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 OF RESPONDENT STATE OF MAINE

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QUESTION PRESENTED

Under the "exclusive representation" provisions of Maine's University of Maine System Labor Relations Act, if a democratically elected labor union is selected by a majority of employees in a bargaining unit, the union bargains on behalf of that bargaining unit with respect to the terms and conditions of employment, and any agreement reached between the union and the employer benefits all employees in the bargaining unit, even those who choose not to be members of the union. The question presented is whether this principle of exclusive representation, which is a bedrock of labor law in both the private and public sector, violates the First Amendment under a theory of compelled speech or compelled association, when no employee is required to join the union or financially support it, and employees are free to speak out and join organizations of their choice.

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INTRODUCTION

The petition does not satisfy any of the standards utilized by this Court for granting review. The First Circuit's decision is consistent with the four circuit courts that have addressed this issue as well as the decision of the highest court of one state.

The First Circuit's decision is also consistent with prior holdings of this Court. The court below correctly applied this Court's decisions in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which rejected compelled speech and compelled association challenges to exclusive representation. This Court's decision in *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) does not change the analysis. In *Janus*, this Court limited its holding to compelled agency fees, expressly approved the exclusive representation model used by the federal government, and further stated that except for compelled agency fees, "(s)tates can keep their labor-relations systems exactly as they are." *Id.* at 2485, n.27. Post-*Janus*, every court of appeals to have considered the issue has held that exclusive representation does not violate First Amendment principles, as did the First Circuit. This Court denied certiorari in the other cases, and it should deny it here as well.

STATEMENT OF THE CASE

A. Statutory Background

The University of Maine System Labor Relations Act ("UMSLRA") governs labor relations between the University of Maine System and its employees. Maine's statutory framework includes separate but analogous provisions governing labor relations for state employees (State Employees Labor Relations Act, Me. Rev. Stat. Ann. tit. 26, §§ 979-979-S), judicial employees (Judicial Employees Labor Relations Act, Me. Rev. Stat. Ann. tit. 26, §§ 1281-1294), and municipal employees (Municipal Public Employees Labor Relations Law, Me. Rev. Stat. Ann. tit. 26, §§ 961-974). The UMSLRA provides that a union duly selected by a majority of employees must be recognized by the public employer (here the University of Maine System) as the "sole and exclusive bargaining agent for all of the employees in the bargaining unit . . . " Me. Rev. Stat. Ann. tit. 26, § 1025(2)(B). Employees within the bargaining unit are not required to be union members. Me. Rev. Stat. Ann. tit. 26, §§ 1023(2); 1027(1)(G). The certified bargaining agent is required to represent all employees within the bargaining unit, regardless of whether the employee is a member of the union. Me. Rev. Stat. Ann. tit. 26, § 1025(2)(E). The University and the Union are obligated to confer and negotiate in good faith "with respect to wages, hours, working conditions and contract grievance arbitration." Me. Rev. Stat. Ann. tit. 26, § 1026(1)(C). Employees retain the right to present a grievance for adjustment to the employer without the Union, if not inconsistent with the collective

bargaining agreement and the Union has been given an opportunity to be present at any meeting. *Id.*

B. Factual Background

The Petitioner, Jonathan Reisman, is a professor at the University of Maine at Machias. Pet. App. 32, Compl. ¶ 4. Respondent University of Maine at Machias ("University") is part of the University System, a state instrumentality, which is overseen by a Board of Trustees ("Board"). Pet. App. 3-4, Compl. ¶¶ 2-3. Respondent Associated Faculties of the Universities of Maine ("Union") has been certified under the UMSLRA as the bargaining agent for certain classes of employees at the University (referred to as the "bargaining unit"), including the class of employees of which Reisman is a part. Pet. App. 36, Compl. ¶ 22.

Employees within the bargaining unit are not required to be Union members. Me. Rev. Stat. Ann. tit. 26, §§ 1023(2); 1027(1)(G). Reisman is not a member of the Union. Pet. App. 38, Compl. ¶ 35. The collective bargaining agreement ("CBA") between the University and the Union retains the right of faculty such as Reisman to comment on matters related to their professional duties, as well as their rights as citizens to comment on matters of public concern. Pet. App. 71-72, Exhibit A to Compl. Article 2.

