No. ____

IN THE

Supreme Court of the United States

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three times in recent years, this Court has recognized that schemes compelling public-sector employees to associate with labor unions impose a "significant impingement" on those employees' First Amendment rights. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–11 (2012); *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2483 (2018). The most recent of those decisions, *Janus*, likewise recognized that a state's appointment of a labor union to speak for its employees as their exclusive representative is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. The court of appeals in this case concluded that compelled association regimes are "in direct conflict with the principles enunciated in *Janus*," Pet.App.3, but upheld Ohio's regime anyway because it considered itself bound to do so by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The questions presented are:

1. 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.

2. Whether *Knight* should be overruled.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Jade Thompson was the Plaintiff-Appellant in the court below.

Respondents, who were Defendants-Appellees in the court below, are the Marietta Education Association and the Marietta City School District Board of Education.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

There are no other court proceedings "directly related" to this case within the meaning of Rule 14(b)(iii).

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As a condition of her employment as a public high school teacher, Petitioner Jade Thompson is compelled by Ohio law to accept a labor union as her "exclusive bargaining representative" to speak for her on what this Court has recognized to be "matters of substantial public concern," *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018). The court below called this exclusive-representation scheme "a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job." Pet.App.3. It also concluded that "[t]his take-it-or-leave-it system is in direct conflict with the principles enunciated in *Janus v. AFSCME*," *id.*, which recognized that exclusive-representation schemes mark "a significant impingement on associational freedoms that would not be tolerated in other contexts," *Janus*, 138 S. Ct. at 2478.

Given all that, one might think Ms. Thompson prevailed below. The Sixth Circuit, in fact, suggested "that Thompson *should* prevail." Pet.App.7 (emphasis added). Yet it found that "Supreme Court precedent says otherwise." *Id. Janus*, it reasoned, "left on the books *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)," Pet.App.3, which the Sixth Circuit read to immunize exclusive-representation arrangements from all constitutional challenges. The result of this decision, and others like it, is to broadly sanction compelled representation of unwilling public employees and subsidy recipients like home healthcare workers, irrespective of their speech and

associational interests. In this instance, Ohio law recognizes a labor union as representing and speaking on behalf of Ms. Thompson, despite her vehement opposition to its positions and advocacy on issues ranging from fiscal policy to school administration. In fact, the union advocated against Ms. Thompson's late husband when he campaigned for the state legislature and, in doing so, purported to speak for all teachers in the local school district, including Ms. Thompson. This assertion enjoyed the imprimatur of Ohio law.

That result cannot be squared with this Court's First Amendment jurisprudence. The "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). *Janus* considered it beyond debate that the First Amendment bars a state from "requir[ing] all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties." *Id.* at 2464. But that is what Ohio requires of public school employees by assigning them a representative to take positions on a host of controversial public issues on their behalf. And, vague references to "labor peace" aside, no one has ever explained how forcing public employees to accept unwanted representation furthers any compelling or legitimate state interest.

The court below did not disagree. It found no principled basis to uphold Ohio's compelled-representation law and ruled against Ms. Thompson only because it found *Knight* and *Janus* to be in open conflict and that *Knight*, rather than *Janus*, "directly controls" the outcome of this case. Pet.App.9. But *Knight* considered no compelled-speech or -association challenge to compelled union representation, only the claim that public workers had a right to be heard by the state in certain "meet and confer" sessions with union representatives. And even if it did, this Court alone has "the prerogative of overruling its own decisions." *Id.* (citation omitted). The court below rightly recognized that *Knight*, as read to endorse compelled speech, "conflicts with the reasoning in *Janus*" and a host of other compelled-speech precedents and that these "First Amendment questions of considerable importance" merit review by the Court with authority to provide clarity, Pet.App.8, 10. This case provides the optimal opportunity for that review.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 972 F.3d 809, and reproduced at Pet.App.1. The district court's opinion is unreported and reproduced at Pet.App.14.

JURISDICTION

The Sixth Circuit entered judgment on August 25, 2020. Pet.App.12. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days, and

this Petition is timely under that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law. . . abridging the freedom of speech . . . or the right of the people to peaceably assemble." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend XIV.

The relevant statutory provisions involved are reproduced at Pet.App.99, as are relevant provisions of the Respondents' collective bargaining agreement, Pet.App.135.

