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 a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

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Respondents' arguments confirm the necessity of the Court's review. Maine's imposition of a labor union as the "sole and exclusive bargaining agent" of Petitioner Jonathan Reisman is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). But the decision below holds it to be no impingement at all. Pet.App.11. Respondents' contention that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), absolves this scheme from *any* scrutiny places the case in conflict with more or less every compelled-speech and compelled-association case this Court has decided over the past 75 years.

In fact, *Knight* said nothing about compelled union representation because it addressed only a "restriction on participation" in meetings with a state employer. 465 U.S. at 273. Professor Reisman challenges the imposition of an unwanted representative, not his exclusion from collective-bargaining sessions. The lower courts' confusion on this point, even following *Janus*'s admonition that "standard First Amendment principles" apply across the board, 138 S. Ct. at 2463, demonstrates the need for clarity.

This case is the ideal vehicle for the Court to provide it. It squarely challenges the constitutionality of Maine's compelled-representation scheme in a typical factual scenario where a state employee objects to the speech of the union state law appoints to speak for him. That issue is dispositive of the Petitioner's entitlement to relief, and Respondents identify nothing to

prevent the Court from addressing it on the merits and finally resolving this important and recurring question.

The Court should grant the petition and do so.

I. Review Is Required To Settle an Important Question That the Court Has Never Considered and That Lower Courts Have Decided Contrary to This Court's Free-Speech Precedents

The decisions below conflict with this Court's free-speech jurisprudence on an indisputably important constitutional question this Court has never meaningfully considered. The very fact that the State of Maine and its instrumentalities believe the First Amendment has *absolutely nothing* to say about its appointment of an unwanted speaker for public employees like Professor Reisman confirms that the Court's guidance is sorely needed.

A. Maine's compelled-representation requirement plainly impinges Professor Reisman's speech and associational rights.

1. The operation of that requirement compels Professor Reisman's speech. The University and Board of Trustees concede that the "representative bargaining" speaks on employees' "behalf" in negotiations over "wages, hours, working conditions and contract grievance arbitration." University Br. 1 (quoting 26 M.R.S. § 1025(B)). In other words, as *Janus* recognized, "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees." 138 S. Ct. at 2474.

This establishes that the State burdens dissenting employees' long-settled rights, including their right not "to associate with speech with which [they] may disagree," *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 15 (1986), and their "autonomy to choose the content of his own message and, conversely, to decide what not to say," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

The State's contention (at 17) that Maine law does not require Professor Reisman "to take any action whatsoever symbolizing his allegiance to the Union" ignores that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 63 (2006). No different from compelling a parade organizer to accept an unwanted brigade carrying its own banner, Maine's compelled-representation requirement usurps dissenting employees' "choice…not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. The Union is therefore incorrect (at 19) that Professor Reisman's injury is merely "semantic." It is the same dignitary harm all compelled-speech regimes inflict: "[f]orcing free and independent individuals to endorse ideas they find objectionable." *Janus*, 138 S. Ct. at 2464 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 663 (1943)).

The Union, meanwhile, is wrong (at 14) to demand evidence that a "reasonable observer" would attribute the Union's speech to Professor Reisman. *See also* State Br. 19. The statute's appointing the Union as the "sole and exclusive bargaining agent for all of the employees," 26 M.R.S. § 1025(B), impinges Professor Reisman's First Amendment rights for the same reason appointing an agent to recite the pledge of allegiance on behalf of school children would impinge their rights. The Court rejected a reasonable-observer test when it rejected compelled flag salutes and pledge recitation, even though students may do these things "without belief and by a gesture barren of meaning"—a fact reasonable observers would appreciate. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 663 (1943). And all its subsequent compelled-speech decisions impliedly reject this test, since reasonable observers can always assume that someone being *compelled* into expression disagrees with the message (or else compulsion would be unnecessary). *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (striking down compelled license-plate message, even though all state drivers would not agree with it). The precedents of this Court the State cites on this point (at 19) do not involve the imposition of an agent and

are inapposite. *See FAIR*, 547 U.S. at 47 (military recruiters not imposed as agents of law schools);[1] *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (pamphleteers not imposed as agents of shopping center).

Indeed, Respondents effectively concede this point when they contend that Professor Reisman's proper "recourse is to correct that view [that the Union speaks for him] by freely expressing his dissent." University Br. 12. But this "pressure to respond" only confirms that Professor Reisman would otherwise be deemed to "agree with [the Union's] views" and is "antithetical to the free discussion that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 15–16 (1986); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see generally FAIR*, 547 U.S. at 63–64.

