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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Last week, the Sixth Circuit announced that Ohio's compelled-union-representation scheme, which is materially identical to the Maine one challenged here, "is in direct conflict with the principles enunciated in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)." *Thompson v. Marietta Educ. Ass'n*, -- F.3d --, No. 19-4217, 2020 WL 5015460, at *1 (6th Cir. Aug. 25, 2020). Judge Thapar, on behalf of a unanimous panel, explained that state-compelled union representation presents "a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job." *Id.* Because "the law requires [public employees] to also accept a union as their exclusive bargaining representative," and because *Janus* held that "'designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights,'" the Sixth Circuit in *Thompson* concluded that Ohio's scheme conflicts with the First Amendment principles set forth in *Janus*. *Id.* at *1–2 (quoting *Janus*, 138 S. Ct. at 2469).

But despite all that, the Sixth Circuit considered itself bound to uphold Ohio's scheme because *Janus* "left on the books *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)." *Id.* at *1. Like the court below, the Sixth Circuit read *Knight* to uphold compelled representation against any and all First Amendment challenge and so, notwithstanding the "conflict[]" with *Janus*, considered itself powerless to scrutinize and redress an obvious impingement of First Amendment rights. *Id.* at *3.

The Sixth Circuit's recognition of the conflict between the *Janus* line of authority and lower courts' application of *Knight* strengthens the already compelling basis for this Court to grant the Petition. Although the Sixth Circuit's *Thompson* decision is wrong to read *Knight* as exempting exclusive-representation schemes from First Amendment scrutiny, its conclusion that compelled representation is incompatible "with the reasoning in *Janus,*" *id.* at *3, and yet still must be upheld, underscores the need for clarity on these issues from this Court. The decision highlights the incongruity between the First Amendment principle that public employees cannot, without a compelling justification, be forced to accept an unwanted representative, and the many state laws doing just that. Until this Court resolves these "First Amendment questions of considerable importance," *id.* at *4, the lower courts are all but certain to further entrench an aggrandized reading of *Knight* that cannot be reconciled with First Amendment principles this Court has articulated since the *Knight* decision. Only this Court can break this vicious cycle, and it should do so in this case.

I. *Thompson* Recognizes that Compelled Union Representation Conflicts with the Standard First Amendment Principles Applied in *Janus*

Thompson recognizes that, under this Court's compelled-speech and -association cases, compelled union representation impinges public employees' First Amendment rights. Ohio's exclusive representation

regime, like Maine's, imposes a labor union as the exclusive representative of *all* employees in a bargaining unit, including non-members who oppose the union's advocacy on their behalf. *Thompson*, 2020 WL 5015460, at *1. As in Maine, Ohio provides no means for employees to avoid being saddled with an unwanted representative. The Sixth Circuit in *Thompson* appreciated that this arrangement creates a compelled expressive-association relationship: "the law requires [employees] to…accept a union as their exclusive bargaining representative. It's a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job." *Id.* And it recognized that arrangement to be a plain-as-day impingement of public workers' rights under "the Supreme Court's language" in its compelled-speech and -association precedents. Under those precedents, it was obvious that "Thompson [the plaintiff] should prevail." *Id.* at *2. In the Sixth Circuit's view, only *Knight* stood in the way of that result. *Id*.

The same can be said in this case. Petitioner Jonathan Reisman, a public university professor, challenges the imposition of an unwanted representative under Maine law, and he has no way to opt out of the bargaining unit subject to the unwanted representation without resigning his public employment.

No different than in *Thompson*, Maine's compelled representation regime stands "in direct conflict with the principles enunciated in *Janus*." 2020 WL

5015460, at *1. As *Thompson* recounts, *Janus* reaffirmed the "basic truth that '[f]orcing free and independent individuals to endorse'—either implicitly or explicitly—'ideas they find objectionable is always demeaning'"; *Janus* "explained that 'designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights'"; and *Janus* "deemed exclusive public-sector bargaining 'a significant impingement on associational freedoms that would not be tolerated in other contexts.'" *Id.* at *2 (quoting *Janus*, 138 S. Ct. at 2464, 2469, and 2478). Most importantly, *Janus* held that the same First Amendment standards applied in other contexts also prevail in the labor-relations context; there is no labor-relations exception to the First Amendment. *See Janus*, 138 S. Ct. at 2482–83. Because those standards subject compelled association and speech to First Amendment scrutiny, there is no basis to uphold compelled representation with *no scrutiny at all*.

In short, as in *Thompson*, someone reading *Janus* and the Court's numerous First Amendment cases condemning compelled speech and association "might think that [Prof. Reisman] should prevail" in vindicating his well-established right to be free from compelled speech and association. 2020 WL 5015460, at *2.

II. *Thompson* Confirms the Need for This Court To Clarify or Overrule *Knight*

As in *Thompson*, the only thing standing between Prof. Reisman's challenge to the state imposing on him an unwanted representative and standard First

Amendment scrutiny is a sweeping reading of *Knight* that treats compelled union representation as a *sui generis* restriction exempt from the scrutiny that would apply—without serious question—in any other context. *Thompson* joined "every other circuit to address the issue," including the First Circuit decision below, in reading *Knight* to foreclose a challenge to compelled representation on compelled-speech and -association grounds. *See* 2020 WL 5015460, at *2 (citing, inter alia, *Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019)). As the Petition explains (at 9–13), *Knight* does not bear this weight, but it is hardly surprising that the Sixth Circuit would find otherwise, rather than split with other courts of appeals.

The Sixth Circuit was not untroubled by this result. It expressly acknowledged that its holding denies First Amendment protections to thousands of public employees within its jurisdiction. The court explained "that *Knight's* reasoning conflicts with the reasoning in *Janus*," and followed *Knight* only because "the Supreme Court did not overrule *Knight* in *Janus*." 2020 WL 5015460, at *3.

These concerns add to those expressed by other courts of appeals. The Eighth Circuit, for instance, recognized that *Janus* "arguably undermines some of [*Knight*'s] reasoning," and yet felt compelled to uphold an exclusive-representation scheme based on a maximalist reading of *Knight*. *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019). Similarly, the

Ninth Circuit recognized the tension between *Janus* and *Knight*, and yet likewise considered itself bound by the latter. *Mentele v. Inslee*, 916 F.3d 783, 788–89 (9th Cir. 2019). The lower courts can see that there is a problem, but believe that resolution must come from this Court. *See Thompson*, 2020 WL 5015460 at *3 (noting that where a Supreme Court opinion "'appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decision[].'" (quoting *Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477, 494 (1989))).

Indeed, the decision below reflects that the lower courts have been left with no explanation why, as a doctrinal matter, compelled union representation would be exempt from ordinary First Amendment scrutiny. All they know is that *Knight*, as a series of lower-court decisions have come to understand it, appears to compel that unlikely result. And each decision applying *Knight* in this way only reduces the likelihood that other courts will seriously consider its reach. *Knight* has become a free-floating holding unmoored from First Amendment principles.

Rarely is there a more compelling cause for this Court to intervene into dark confusion to provide clarity. The Sixth Circuit recognized the issues presented here to be "First Amendment questions of considerable importance," 2020 WL 5015460, at *4, and yet considered itself powerless to address them. Under the

Sixth Circuit's reading of *Knight*, this Court alone may do so.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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