate to represent the entire workforce in its bargaining efforts (which contain inherently political elements). Pet. App. 16–17; *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("[I]ndividual employees are required by law to sacrifice rights which, in some cases, are valuable to them[]" under exclusive representation, and "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union.").

The First Circuit found *Janus* inapplicable to Reisman's claims in part because *Janus* involved the compelled funding of speech, rather than the compelled association with another's speech. Pet. App. 11–12. However, compelled association—even standing alone—implicates the First Amendment.

As the exclusive representative, per state law and its collective bargaining agreement with Respondent Board of Trustee of the University of Maine System, AFUM speaks on Reisman's behalf to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration." Me. Rev. Stat. tit. 26 § 1026(1)(C); Pet. App. 58. Moreover, "[t]he Board or its officers and agents shall at all times be cognizant of the status of [AFUM] as the sole and exclusive bargaining agent under the University of Main System Labor Relations Act for unit members." Pet. App. 73. AFUM has guaranteed access to express its views to the Board of Trustees and University representatives, *id.*, determine the "default student evaluation form and procedures for assessment of online and interactive television (ITV) courses," Pet. App. 80, can "state its views" at all stages of a grievance process, even one prosecuted by a nonmember, Pet. App. 97, and is the only entity allowed to elevate a grievance to the University Chancellor or arbitration. Pet. App. 92–93. Against these extraordinary privileges, Reisman's voice is muted. Exclusive representation fully "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

Justice Stevens focused on individual rights in his dissent in *Knight*.[2] While the majority in that case rested on a unique theory that the government is not bound to listen just because people choose to speak,

[2] Justices Brennan and Powell joined Justice Stevens in this portion of his dissent.

Knight, 465 U.S. at 283, the dissenting Justices' view reflected the reality that a government communicative prohibition based on the identity of a speaker in favor of a communicative monopoly for a preferred speaker is odious to the First Amendment. *Id*. at 301 (Stevens, J., dissenting). While government has no affirmative duty to listen, laws that prevent citizens from competing in the marketplace of ideas renders their speech futile. *Id*. at 308–09 (Stevens, J., dissenting) ("[T]he First Amendment was intended to secure something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views."). By extension, the freedom of association is protected by the First Amendment because it "makes the right to express one's views meaningful." *Id*. at 309 (Stevens, J., dissenting).

A government grant of a communicative monopoly stands directly at odds with the well-recognized principle that government endorsing one form of speech over another is illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980); *see also Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[I]t is hazardous to discourage thought, hope and imagination; [the Founders understood] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]"). Whether or not Reisman is a member of the union, his voice is effectively silenced, and any attempt to speak contrary to the union would be futile.

In refusing to apply the heightened scrutiny required by *Janus*, the lower courts in this case held that exclusive representation laws are a carve-out

from normal constitutional scrutiny of infringements on First Amendment guarantees like freedom of association. Only this Court can provide relief. Particularly in the context of a labor union, dissenters risk retribution from union loyalists. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and nonmembers from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed., 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down their Members and Corrupt American Politics* 44–46 (2004). This is why nonconformists like Reisman must rely on the Constitution for protection. *See*, *e.g.*, *W. Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process.). While the First Amendment union cases have thus far focused largely on compelled financial subsidization, *e.g.*, *Janus*, 138 S. Ct. 2448; *Harris*, 573 U.S. 616; *Knox*, 567 U.S. 298, the exclusive representation aspect equally forces nonunion workers to be used as "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

II

THIS COURT SHOULD GRANT THE PETITION TO OVERRULE *KNIGHT*

The court below based its decision on *Knight* and found *Janus* inapplicable because Reisman is not compelled to pay a mandatory fee to the union. Pet. App. 11–12. However, after the evolution in First Amendment doctrine explained in *Knox*, *Harris*, and *Janus*, *Knight* should no longer be invoked to support such an extensive infringement on Reisman's constitutional rights.

Compelled association with another's speech, like the kind inflicted on Reisman by AFUM's exclusive representation, presents the same dangers as compelled funding of speech. *Harris*, 573 U.S. at 647–48; *Knox*, 567 U.S. at 309. *Janus* definitively struck down the compelled funding of union speech by public employees, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to a union may be deducted from a nonmember's wages, nor any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."). It did not rule on the collateral issue of compelled association with another's speech, nor did it consider the implications of the ruling on *Knight*. For this reason, the lower court in the instant case distinguished compelled association with another's speech from the compelled *funding* of speech, assuming that exclusive representation survived the sea-change in this Court's newly announced conception of an employee's First Amendment rights

Like the compelling funding cases (prior to *Janus*), the decision in *Knight* was based largely upon *Abood*,

431 U.S. 209. *Abood* was the first time in American history that the Court held that the state had no affirmative obligation to show a compelling interest when a state law intruded upon protected speech, *id.* at 263, and was based upon a misreading of precedent, *Harris*, 573 U.S. at 635–37. *Abood* relaxed First Amendment protections based on two justifications: the preservation of "labor peace" and the prevention of "free riders." *Harris*, 573 U.S. at 655. *Janus* held these justifications to be insufficiently compelling. 138 S. Ct. at 2466–69, and overruled *Abood*. *Id.* at 2486. If the justifications for impinging on the First Amendment are not present, then the case advancing those justifications is inapplicable. And if the *Abood* foundation is removed, the entire structure of *Knight* as applied to this case must fall. *Knight*, based on the false premises of *Abood*, must be reconsidered and overruled. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (Only this Court has the "prerogative . . . to overrule one of its precedents.").

Since it was decided in 1984, *Knight* has been overwhelmingly cited for the proposition that the right to speak does not guarantee a commensurate right to be heard by the government. *See*, *e.g.*, *Bridgeport Way Cmty. Ass'n v. City of Lakewood*, 203 F. App'x 64, 66 (9th Cir. 2006) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). The D.C. Circuit's rationale in *Autor v. Pritzker* explicitly recognizes this limited scope. 740 F.3d 176, 181 (D.C. Cir. 2014) ("[T]he Supreme Court recognized [in *Knight*] that the government may choose to hear from some groups at the expense of others . . .."). But even on its own terms, *Knight* cannot bear the weight that has been placed on it as justifying all manner of

exclusive representation statutes. *Knight* only briefly touches upon the question of freedom of association, which is central to the instant case. In *Knight*, the Court likens the pressure to join a public-sector union with the pressure to join a majority political party, which is "inherent in our system of government." 465 U.S. at 290. Nowhere does *Knight* suggest that this limited observation was intended to apply across the board to all nonunion members at all possible times. This brief comment, addressing a tangential issue to the main question of the case, has been stretched by union advocates and lower courts to permit states to designate who will speak on behalf of all public employees. This Court should reject this unwarranted interpretation and intrusion on individual rights in light of its recent cases applying the First Amendment to instances of union compulsion.

With the compelled funding of speech now firmly dismantled, the tenuous distinction that still permits compelled association with another's speech must fall. For purposes of the First Amendment, it does not matter that Reisman is not forced to financially support AFUM; as a public employee, his forced association with the union as a bargaining unit member and the union's speech on his behalf as the exclusive representative is an unjustifiable infringement on his freedom of association. To the extent *Knight* supports such state intrusion on individual rights, it should be overruled.

CONCLUSION

This Court is fully cognizant of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Exclusive representation severely infringes on these rights of workers who would use their own voice to state their employment preferences. This Court should grant the petition for a writ of certiorari and uphold all public employees' First Amendment rights.

DATED: January 2020.

Respectfully submitted,

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