No. 20-1574

IN THE
Supreme Court of the United States

JOSEPH OCOL,
Petitioner,
v.

CHICAGO TEACHERS UNION, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO TEACHERS UNION AND AMERICAN FEDERATION OF TEACHERS

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QUESTIONS PRESENTED

1. For nearly a century, American labor law, in both the public and private sectors, has been grounded in the principle of exclusive representation—the principle that, once a majority of employees in a bargaining unit elects to be represented by a union, that union is designated to bargain on behalf of the entire unit with respect to the terms and conditions of their employment, and any agreement the union negotiates with the employer runs to the benefit of all employees in the unit. This Court held in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that exclusive representation in public-sector employment does not violate the First Amendment, and it has declined every invitation to revisit that holding since.

The principal question presented by the Petition is whether this Court should overrule *Knight* and hold that exclusive representation in public-sector employment is prohibited by the First Amendment.

2. Whether, contrary to the unanimous holdings of all seven courts of appeals and several dozen district courts that have addressed the issue, Respondents Chicago Teachers Union and the American Federation of Teachers can be held liable for repayment of agency fees they lawfully received, which were authorized by state law and had been held constitutional under this Court's then-controlling precedent, prior to this Court's overruling of that precedent in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

CORPORATE DISCLOSURE STATEMENT

Respondents Chicago Teachers Union and the American Federation of Teachers (the "Union Respondents") are not corporations. The Union Respondents have no parent corporations, and no corporation or other entity owns any stock in either respondent.

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STATEMENT

A. Background[1]

1. Enacted in 1983, the Illinois Educational Labor Relations Act ("IELRA" or "the Act"), like the laws of many other states, allows Illinois public education employees to organize and bargain collectively with their public employer over the terms and conditions of their employment through an employee organization of their choosing. 115 ILCS 5/1, *et seq.*; Ill. P.A. 83-1014.

Under the Act, an employee organization may be recognized as the representative of a bargaining unit upon a showing that a majority of the employees in the unit wish to be represented by that organization. 115 ILCS 5/2(d), 5/7. The employee organization is thereupon authorized to represent all members of the bargaining unit—whether union members or not—in bargaining with the employer regarding wages, hours, and terms and conditions of employment. *Id.* at 5/3(b), 5/10. A public employer is required to "meet at reasonable times and confer in good faith" with the exclusive representative with respect to these issues, and to "execute a written contract incorporating any agreement reached by such obligation." *Id.* at 5/10. Individual employees have a right under the Act to

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[1] The facts set forth herein are drawn from the evidence presented in the Union Respondents' summary judgment submission, which was uncontroverted. As discussed further below, the Petition instead relies entirely—and improperly—on the allegations of the complaint, many of which find no support in the summary judgment record upon which this case was decided. *See infra* at 5-6, 9-12.

present grievances to their employer and have them heard without the intervention of the exclusive representative, so long as any resolution is consistent with the terms of a collective bargaining agreement then in effect and the exclusive representative has been given an opportunity to participate in the grievance resolution process. *Id.* at 5/3(b).

The Act also imposes on the exclusive representative a legal duty to represent the interests of all employees, in collective bargaining and grievance administration, whether they are union members or not. *Id.* at 5/3(b), 5/14(b)(1). Recognizing that this "duty of fair representation" with respect to non-dues-paying members of the bargaining unit entailed significant costs for the union, the IELRA authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a clause requiring non-members to pay a "fair share fee for services rendered." *Id.* at 5/11. The IELRA, including this agency ("fair-share") fee provision, was enacted following the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court explicitly upheld the constitutionality of such agency fee requirements in the public sector. In *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), however, this Court overruled *Abood* and held agency fee requirements in the public sector unconstitutional.

The IELRA's exclusive-representation model mirrors those that Congress adopted with respect to private-sector labor relations nearly a century ago. 29 U.S.C. §§ 158(d), 159 (exclusive-representation provisions of National Labor Relations Act, enacted in 1935); 45 U.S.C. § 152, Fourth (exclusive-representation provisions of Railway Labor Act,

enacted in 1934). It is also the model that nearly all states, the District of Columbia, and Puerto Rico have adopted for at least some of their public employees. D. Ct. ECF 35-2 at 623. And it is the model that Congress adopted for federal civil-service employees in 1978, on the basis that "experience in both private and public employment indicates that the statutory protection of the right . . . to . . . bargain collectively . . . safeguards the public interest [and] contributes to the effective conduct of public business." 5 U.S.C. § 7101(a)(1); *see also id.* at § 7111.