C. Procedural History

Reisman brought claims pursuant to 42 U.S.C. § 1983 against the Union, the University, and the Board, alleging that the exclusive representation provisions of the UMSLRA violate his First Amendment rights. Reisman initially complained that the designation of the Union as his exclusive representative violated his right to petition the government and his free speech and associational rights under the First Amendment. Reisman later abandoned his petition claim and now pursues this case solely on the basis of compelled speech and compelled association. Shortly after filing the complaint, Reisman moved for a preliminary injunction.

Pursuant to 28 U.S.C. § 2403(b), which authorizes the Attorney General to intervene as a matter of right when the constitutionality of a state law which affects the public interest is drawn into question, the Attorney General successfully moved to intervene. The Attorney General maintains that the exclusive representation provisions of the UMSLRA establish that, for the purposes of collective bargaining, the Union is the exclusive bargaining agent for the unit of those employees whose positions are within the bargaining unit, but the statutory framework neither makes the Union the "personal agent" of non-members nor allows the union to "speak for" non-members on issues of public concern. The Attorney General, in recognition of this Court's decisions in *Knight*, contended below that exclusive representation does not violate the First Amendment under a compelled speech or compelled association

theory and that this Court's decision in *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018) does not change the result.

The Union, the University, and the Attorney General filed motions to dismiss and opposed Reisman's motion for preliminary injunction. On December 3, 2018, the district court issued an order granting the defendants' motions to dismiss and denying Reisman's motion for a preliminary injunction. Pet. App. 15-27. The district court held that cases from this Court, the First Circuit, and other jurisdictions establish that exclusive representation in collective bargaining does *not* infringe on First Amendment rights. Pet. App. 24-26. The district court reasoned that Reisman's claims were controlled by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), where this Court rejected the First Amendment claims of a nonmember faculty member at a community college, holding "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 276. Pet. App. 21. The district court also rejected Reisman's argument that prior cases are no longer good law in light of the Court's recent decision in *Janus.* Pet. App. 24-26. The district court recognized that in *Janus*, the Court simply held that states may not force public employees who decline to join a union to pay "agency fees" to subsidize the union's exclusive representation activities. Pet. App. 22-23. The district court also rejected Reisman's claim that the exclusive representation provisions of the UMSLRA designated the Union as his personal representative and agent, finding that the

Union was the representative of the bargaining unit with respect to collective bargaining issues. Pet. App. 26. The district court found that "[b]ecause the Union is not Reisman's agent, representative, or spokesperson, the Act does not compel him, in violation of the First Amendment, to engage in speech or maintain an association with which he disagrees." *Id.*

On appeal, the United States Court of Appeals for the First Circuit affirmed. Pet. App. 1-12. The Court rejected Reisman's argument that a democratically chosen union selected to represent a bargaining unit of employees becomes the personal representatives or agent of employees whose positions fall within the bargaining unit, including non-members, like Reisman. The Court of Appeals held that the UMSLRA simply makes the Union the bargaining agent for the "bargaining unit" and not the agent for each employee within it. Pet. App. 8-9. It therefore does not make the Union the representative or agent of Reisman. *Id*. The court then addressed Reisman's "attempt to advance an alternative challenge" alleging compelled association and speech claims on the premise that the Union was the agent only of the bargaining unit, and not him personally. Pet. App. 10. The Court found that alternative argument waived, Pet. App. 12, and foreclosed on the merits by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). As the First Circuit recognized, *Knight* held that the First Amendment associational rights of non-members are not infringed by the system of exclusive representation which permits the democratically selected union to speak for the

bargaining unit when dealing with the state on matters related to employment that are outside the scope of mandatory collective bargaining. Pet. App. 10. The First Circuit further explained that *Knight* rejected the argument of compelled speech because it is readily understood that when a bargaining agent is selected by a majority choice, minority members will likely disagree with some positions taken by the bargaining agent selected by the majority. Pet. App. 11.

The court of appeals rejected Reisman's argument that *Janus* changes the result. The First Circuit readily distinguished *Janus* because *Janus* related to the constitutionality of agency-fee laws which requires non-union members to pay an agency fee to the union. In this case, neither membership in the union nor agency fees is required. As explained, the UMSLRA expressly recognizes the right not to join the union, and agency fees are not at issue in this case.

REASONS FOR DENYING THE PETITION

Reisman has not identified any compelling reason to grant certiorari. The First Circuit's decision does not conflict with decisions of this Court or other appellate circuit courts. The legal issue presented was settled by this Court in *Knight*, and *Janus* expressly does not change the result. In addition to the First Circuit, the Second, Seventh, Eighth and Ninth Circuits, as well as the Massachusetts Supreme Judicial Court, have all held that exclusive representation does not infringe on

the free speech or associational rights on non-union members. This Court has denied certiorari in a total of seven cases related to the precise question presented here, four of them post-*Janus*. The Court should deny certiorari here.