Equally unsupportable is Respondents' attempt to distinguish the Union's speech "for the bargaining unit" from that as each employee's "personal representative." State Br. 20 (quotation marks omitted); Union Br. 15. Professor Reisman is a captive member of the unit, which he can only leave by resigning his public employment. He is therefore "intimately connected with the" unwanted message. *Hurley*, 515 U.S. at 576. Respondents identify no other context in

[1] *FAIR* is inapposite for the additional reason that "a law school's decision to allow recruiters on campus is not inherently expressive." 547 U.S. at 64. The Union's speech is. *Janus*, 138 S. Ct. at 2475–77.

which this Court's precedent would permit the government to force an individual into a unit, appoint a speaker to advocate for the unit on matters of intense public concern, and avoid First Amendment scrutiny on the theory that no individual is concerned in the speech. Because a unit is a collection of individuals, this would make no sense.[2]

2. Likewise, Maine's compelled-representation requirement clearly impinges Professor Reisman's associational rights. Again, the whole point of that requirement is to achieve "representation of employees," 26 M.R.S. § 1022(1-B), on "matters…of great public concern," *Janus*, 138 S. Ct at 2475.

The State's response (at 19) that compelled-association precedents merely prohibit the government from "forcing private organizations to admit undesired members" overlooks that the right of free-association runs both ways, protecting individuals and associations equally. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). The same principle forbidding states from requiring the Boy Scouts to admit individuals against its will, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), prohibits states from requiring individuals to join the Boy Scouts against their will, *see Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon this

[2] Because it is undisputed that Professor Reisman must remain in his bargaining unit so long as he remains at the University, there is no need for the Court to interpret Maine law. Union Br. 21.

freedom can take a number of forms."). Here, Maine forces Professor Reisman into a bargaining unit, and the unit's purpose is "to generate the very speech to which some [employees] object." *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001). That certainly impinges his associational rights.

B. Respondents make no meaningful attempt to justify these impingements. In fact, Respondents virtually concede that they serve no purpose, the Union (at 19) calling this "a dispute about semantics" and the State (at 21) seeing no need to regard the Union as advocating for unit members.[3]

Instead, Respondents argue that *Knight* exempts this scheme entirely from First Amendment scrutiny. Union Br. 9–15; University Br. 7–10; State Br. 14–20. But they fail to grapple with the fact that *Knight* adjudicated only a "restriction on participation" that barred public college instructors from participating themselves in "meet and confer" sessions between the union and the college. 465 U.S. at 273. There is a material difference between the government's choosing to listen to only certain speakers—the restriction *Knight* addressed—and its appointment of an unwanted representative to speak on behalf of objectors like Professor Reisman.

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[3] The Union (at 18) cites its "duty of fair representation," but the duty merely forbids it from proposing unequal terms on the basis of association, which the First Amendment would forbid the State from accepting. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72–73 (1990). Nothing about that duty necessitates compelled speech or association.

Respondents insist that *Knight* also upheld compelled union representation, but it says no such thing. The precise section they cite expressly addresses the instructors' argument that "restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" impaired their associational rights by pressuring them to associate with the union. *Id*. at 288. Indeed, that same section explains that the Court "summarily approved" in a companion case the district court's rejection of the instructor's challenge to union's "unique status." *Id*. at 290. As the Petition recounts (at 11), that separate claim did challenge compelled union representation, but solely on nondelegation grounds. *See id.* at 279 (discussing that claim); *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982) (same). In sum, the Court has never addressed whether compelled union representation comports with the First Amendment.

C. Respondents' inability to demonstrate that *Knight* exempted compelled union representation from First Amendment scrutiny renders it all the more troubling that the lower courts have come to regard *Knight* as controlling on that point. That is an accident of history, and the Court's intervention is required to correct it.

Because *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), upheld compulsory financial support for union collective bargaining, it naturally followed that compelled union representation in bargaining was permissible—indeed, the district court in *Knight*

recognized that to be a necessary corollary of *Abood*. 571 F. Supp. at 4. What did not follow, however, was that such compulsion does not even implicate First Amendment rights. Although the lower courts drew that mistaken lesson from *Knight*'s treatment of an adjacent issue, concerning the right to be heard by government, their error made no practical difference until *Janus* jettisoned *Abood* and its "deferential standard that finds no support in [the Court's] free speech cases." 138 S. Ct. at 2480. But, by then, the lower courts' reliance on *Knight* as exempting compelled union from First Amendment scrutiny had become entrenched, preventing consideration of the issue from first principles.

Respondents ignore this history, preferring instead to reel off citations of lower-court decisions applying a distorted reading of *Knight* that they cannot defend. Yet even those decisions recognize that the prevailing view does not quite add up. The Eighth Circuit's decision in *Bierman v. Dayton* felt the need to bolster its reliance on *Knight* with discussion of this Court's summary affirmance of "the constitutionality of exclusive representation for subjects of mandatory bargaining," being apparently unaware that that affirmance concerned only a nondelegation challenge. 900 F.3d 570, 574 (8th Cir. 2018). And the Ninth Circuit's decision in *Mentele v. Inslee* acknowledged that "*Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct" from a challenge to compelled representation, but opted to apply *Knight* regardless because

it "is a closer fit than *Janus*." 916 F.3d 783, 788 (9th Cir. 2019). This ignores that this Court's compelled-speech and compelled-association principles provide "a closer fit" than *Knight*. And, as the Petition explains (at 12), *Mentele*'s heightened-scrutiny analysis inexplicably depends on the now-overruled *Abood* decision.