Like these statutes from other jurisdictions, the IELRA's system of exclusive representation was enacted to promote "orderly and constructive relationships between all educational employees and their employers." 115 ILCS 5/1. It is undisputed that the IELRA does just that. The chief labor negotiator for the Chicago Board of Education ("CBOE"), who was one of the principal drafters of the IELRA, attested without contradiction that "exclusive representation . . . is in the best interest of the CBOE because it facilitates the orderly determination and administration of wages, benefits, and working conditions." D. Ct. ECF No. 35-1 at 618-19. In contrast, "[b]argaining with non-exclusive representatives . . . would result in inconsistencies, labor strife, and a costly and fragmented system of labor relations" that would be detrimental to "the children, employees, and taxpayers of the City of Chicago." D. Ct. ECF No. 35-1 at 619. As a result, exclusive representation "conserves public resources." D. Ct. ECF No. 35-2 at 623.

2. Respondent Chicago Teachers Union ("CTU" or the "Union"), which is affiliated at the national level with Respondent American Federation of Teachers

("AFT"), has long been the labor organization chosen as the exclusive bargaining representative by a unit of employees of the CBOE, which administers the Chicago Public Schools. D. Ct. ECF No. 35 at 614-15. Consistent with the IELRA statutory scheme, the collective bargaining agreements negotiated between CTU and CBOE prior to *Janus* included an agency fee provision requiring employees who declined to join the Union to pay a fee to help defray the Union's costs of collective bargaining and contract enforcement that benefited Union members and nonmembers alike. *Id.* at 615.

Petitioner Joseph Ocol is a Chicago elementary school teacher, and, as such, a member of the bargaining unit represented by CTU. *Id.* Petitioner was a member of CTU from 2005 until June 2016. *Id.*

On April 1, 2016, CTU held a one-day strike to protest an ongoing and pending unfair labor practice by CBOE while CTU and CBOE were at loggerheads over negotiating a new collective bargaining agreement.[2] *See* D. Ct. ECF No. 35-4 at 633-34. Eighty-eight percent of the CTU House of Delegates had voted to authorize the strike. *Id.* at 633. Petitioner crossed the picket line on that day. *Id.* at 634. He was subsequently charged with violation of the CTU Strike Policy and given the option of paying as a fine the net amount he earned on the day of the strike or contesting the charge against him at a hearing before the CTU Executive Board. *Id.* at 634-

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[2] Nothing in the summary judgment record supports Petitioner's characterization of the strike as "illegal." *See generally* D. Ct. ECF 35-4 at 634.

35. Petitioner declined to do either and, as a result, was expelled from the Union. *Id.*

As a nonmember thereafter, and until the *Janus* decision, Petitioner paid an agency fee to CTU. D. Ct. ECF No. 35 at 615.[3] He was last assessed such a fee in May 2018, as CTU and CBOE promptly ceased the collection of agency fees following the *Janus* decision in June 2018. *Id.* at 616; D. Ct. ECF No. 35-4 at 631-32.

B. Proceedings Below

Petitioner filed a putative class action complaint on December 6, 2018 against CTU, AFT, the Attorney General of Illinois, and the members of the Illinois Educational Labor Relations Board ("IELRB"). D. Ct. ECF No. 1. In addition to several claims that have not been pursued on appeal, the complaint (1) sought to require the Union Respondents to refund all agency fees received from Petitioner prior to the *Janus* decision; and (2) alleged that the IELRA's system of exclusive representation violated Petitioner's First Amendment rights. *Id.* at 12-16.

The claims against the Attorney General and the members of the IELRB, which sought only prospective injunctive relief, were summarily dismissed, without opposition, upon the State Defendants' motion to dismiss on both jurisdictional and substantive grounds. D. Ct. ECF Nos. 28, 31, 36.

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[3] Petitioner's assertion that he was assessed an agency fee in a higher amount than membership dues he had paid, Pet. 6, is incorrect and unsupported by the record. *See generally* D. Ct. ECF No. 35 at 616-17; D. Ct. ECF No. 35-3 at 627.