Reisman argues that the issue of exclusive representation has not received careful consideration by this Court. Pet. 8. Reisman is wrong. The issue of compelled association and speech was addressed and rejected by this Court in *Knight*, and in *Janus*, this Court cited with approval to the system of exclusive representation for federal employees. Reisman does not argue that *Knight* should be overruled, and he failed to establish below any factual support for his assertion that the system of exclusive representation imputes the views of the Union to him. As correctly noted by the court below, under the exclusive representation provisions of the UMSLRA, the union is the exclusive representative of the bargaining unit, not the personal representative of individual employees, for the limited purposes of collective bargaining. Reisman has not presented a compelling case for review as required. The Petition should therefore be denied.

I. There is no Conflict in the Lower Courts

The decision of the court of appeals does not conflict with the decision of any other appellate court. To the contrary, the First Circuit's decision is in lockstep with the decision of the four other circuits to have

considered this issue and is also consistent with the decision of the Massachusetts Supreme Court.[1]

In each case, the lower court held that exclusive representation in the context of collective bargaining does not violate the First Amendment. *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019) (holding

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[1] There have been at least ten recent district court decisions holding that exclusive representation does not infringe on First Amendment rights. *Bennett v. AFSCME, Council 31, AFL-CIO et al.*, No. 19-cv-04087, 2020 WL 1549603 (C.D. Ill. 2020) (granting motion to dismiss), *appeal docketed*, No. 20-1621 (7th Cir. April 15, 2020); *Hendrickson v. AFSCMA Council 18 et al.*, No. CIV 18-1119, 2020 WL 522369 (D.N.M. 2020) (granting motion for summary judgment), *appeal filed*, No. 20-2018 (10th Cir. Feb. 19, 2020); *Adams et al. v. Teamsters Local Union 429 et al.*, Civ. No. 1:19-cv-336, 2019 WL 8504343 (M.D. Pa. 2019) (granting motion to dismiss), *appeal filed*, No. 20-1824 (3d Cir. April 17, 2020); *Oliver v. Serv. Employees Int'l Union Local 668*, 418 F. Supp. 3d 93 (E.D. Pa. 2019) (granting motion for summary judgment), *appeal filed*, No. 19-3876 (3d Cir. Dec. 17, 2019); *Sweet v. California Ass'n of Psychiatric Technicians*, No. 2:19-CV-00349-JAM-AC, 2019 WL 4054105 (E.D. Cal. Aug. 28, 2019) (granting motion to dismiss); *O'Callahan v. Regents of the Univ. of Cal.*, No. 19-02289, 2019 WL 2635585 (C.D. Cal. June 10, 2019) (denying motion for preliminary injunction); *Kabler v. United Food and Commercial Workers Union, Local 176 et al.*, No. 1:19-cv-395, 2019 WL 9051816 (M.D. Pa. December 11, 2019) (granting motion for summary judgment); *Grossman v. Hawaii Gov't Emps. Ass'n/AFSCME Local 152*, 382 F. Supp. 3d 1088 (D. Haw. 2019) (dismissing First Amendment compelled association claim); *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019) (granting motion to dismiss and denying motion for preliminary injunction), *appeal pending*, No. 19-1524 (4th Cir. May 16, 2019); *Thompson v. Marietta Educ. Ass'n*, 371 F. Supp. 3d 431 (S.D. Ohio 2019) (denying motion for preliminary injunction), *appeal filed*, No. 19-4217 (6th Cir. Dec. 13, 2019).

that exclusive representation of child care providers did not violate First Amendment rights of non-union members, and further holding that state interest in labor peace is compelling post-*Janus*); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Waltz*, 139 S. Ct. 2043 (2019) (holding that plaintiffs' argument that their right to free association was violated by exclusive representation provision "is foreclosed by *Knight*"); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 (D. Minn. 2018), *sum. aff'd.*, No. 18-3086 (8th Cir. 2018), *cert. denied*, No. 18-719, 139 S. Ct. 1618 (2019) (holding that exclusive representation does not violate First Amendment rights of non-member university professors); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017) (holding that freedom not to associate was not violated by State's recognition of union as exclusive bargaining representative because it did not obligate employees to join union, union was prohibited from discriminating on the basis of union membership, and employees were allowed to present their own grievances to the state, publicly oppose the union and associate with whomever they chose, without retaliation); *Jarvis v. Cuomo*, 660 Fed. Appx. 72 (2d Cir. 2016) (unpublished), *cert. denied*, 137 S. Ct. 1204 (2017) (holding that State's recognition of union as exclusive bargaining representative for bargaining unit for operators of home child-care businesses did not compel union association and did not violate First Amendment right to association); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016) (exclusive bargaining representation by a democratically selected union