STATEMENT OF THE CASE

A. Ohio Compels Public Employees To Accept a "Representative" That Speaks on Their Behalf

Ohio law empowers a union to become the "exclusive representative" for "all the public employees in a bargaining unit" (often a public school district) by submitting proof that a majority of employees in the unit wish to be represented by the union. Ohio Rev. Code § 4117.05(A). A "public employee" is "any person

holding a position by appointment or employment in the service of a public employer." *Id.* § 4117.01(C). On this showing, the public employer "shall extend" to the union "the right to represent exclusively the employees in the appropriate bargaining unit and the right to unchallenged and exclusive representation" of the employees in the unit. *Id.* § 4117.04(A). And the public employer "shall bargain" with that union. *Id.* § 4117.04(B).

The result is that the public employer recognizes the union as the representative of *all* employees in a unit—including those who have declined to join the union and object to its speech—in bargaining over a wide variety of matters of public interest. The union represents employees, and the public employer recognizes the union as representing employees, in bargaining over "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment" as well as over "the continuation, modification, or deletion of any existing provision of a collective bargaining agreement." *Id.* § 4117.08(A). Additionally, public employers and unions may bargain over matters of "inherent managerial policy," such as "the functions and programs of the public employer"; "standards of services"; the employer's "overall budget"; its "organizational structure"; hiring, discipline, and supervision of employees; methods "by which governmental operations are to be conducted"; and other matters related to "the mission of the public employer as a governmental unit." *Id.* § 4117.08(C).

B. Ohio Recognizes the Union as Ms. Thompson's "Representative"

Ms. Thompson is a Spanish teacher at Marietta High School and belongs to the bargaining unit covered by the collective-bargaining agreement between the Marietta Board of Education (the "Board") and the Marietta Education Association (the "Union") (collectively, "Respondents"). Pet.App.37–40. Ms. Thompson is not a member of the Union. Pet.App.40. She opposes many positions the Union has taken, both in collective-bargaining sessions and on policy matters more generally. Pet.App.71–72. When Ms. Thompson's late husband ran for public office, the Union took out radio and television advertisements against him. Pet.App.72. The Union's president also advocated against him in emails to Ms. Thompson and her colleagues at Marietta High School. *Id.*

Nonetheless, the Board recognizes the Union as Ms. Thompson's "representative" and "agent." As authorized by Ohio law, the Board recognizes the Union as "the sole and exclusive bargaining agent" for certain employees of the Marietta School Board—including Ms. Thompson, Pet.App.69–70—and has entered into a series of collective-bargaining agreements with the Union, including the recent "Agreement." Pet.App.135, *see also* Pet.App.39. The bargaining unit includes "all full and regular part-time certificated personnel employed under contract, including classroom teachers," irrespective of whether they are members of the Union or object to its speech. Pet.App.135.

Thus, the Union represents Ms. Thompson when it speaks with the Board regarding "wages, hours, terms and conditions and employment" and all the other matters that are addressed in the 72-page Agreement between the Board and the Union. Pet.App.136. Likewise, the Union represents Ms. Thompson when it speaks with the Board regarding "all elements of the teacher evaluation procedure" or layoffs. Pet.App.146–48. And it speaks for Ms. Thompson when it adopts positions regarding grievances concerning the interpretation and application of the Agreement. Pet.App.137–44. The Union and the Board also jointly appoint the membership of various committees, including the Sabbatical Committee, the Student Growth Measures Committee, the Teacher Evaluation Handbook Committee, and the Evaluation Committee, which participates in making retention and promotion decisions and in removing teachers. Pet.App.144–47. Indeed, under a provision bargained for by the Union, teacher membership on the Evaluation Committee is limited to Union members, as is teacher membership on the Student Growth Measures Committee. Pet.App.145, 147.

Ms. Thompson also has no choice but to submit to the Union in resolving disputes with the Board. Although a teacher may decline to be represented by the Union in the adjustment of a grievance, the Union is still entitled to participate in the adjustment process, the teacher may not obtain representation from another employee organization, and only the Union may obtain witness testimony in her support at a hearing.

Pet.App.137–44. Similarly, a teacher may be accompanied and represented only by a Union-approved representative at a reprimand meeting. Pet.App.147. Accordingly, to obtain the benefit of representation in disputes with the Board, teachers must associate with the Union.