The Union Respondents, however, answered the complaint and subsequently filed a fully-supported motion for summary judgment, D. Ct. ECF Nos. 26, 35, 47, 48.

On summary judgment, Petitioner did not submit a statement of disputed facts, as required by the District Court's local rules. *See* N.D. Ill. L. R. 56.1(b)(2). Nor did he in any other way controvert any of the evidence presented by the Union Respondents' summary judgment submission or submit any evidence in support of his claims. Petitioner conceded that his two claims at issue here were foreclosed by this Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and the Seventh Circuit's intervening decisions in *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*") (on remand from this Court), and *Mooney v. Illinois Education Ass'n*, 942 F.3d 368 (7th Cir. 2019), and he contested only two other claims as to which he does not seek certiorari. Pet. App. 8a, 11a. The District Court granted summary judgment for the Union Respondents on all claims, *id.* at 12a, and the Seventh Circuit affirmed in all respects, *id.* at 6a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to consider two questions that the Court has repeatedly declined to take up in recent years, including on multiple occasions during the 2020-21 Term. There is no reason for a different outcome now. Indeed, this case is a particularly poor vehicle for the Court's consideration of the issues presented because the Petition relies throughout on facts that have no

support in the summary judgment record on which the case was decided.

Petitioner's First Amendment challenge to exclusive representation asks this Court to consider holding unconstitutional what has been, for the past century, the fundamental principle of American labor relations in both the public and private sector: the representation of an entire bargaining unit, for purposes of negotiating terms and conditions of employment and enforcing the agreed-upon terms, by a union democratically selected by a majority of employees in that unit. This Court upheld the constitutionality of exclusive representation in the public sector many years ago in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). Since then, it has denied certiorari in each case challenging the constitutionality of exclusive representation—including on nine occasions in the last five years.[4]

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[4] *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020), *cert. denied*, 2021 WL 2301972 (U.S. June 7, 2021); *Reisman v. Assoc. Facs. of Univ. of Me.*, 939 F.3d 409 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020); *Branch v. Commonwealth Emp't Rels. Bd.*, 120 N.E.3d 1163 (Mass. 2019), *cert. denied sub nom. Branch v. Mass. Dep't of Labor Rels.*, 140 S. Ct. 858 (2020); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Uradnik v. Inter Fac. Org.*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018) (preliminary-

Petitioner concedes that his case is governed by *Knight* and he asks the Court to overrule it. Pet. 8-9. His central argument—also made in the petition in the *Thompson* case (U.S. No. 20-1019), which the Court denied just last month, as well as in prior petitions that the Court has uniformly denied—is that this Court's 2018 decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), "call[ed] into question the constitutionality of exclusive representation in public sector employment." Pet. 8. *Janus* did no such thing. Not only was the issue of exclusive representation not before the Court in *Janus*, but the Court made clear that States could "keep their labor-relations systems exactly as they are" and that the Court was "not in any way questioning the foundations of modern labor law." 138 S. Ct. at 2471 n.7, 2485 n.27. No principle is more central to the foundations of modern labor law than exclusive representation.

There is also no reason for the Court to consider the second question half-heartedly presented by the Petition—whether unions that lawfully received agency fees pursuant to state law and this Court's then-controlling *Abood* decision prior to the Court's overruling of that precedent in *Janus* can be held liable for repayment of those fees. All seven courts of appeals to have considered this issue following *Janus* (as well as all of the several dozen district courts) have rejected such claims, holding that unions sued under 42 U.S.C. § 1983 do not have to repay such fees.

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injunction denial), *aff'd*, No. 18-3086, 2018 WL 11301550 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

This Court, during the 2020-21 Term, has denied all of the nine petitions for certiorari from those decisions that have reached it to date, including two in June 2021. Petitioner appropriately concedes that this case is not distinguishable from those cases and that there is no reason for the Court to grant his petition to consider this issue in connection with this case. Pet. 14.

I. The Petition Relies on Misstatements of the Factual Record

Regardless of what merit it might otherwise have, this case is an inappropriate vehicle for review of the issues presented by the Petition because many of the factual assertions upon which it relies are unsupported by the record.