does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit); *Branch v. Commonwealth Employment Relations Board*, 481 Mass. 810 (2019), *cert. denied*, 140 S. Ct. 858 (2020) (exclusive bargaining representation does not violate First Amendment under compelled speech or compelled association theory under *Knight* decisions and *Janus* did not change result).

Reisman does not argue that there is conflict in the lower courts. Instead, he argues that *Knight* has been misconstrued because *Knight* did not address the argument of compelled speech or compelled association. That is not the case. In *Knight*, this Court considered and rejected the claim of associational harm. The non-member faculty members in *Knight* addressed the issue of compelled representation in their brief to the Supreme Court. Brief for Appellees at 12-13, 23-24, 34-39, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) (No. 82-898) (describing the union's status as exclusive representative as "organized groups posturing as the authorized representatives of unaffiliated individuals [who] protest and that the governmental action impairs the ability of individuals to remain isolated from the expressive activity of others"). *Id.* at 36-37 (internal quotations omitted); *see also* Brief for the AFL-CIO as Amicus Curiae in Support of Appellants at 2-4, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) (No. 82-898, 82-977) (discussing lower court's ruling that union's exclusive representation at meet and confer

sessions impaired "right of non-association" of non-members).

In *Knight*, this Court rejected the argument of the non-members that the recognition of the exclusive bargaining agent to "meet and confer" with the state on matters outside of collective bargaining compelled the non-members to associate with the union.[2] The Court held that this arrangement "in no way restrained" the non-members' "freedom to associate *or not to associate* with whom they please, *including the exclusive representative.*" *Id.* at 288 (emphasis added). The Court also found exclusive representation had not restrained the non-union members' "freedom to speak." *Id.* The Court recognized that the state negotiates with the union with the understanding that not all bargaining unit members agree with the "official [] view" presented by the union. *Id.* at 276. Broad language in *Knight* states that non-members' "speech and association rights . . . have not been infringed." *Id.* at 288. An entire section of the *Knight* opinion discusses the speech and associational right of non-members. *Id.* at 295-296.

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[2] This Court also summarily affirmed the lower court's conclusion that exclusive bargaining with regard to mandatory subjects of bargaining was constitutional. *Knight v. Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983), *summarily aff'g*, 571 F. Supp. 1 (D. Minn. 1982); *see also Minnesota State Board for Community Colleges v. Knight*, 465 U.S. at 279 (explaining that the summary affirmance "rejected the constitutional attack on [the Minnesota statute's] restriction to the exclusive representative of participation in the 'meet and negotiate' process").

Like the non-union members in *Knight*, Reisman is free not to join the union, he is not required to pay dues, he is free to form whatever advocacy group he likes, and he is free to disagree with the positions the Union takes. Reisman also is free to present his grievances directly to the University as long as the Union has the opportunity to be present. Per the CBA, Reisman retains the right to comment on matters related to his professional duties, as well as his rights as a citizen to comment on matters of public concern. Pet. App. 71-72, Exhibit A to Compl. Article 2.

Contrary to Reisman's contentions, compelled speech and compelled association were considered and rejected by this Court in *Knight* and the lower courts have correctly and uniformly found *Knight* to be controlling. The First Circuit decision is also consistent with decisions of the lower courts which have uniformly held that *Janus* does not change *Knight*'s holding that exclusive representation does not infringe on the associational or free speech rights of non-members of unions. Post-*Janus*, the compelled speech argument has been rejected by four Circuit Court of Appeals decisions in: the First Circuit in this case, the 9th Circuit in *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019), the 8th Circuit in *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Waltz*, 139 S. Ct. 2043 (2019) and *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 (D. Minn. 2018), *sum. aff'd.*, No. 18-3086 (8th Cir. 2018), *cert. denied*, No. 18-719, 139 S. Ct. 1618 (2019); and the Massachusetts Supreme Judicial

Court in *Branch v. Commonwealth Employment Relations Board*, 481 Mass. 810 (2019), *cert. denied*, 140 S. Ct. 858 (2020). Reisman cites no case that holds otherwise, and the Attorney General is aware of none.