The Union, as Ms. Thompson's representative, does more than just speak on her behalf in bargaining sessions. It is also authorized to hold meetings using school facilities; to use the intra-school mail system to distribute "bulletins, newsletters or other communication"; and to communicate through notices on a bulletin board. Pet.App.149. These activities, too, are undertaken in the Union's role as the representative and agent of teachers like Ms. Thompson.

C. Proceedings Below

Ms. Thompson filed a complaint in June 2018, challenging the compelled-representation regime maintained by the Respondents, alleging that it violates her rights under the First and Fourteenth Amendments to be free from compelled speech and compelled association. Pet.App.73–98. Ms. Thompson moved for a preliminary injunction, and the district court denied that motion, reasoning that *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), foreclosed her likelihood of success on the merits Pet.App.43–68. The parties then submitted the case on stipulated facts, Pet.App.37–42, and filed cross-motions for summary judgment. The district court denied Ms. Thompson's summary-judgment motion and

granted the union's motion, incorporating its preliminary-injunction ruling and concluding once more that *Knight* precluded Ms. Thompson's First Amendment claim. Pet.App.14–34.

On appeal, the unanimous Sixth Circuit panel determined that Ohio's compelled-representation law "is in direct conflict with the principles enunciated in *Janus*." Pet.App.3. But it upheld the law anyway, reasoning that *Janus* did not overrule *Knight*, which the Sixth Circuit found "directly controls" the outcome of this case. Pet.App.9. The court dismissed Ms. Thompson's contention that *Knight* involved no compelled-speech or -association claim, reasoning that, even if this might render *Knight* "technically distinguishable," "such a cramped reading of *Knight* would functionally overrule the decision." Pet.App.8. "And that is something lower court judges have no authority to do." *Id.* The court felt constrained to "follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." Pet.App.9.

REASONS FOR GRANTING THE PETITION

As the Sixth Circuit found, this case "presents First Amendment question of considerable importance." Pet.App.10. In that court's view, this case pits compelled representation and *Knight*, on the one hand, against *Janus* and the entire corpus of this Court's compelled-speech and -association cases, on the other. Although Ms. Thompson disagrees that *Knight* need be understood to conflict with the Court's compelled-

speech and -association precedents, the Sixth Circuit's decision highlights the stark need for resolution of the questions presented, which concern the First Amendment rights of hundreds of thousands of public employees. Only this Court can provide clarity because, as the decision below demonstrates, the lower courts are all but certain to maintain rote adherence to an erroneous reading of *Knight* at the expense of generally applicable First Amendment doctrine until this Court intervenes. The need for that intervention is rarely more pressing.

The appointment of an exclusive representative or "agent" to speak on public employees' behalf is an obvious impingement on their First Amendment rights, as the Court recognized in *Janus*. Yet the lower courts understand the Court to have held, in *Knight*, that such regimes implicate no First Amendment interests at all. *Knight*, however, had no occasion to pass on that issue, because it was not raised or argued. And, in all events, a slew of intervening compelled-speech and -association precedents render the doctrine attributed to *Knight* obsolete.

The result of this confusion is that public workers whom *Janus* recognized to have the right to be free from subsidizing a labor union's speech may nonetheless be compelled to enter an expressive association with a union and to suffer it speaking for them, no matter their disagreement with the words it puts in their mouths. That is, if anything, a more severe impingement on First Amendment rights than that disapproved in *Janus*, and it is unjustified by any state

interest, let alone the compelling one required by strict or exacting scrutiny. The Court should give this important issue the full and fair consideration it deserves. This case, which challenges a typical exclusive-representation regime and presents the constitutional issue squarely, is the ideal vehicle to do so.

I. State-Compelled Union Representation Cannot Be Reconciled with This Court's First Amendment Jurisprudence

Subjecting public workers to state-compelled union representation contravenes established First Amendment doctrine. As *Janus* explained, these regimes constitute "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478. And the lower court recognized that arrangement to be a plain impingement of public workers' rights under this Court's compelled-speech and -association precedents, under which, it observed, "Thompson should prevail." Pet.App.7.