These misstatements of fact flow directly from the Petition's misrepresentation that the case was decided below on a motion to dismiss under Rule 12(b)(6), under which the facts alleged in the complaint are to be taken as true. Pet. 4 n.4; Fed. R. Civ. P. 12(b)(6). Although the claims for prospective relief against the State Defendants were dismissed summarily and without opposition on a motion to dismiss raising both substantive and jurisdictional issues, the claims against the Union Respondents were decided on a summary judgment motion under Rule 56. *See* Pet. App. 7a-12a. At summary judgment, of course, a party "may not rest upon the mere allegations or denials of [its] pleading," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), but must support its factual assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically

stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

In connection with their motion for summary judgment, the Union Respondents filed a Statement of Material Fact, as required by the District Court's local rules, as well as declarations and exhibits from four witnesses. *See* D. Ct. ECF No. 35; N.D. Ill. L. R. 56.1. Petitioner did not respond to the Union Respondents' Statement of Material Fact, nor did he submit any declarations or other evidence to contravene the evidence proffered by the Union Respondents or otherwise in opposition to summary judgment. Consistent with Rule 56(e), the Seventh Circuit has held that when a party fails to respond to a moving party's statement of material fact in the manner dictated by the District Court's local rule, the facts contained in the moving party's statement of material fact "are deemed admitted for purposes of the motion." *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015).

As a result, the facts set forth in the Union Respondents' summary judgment submission are undisputed and, together with their Answer, form the factual record on appeal. Conversely, many of the allegations that appear to motivate the Petition lack any record support. For example, there is no support in the record for the following assertions in the Petition, many of which are indeed belied by the record:

- that the April 1, 2016 strike by CTU was "illegal" (Pet. (i), (ii), 4, 5, 7, 8, 10);

- that Petitioner was subjected to "repeated acts of bullying and persecution" (Pet. (i));
- the reasons why Petitioner chose to cross the picket line during the April 1, 2016 strike (Pet. 5);
- the reason why Petitioner chose not to attend the hearing on the charges against him by CTU (Pet. 5);
- that Petitioner was charged an amount of agency fees higher than the union membership dues he had been charged as a union member, "in violation of state law" (Pet. 6); and
- that CTU "retaliat[ed]" against Petitioner for his refusal to participate in an "illegal" one-day strike (Pet. 10).

In addition, Petitioner's challenge to exclusive representation rests on speculation about what the labor market for science, technology, engineering, and mathematics ("STEM") teachers would be in the absence of exclusive representation. Petitioner asserts that collective bargaining limits the salaries available to STEM teachers by forcing teachers into "union-imposed salary structure[s]." Pet. 11. Petitioner cites no record evidence in support of his assertion and, in fact, the undisputed factual record on appeal is to the contrary. First, nothing prevents CBOE and CTU from negotiating more favorable terms and conditions of employment for teachers in areas of significant need, and they have done so in the past. D. Ct. ECF No. 35-2 at 623-24. Second, uniform

salary schedules ("salary grids") are widely used to set teachers' compensation even in school systems where teachers do not have the right to bargain collectively. *Id.* Petitioner's speculation as to the salary structures that might exist in the absence of exclusive representation must give way to these undisputed record facts.

II. The Petition Presents No Reason to Revisit the Principle of Exclusive Representation

This Court has characterized the principle of exclusive representation—the negotiation of terms and conditions of employment for the entire bargaining unit by a union chosen by the majority of its members—as the "central premise" of American labor law. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009). The Court upheld the constitutionality of this fundamental principle, as applied to public-sector employment, more than 37 years ago in *Knight*, and it has declined to entertain every challenge to it since. Petitioner presents no reason for the Court to do otherwise in this case.

A. In *Knight*, this Court addressed a First Amendment challenge to a Minnesota statute, similar to the Illinois statute at issue in this case, that "establishe[d] a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit." *Knight*, 465 U.S. at 274. The Minnesota statute also required public employers (1) to negotiate with such an exclusive representative over terms and conditions of employment (the "meet and negotiate" requirement), and (2) to confer with the exclusive representative

about subjects outside the scope of mandatory negotiations (the "meet and confer" requirement). *Id.* at 274, 275. Under the statute, "the employer may neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id.* at 275. The statute did not, however, prevent members of the bargaining unit from submitting advice to their employer or from speaking publicly on matters related to their employment. *Id.*