As noted by the Ninth Circuit in *Mentele* and the Eighth Circuit in *Bierman, Janus* expressly affirms the propriety of exclusive representation, which is consistent with this Court's holding in *Knight. Mentele*, 916 F.3d at 789; *Bierman*, 900 F.3d at 574 (*Janus* "do[es] not supersede *Knight*" because "the decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue").

II. The Court of Appeals' Decision is Consistent with First Amendment Jurisprudence

Reisman argues that *Knight*, the decisions of the courts which have followed *Knight*, and the decision of the court below are inconsistent with this Court's First Amendment jurisprudence. Pet. 12-18. This argument is without support in the case law. Compelled speech and association claims have not been recognized where the complainant is not required to join an organization, or provide financial support, and is free to associate (or not) and speak out.

Reisman's argument relies on one sentence in the *Janus* opinion which observed that exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478. Reading this sentence

in the context of the entire opinion makes clear that this Court did not find exclusive representation contrary to First Amendment rights:

> It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. 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., 138 S. Ct. at 2478.

***Janus* and Post-*Janus* Cases.** The Court held in *Janus* that a state may not require all employees to pay agency fees to the union for the costs of collective bargaining and contract administration irrespective of whether they share the union's views. *Janus*, 138 S. Ct. at 2478. *Janus*'s holding was limited to mandatory agency fees and does not impact the concept of an exclusive bargaining agent, which is the bedrock of labor relations law.

In *Janus*, the Court recognized the validity of exclusive representation. It also recognized that it "is simply not true" that "the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked." *Id*. at 2465. It noted that federal law and many states provide for exclusive representation without payment of agency fees, and it did not suggest that this was problematic. *Id*. at 2466. The

Court in *Janus* cited approvingly to labor relations law applicable to federal employees which includes exclusive union representation selected by a majority vote of the employees but does not include agency fees. *See*, *e.g.*, 5 U.S.C.A. §§ 7102, 7111(a), 7114(a). The federal statutory scheme cited by the Supreme Court with approval in *Janus* is the exact arrangement codified by the UMSLRA, which Reisman challenges here. *Id.* at 2466.

Janus supports the constitutionality of the exclusive representation construct. Quite simply, there is no suggestion in *Janus* that exclusive representation is unconstitutional or that the Court was silently overruling *Knight.* This Court made clear that it was limiting the scope of the *Janus* decision to compelled financial support of the union by non-union members and that the States would not be required to make extensive changes in labor relations practices and laws: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector union. In this way . . . States can follow the model of the federal government and 28 other States." *Janus*, 138 S. Ct. at 2485, n.27.

Compelled Speech Cases. Reisman argues that the exclusive representation provision of the UMSLRA results in compelled speech because by virtue of the state law, the Union's speech is attributed to him. Pet. 13-18. Reisman's reliance on the compelled speech line of cases is misplaced. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633 (1943), relied upon by Reisman (Pet. 14), this Court struck down a West

Virginia regulation requiring children to salute the American flag, holding that the compelled salute violates the First Amendment. This case does not come close to a compelled salute. Reisman has not been required to take any action whatsoever symbolizing his allegiance to the Union. *Barnette* provides no support for Reisman's compelled speech claim here.

Reisman also relies on *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800-801 (1988) to support his compelled speech claim. Pet. 14. That case is similarly inapposite. At issue in *Riley* was whether the state's regulation of charitable solicitation practices by professional fund raisers—setting limits on the fees charged and requiring fund raisers to disclose to potential donors the percentage of charitable contributions actually turned over to charity—unconstitutionally chilled protected speech. This Court held that the solicitation of charitable contributions is protected speech and using percentages to decide the legality of the fundraiser's fee was not narrowly tailored to the State's interest in preventing fraud. *Riley* involved mandated speech, *i.e.*, the disclosure to donors, before the solicitation of funds, of the percentage of charitable contributions actually turned over to charity. Again, designation of an exclusive bargaining agent is nothing like the mandated speech at issue in *Riley*, and *Riley* provides no support for Reisman's claim.