None of this inspires confidence in the lower courts' treatment of this issue. Instead, it confirms the confusion that remains in the absence of meaningful guidance from this Court. There is no dispute that the question presented is important and recurring, nor could there be given the rights at stake and number of public employees affected. Review is necessary to correct a serious departure from the Court's free-speech jurisprudence.

II. This Case Is an Ideal Vehicle To Address the Question Presented

Having sought and obtained dismissal based on *Knight*, Respondents now argue that this case is inadequate for the Court to clarify *Knight*'s reach. This case presents an ideal vehicle for the Court to do so and finally resolve an issue of overriding importance.

A. Professor Reisman forfeited nothing, as even a cursory review of the record would confirm. The question presented here is "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." Petition (i). Professor Reisman extensively briefed that question in his

opening brief below. Appellant's Br., No. 18-2201, at 11–18 (1st Cir. filed April 1, 2019). This preserved that "federal claim" for review in the Court of Appeals and this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotation marks omitted).

Professor Reisman did not, as the Respondents claim (State Br. 20–22; Union Br. 19; University Br. 15), raise an "alternative" claim in the Court of Appeals concerning the First Amendment rights of a bargaining unit, as opposed to an individual. To the contrary, Professor Reisman argued that there is no "material distinction between the unit as a whole and its members," Appellant's Reply Br. 18-2201, at 10 (1st Cir. Filed May 24, 2019), in response to Respondents' attempt to draw that distinction. This was an "argument to support what has been his consistent claim," i.e., that compelled-representation violates his rights. *Lebron*, 513 U.S. at 379. And "once a federal claim is properly presented, a party can make any argument in support of that claim." *Id.* (cleaned up). Accordingly, there was no forfeiture. *See id.* (finding no forfeiture of argument "expressly disavowed" below because it supported a preserved claim).

Even if Professor Reisman were presenting an alternative argument, the Court "would ordinarily feel free to address it, since it was addressed by the court below." *Id.* The Court of Appeals had no trouble addressing (albeit erroneously) the supposed "alternative" argument claimed to be waived. Pet.App.10–12. The Court's "practice permits review of an issue not

pressed so long as it has been passed upon." *Lebron*, 513 U.S. at 379 (cleaned up).

B. The University's contention (at 6, 14) that certiorari is improper because there is "no record evidence upon which the Court can review the issues" ignores that the case was dismissed on legal grounds, and review of the legal question is perfectly proper on the pleadings, where the Court "assume[s] the allegations in petitioner's complaint to be true." *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637, 640 (2004).

The record is more than sufficient for the Court to review the decision below and consider *Knight*'s reach. Professor Reisman objects to being represented by an agent he rejects. Pet.App.39. The complaint states this claim and contains well-pleaded allegations that the Union advocates on terms and conditions of employment, Pet.App.35, which *Janus* holds are "matters of substantial public concern," *Janus*, 138 S. Ct. at 2460, and that Professor Reisman disagrees with the Union's speech. Pet.App.38. This case provides a firm basis to assess the question presented.

This Court regularly resolves First Amendment questions on the pleadings. That includes *Janus*, where the Court rejected an identical "insufficient record" argument against certiorari, *see* Brief in Opposition for Respondents Lisa Madigan & Michael Hoffman, *Janus v. AFSCME, Council 31*, No. 16-1466, at 7–10 (Aug. 10, 2017); *Harris v. Quinn*, which

assessed an agency-fee law as applied to personal assistants, 573 U.S. 616, 626 (2014); and *Abood*, 431 U.S. at 213 n.4.[4]

C. The State's argument (at 21) that "Reisman has been inconsistent and vague about the remedy he is seeking" identifies no inconsistency, and there is nothing "vague" about Professor Reisman's request to be free from an "agent" that holds itself out, and is regarded by the State, as the agent of a unit Professor Reisman cannot freely leave. Likewise, the Union's contention that relief "would have no practical effect" (at 21) is incoherent—the same page calls the potential impact "sweeping"—and ignores that the effect would be the same as in every compelled-speech and compelled-association case: Professor Reisman would no longer be required to associate with the Union or its speech. The Union's failure to appreciate the value of First Amendment rights renders them no less real and their vindication no less impactful.

CONCLUSION

The Court should grant the petition.

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[4] That objection was also raised, and rejected, in *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), which presented essentially the same question as *Janus*. *See* Brief of Respondents Cal. Teachers Ass'n et al. in Opposition, *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915, at 22–27 (Apr. 1, 2015).

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

Counsel for Petitioner

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