This Court summarily affirmed the district court's dismissal of the plaintiffs' constitutional challenge to the "meet and negotiate" requirement. *See Knight*, 465 U.S. at 279 (citing *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 460 U.S. 1048 (1983)). The district court had, however, held the "meet and confer" requirement unconstitutional, and this Court gave plenary consideration to that issue, concluding that exclusive representation was constitutional in that context as well. *Id.* at 288. In particular, the Court held that "[t]he State has *in no way* restrained appellees' freedom to speak on any education-related issue or their freedom to associate *or not to associate* with whom they please, including the exclusive representative." *Id.* at 288 (emphases added). Plaintiffs were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 289. And, as the Court specifically noted, the employer "considers the [union's] views . . . to be the faculty's official collective position," while recognizing "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 276. In sum, the Court held, the plaintiffs' "associational freedom has not been impaired" because "the pressure [they may feel to join

the exclusive representative] is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 289, 290.

B. Petitioner concedes that *Knight* applies to the Illinois statute at issue but asks the Court to overrule *Knight* because, he contends, it is in tension with the Court's recent decision in *Janus*. Pet. 9-10. But that contention is incorrect. The issue before the Court in *Janus* was the constitutionality of statutory and contractual provisions requiring members of a bargaining unit who declined to become dues-paying union members to pay an "agency fee" consisting of their proportionate share of the union's costs of collective bargaining and contract administration. This Court, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that the First Amendment prohibits such agency-fee requirements in public-sector employment.

In holding compelled-fee requirements unconstitutional, however, the Court explicitly *distinguished* exclusive representation:

> It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees . . . . 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.

Janus, 138 S. Ct. at 2478.

Indeed, in addressing the dissent's concern that the *Janus* decision would require states that had authorized agency fees to undertake an "extensive

legislative response," the Court emphasized that those states "can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27. "In this way," the Court explained, "these States can follow the model of the federal government and 28 other States" that provided for exclusive representation but had *not* authorized agency fees. *Id.*; *see also id.* at 2466. By expressly holding out the labor-law regimes in the federal government and these 28 states as a "model" for the remaining states to follow in the wake of *Janus*, the Court was reaffirming—not criticizing—exclusive representation.

Janus also emphasized that the Court was "not in any way questioning the foundations of modern labor law," *id.* at 2471 n.7—and, as we have noted, no principle is more fundamental to the "foundations of modern labor law" than exclusive representation. *Supra* at 12.

Even the remarks in the *Janus* opinion on which Petitioner relies—that exclusive representation constitutes "a significant impingement on associational freedoms that would not be tolerated in other contexts," *id.* at 2478; *see also id.* at 2460—cannot be read as anything other than an acknowledgment that the principle of exclusive representation in collective bargaining was *not* being called into question. The necessary implication to be drawn from the Court's recognition that such an impingement might not be allowed in *other* contexts is that it was understood that, in *this* context, whatever impingement was occasioned by a system of exclusive representation is constitutionally permissible. And that is doubly so, given that the

Court bracketed this comment by affirming that "[i]t is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees," and that the Court would "simply draw the line at allowing the government to go further still and require all employees to support the union." *Id.* at 2478.[5]

One important reason for the distinction between exclusive representation in collective bargaining and any similar arrangement in "other contexts" is the presence, in *this* context, of the union's "duty of fair representation." That duty requires the union to represent all employees in the bargaining unit on equal terms, without regard to union membership. *See* 115 ILCS 5/3(b), 5/14(b)(1). As *Janus* explained, the duty of fair representation is a "necessary concomitant" of exclusive representation. 138 S. Ct. at 2469; *see also D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) ("[I]t is not the presence but the absence of a prohibition on discrimination that could well ground a constitutional objection.").

C. Nor is there any substance to Petitioner's argument that his associational freedoms have been abridged because he has been required to accept an "unwanted agent to act on his behalf," and that, in the absence of exclusive representation, he would be free

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[5] In the same vein, the Court made clear that it had no quarrel with *Abood*'s conclusion that "labor peace," meaning the avoidance of conflicts resulting from the presence of multiple competing unions within the workforce, was a "compelling state interest." 138 S. Ct. at 2465. Rather, the Court took issue only with *Abood*'s understanding that agency fees were necessary to that end. *Id.*

to negotiate better employment terms with CBOE. Pet. 10-12. As noted above, *supra* at 11-12, Petitioner's theory about the economic terms he believes he could negotiate rests on speculation that is contrary to the facts in the record. Indeed, there is good reason to expect that CBOE would not negotiate with teachers individually in the absence of an exclusive representation system. *See* Dist. Ct. ECF No. 35-2 at 623-24. But, in any event, the mere fact that the terms and conditions of employment that have been offered to Petitioner are the result of collective bargaining between CBOE and CTU does not violate Petitioner's First Amendment rights. This Court has repeatedly held that an employee has no First Amendment right to require that a public employer negotiate with him individually—a holding Petitioner does not even suggest was called into question by *Janus*. *See Knight*, 465 U.S. at 282; *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) ("[T]he First Amendment does not impose any affirmative obligation on the government to listen.").