Below, Reisman relied on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) to support his compelled speech claim. There, this Court upheld the federal Solomon Act, which

requires certain educational institutions receiving federal funding to allow access to campus by military recruiters to the same extent as other non-military organizations. The schools challenged the requirement, arguing that it compelled the schools to accommodate the message of the military. This Court rejected the argument, holding that the military's message does not affect the school's speech. Significantly, the Court explained:

> Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. 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, pursuant to an equal access policy.

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. at 65. Here, no one would presume that every member of a collective bargaining agrees with a union's speech, and dissenting members remain free to express their own views. As was properly recognized by Justice Souter in *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016), exclusive representation does not result in "compelled speech" of non-members because it is readily understood that a union is selected by the majority and non-members in the minority will likely disagree with some positions taken by the union. This is exactly the holding of *Knight.*

Compelled Association Cases. The cases relied upon by Reisman relating to forcing private organizations to admit undesired members are not on point. Pet. 14-15 (citing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (requiring Boy Scouts to admit openly gay scoutmaster violated Boy Scout's right of free expression); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (requiring Jaycees to admit women as regular members infringed male members' freedom of intimate association or their freedom of expressive association but such infringement was justified by compelling state interest in eradicating discrimination against female citizens).

As the First Circuit explained in *D'Agostino*: "Nor, of course, are [plaintiffs] under any compulsion to accept an undesired member of any association they may belong to, as in *Boy Scouts of America* or to modify the expressive message of any public conduct they may choose to engage in, the issue addressed in *Hurley*." *D'Agostino*, 812 F.3d at 244 (full citations omitted). Reisman is not being forced to accept a person to whom he objects nor is he faced with a modification of his own messages. Again, his claim is that the Union's messages are being attributed to him, and this case is thus more like cases in which this Court concluded that there was little risk of one person's message being attributed to another. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (rejecting argument by law schools that by allowing military recruiters on campus, they would be viewed as agreeing with the military's policy on homosexuals); *PruneYard*

Shopping Center v. Robins, 447 U.S. 74 (1980) (views of persons handing out pamphlets in shopping center not likely to be attributed to shopping center's owner).

III. This Case Presents Justiciability Issues which Make it an Inappropriate Case for the Grant of Certiorari

In his opening brief below, Reisman contended that the exclusive representation provisions of the UMSLRA were unconstitutional because the Union was appointed by state law as his "agent" to "speak for" him. Appellant's Brief (1st Cir. April 4, 2019) at 11. In his reply brief, and at oral argument in the court of appeals below, Reisman contended that even if the UMSLRA were construed to make the Union the exclusive representative of the bargaining unit, as opposed to individual employees, the First Amendment rights of individual non-members are infringed. Appellant's Reply Brief (1st Cir. May 24, 2019) at 9. The First Circuit found that Reisman had waived this argument by not developing it in his opening brief. Pet. App. 12. Reisman does not address the issue of waiver in his Petition and presumably concedes this point.

The First Circuit held that the UMSLRA makes the union the bargaining agent for the bargaining unit, not Reisman's "personal representative" as Reisman contends. Pet. App. 8-9. This is a question of construction of state law which Reisman does not challenge in his Petition. Given that the First Circuit found that

Reisman has waived his "alternative" argument, there is nothing left for this Court to decide.

In addition, Reisman has been inconsistent and vague about the remedy he is seeking. In his opening brief below, Reisman stated that he is not seeking to prevent the Union from negotiating terms and conditions of employment with the University on behalf of all bargaining unit employees. Appellant's Brief (1st Cir. April 4, 2019) at 9. Rather, Reisman seeks "not to have the Union be able to put words in his mouth and not to speak as his representative when he has refused to associate with it." *Id.* Since neither the Union nor the University have taken the position that the Union speaks for Reisman (or for any other individual employee), there does not appear to be any actual dispute between the parties. *See Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (federal courts "are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties"). Further, as properly found by the court below, the statutory framework makes the Union the representative of the bargaining unit, not Riesman, for purposes of collective bargaining.

Two years ago, this Court made clear in *Janus* that it was "drawing the line" at prohibiting agency fees and that the rest of labor law could stay exactly as it was. While non-members like Reisman continue to file lawsuits challenging exclusive representation, there is no compelling reason for this Court to grant certiorari to revisit the issue of exclusive representation. Even if this Court were inclined to revisit this

issue, this case presents a poor vehicle for doing so, because 1) Reisman failed to fully develop the argument he is now making in the court below and has waived the argument; 2) Maine's UMSLRA does not designate the Union as Reisman's personal representative or agent; and 3) Reisman has not articulated any meaningful relief that could address a live dispute between the parties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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