Further, the fact that Petitioner's terms and conditions of employment are negotiated collectively by the designated exclusive representative in no way implicates his associational rights, much less violates them. This Court's decisions establish that, if outsiders would not reasonably perceive one group's speech as reflecting the view and endorsement of another person, then that person has not been forced to associate with the group in a manner that implicates the First Amendment. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 65, 69 (2006) (no compelled expressive association where law schools had to

"associate" with military recruiters by allowing on campus recruiting, but recruiters did not "become members of the school's expressive association," and "[n]othing about recruiting suggests that law schools agree with any speech by recruiters"). That is true of the relationship between a union designated to act as an exclusive representative of a bargaining unit, and the members of that bargaining unit. As Justice Souter recognized in *D'Agostino,* "it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority." 812 F.3d at 244.[6]

D. *Knight* has undergirded public-sector labor relations for more than 37 years, and overruling it would throw public sector labor relations into chaos. Considerations of *stare decisis* alone counsel strongly in favor of denying the petition—just as all other

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[6] *See also, e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.") (cleaned up); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring) ("Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated."); *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (finding no First Amendment violation where views of individuals granted right to gather signatures and distribute pamphlets in a privately owned shopping center "[would] not likely be identified with those of the owner").

petitions seeking to challenge *Knight* have been denied. The same outcome is appropriate here.

III. As Petitioner Concedes, the Court Should Not Grant Certiorari Regarding Whether Unions Are Liable for Pre-*Janus* Agency Fees Under 42 U.S.C. § 1983

The Seventh Circuit rejected Petitioner's claim against the Union Respondents for a refund of the agency fees that he paid prior to the *Janus* decision in light of its holdings in *Janus II* and *Mooney* that a union is entitled to a good-faith defense to liability under 42 U.S.C. § 1983 for actions taken pursuant to then-controlling law. *See Mooney*, 942 F.3d at 369; *Janus II*, 942 F.3d at 362, 366-67; *see also* Pet. App. 4a-5a. As the Seventh Circuit found in those cases, a union's reliance on this Court's holding in *Abood* that agency fee arrangements were lawful was objectively reasonable. These holdings of the Seventh Circuit are consistent with those of the other six courts of appeals—and several dozen district courts—that have considered the issue on substantially identical facts since the *Janus* decision.[7]

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[7] *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375 (4th Cir. 2021); *Doughty v. State Emps.' Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019).

Nine of these decisions reached this Court on petitions for certiorari during the 2020-21 Term, and the Court denied all of the petitions.[8] Petitioner acknowledges this, admits that there is "no basis for distinguishing his petition . . . from the myriad petitions that this Court denied on January 25, 2021" (and thereafter), Pet. 14, and therefore "is not recommending that the Court grant certiorari on that issue at this time." *Id.* We agree. The Court should deny this Petition just as it denied all prior petitions raising this same issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[8] *Diamond v. Pa. State. Educ. Ass'n*, 2021 WL 2405172 (U.S. June 14, 2021); *Doughty v. State Emps.' Ass'n of N.H*, 2021 WL 2405208 (U.S. June 14, 2021); *Wholean v. CSEA SEIU Local 2001*, 141 S. Ct. 1735 (2021); *Casanova v. Int'l Assoc. of Machinists, Local 701*, 141 S. Ct. 1283 (2021); *Danielson v. Inslee*, 141 S. Ct. 1265 (2021); *Janus II*, 141 S. Ct. 1282 (2021); *Lee v. Ohio Educ. Ass'n*, 141 S. Ct. 1264 (2021); *Mooney v. Ill. Educ. Ass'n*, 141 S. Ct. 1283 (2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 141 S. Ct. 1265 (2021).

Respectfully submitted,

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