A. When state law appoints a union to represent unwilling public workers, it compels their speech. The State of Ohio has imposed upon Ms. Thompson a government-appointed lobbyist who works on her behalf and in her name, as her "agent" and "representative," even though she disagrees with the positions it attributes to her. Pet.App.135. So, when the Union speaks, it is putting words in Ms. Thompson's mouth. *See Janus*, 138 S. Ct. at 2474 ("[W]hen a union negotiates with the employer or represents employees in discipli-

nary proceedings, the union speaks for the *employees*…."). And, after *Janus*, there can be no dispute that this speech addresses "matters of substantial public concern," *id.* at 2460, including public-sector wages and benefits and the governance of public institutions.

The state's compulsion of Ms. Thompson's speech on these issues is, to say the least, an impingement of her First Amendment right to be free from compelled speech. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of [the Court's] landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* at 2464 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). And Ohio cannot eliminate this First Amendment impingement by requiring Ms. Thompson to speak out to clarify her individual position on the Union's statements. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."). Government-compelled speech is therefore subject to strict scrutiny. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800–01 (1988).

Likewise, compelled union representation impinges on associational rights. An association "is protected

by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). That is, of course, the entire purpose of the Union's appointment as Ms. Thompson's "bargaining agent"—to speak on behalf of her and other employees. *Compare United States v. United Foods*, 533 U.S. 405, 411–12 (2001) (finding violation where the compelled speech "itself, far from being ancillary, is the principal object of the regulatory scheme").

"Freedom of association…plainly presupposes a freedom not to associate." *Roberts v. U. S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.,* 475 U.S. 1, 12 (1986) (plurality opinion) ("[F]orced associations that burden protected speech are impermissible."). Compelled association is therefore subject, at a minimum, to "exacting scrutiny" and so must at least "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012) (citation omitted).

B. Ohio law magnifies these impingements by affording formal, indefinite recognition to one private organization, the Union, at the expense of all other persons who might petition the Board and from whom the Board itself may wish to hear. "There can be no doubt that" granting *de jure* recognition to the Union and "denial of" it to anyone else "burdens or abridges" associational and free-speech rights. *Healy v. James*,

408 U.S. 169, 181 (1972). The rights and privileges granted to the Union preclude non-Union members like Ms. Thompson from any possibility of meaningful communication to the Board and compel them to associate with the Union. That state of affairs "would not be tolerated in other contexts." *Janus* 138 S. Ct. at 2478.

To be sure, "[t]he First Amendment right to associate and advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464–65 (1979) (per curiam) (quotation marks omitted). And, for that reason, there is no First Amendment right of any public employee to participate in specific discussions that a state actor conducts with private persons, including labor negotiations. *See Knight*, 465 U.S. at 285.

But it does not follow that government bodies are free to tilt the playing field of public affairs as they please. The Constitution's right to speech and petitioning prohibit "indirect" as well as direct infringements upon these liberties. *Healy*, 408 U.S. at 183; *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (stating that the right to petition the government would be "a hollow promise" if it tolerated "indirect restraints"). Ohio law bars the Board on an indefinite basis from allowing parties other than the Union from participating in negotiations on topics subject to bargaining with the Union, and it forbids the Board from effectuating any policies

related to the Union's scope of bargaining power without the Union's consent. *See* Ohio Rev. Cod. § 4117.08(A); Pet.App.136. That is altogether different from a government actor's *ad hoc* decision to hear or ignore various competing speakers in a given session or meeting. The Board's right not "to listen, to respond or, in this context, to recognize" Ms. Thompson or her preferred labor organization, *Smith*, 441 U.S. at 465, is entirely beside the point, because state law has already removed any discretion from the Board on whom it may "choose to hear." *Knight*, 465 U.S. at 284.

The government's *de jure* choice to resolve all matters governing terms and conditions of employment with only one group is an acute burden on First Amendment rights in a way that its *ad hoc* choice to listen to different speakers is not. Because of the Union's exclusive status and special privileges, the only way Ms. Thompson has even a possibility of the Board's considering her speech is to join the Union as a member, a compulsion that even the *Janus* dissenters recognized to violate the First Amendment. *Janus*, 138 S. Ct. at 2489 (Kagan, J., dissenting) (noting that "dissenting employees" have "First Amendment interests" and may oppose "unionism itself"). It is futile for Ms. Thompson to exercise her voting, petitioning, and speech rights to influence the Board or elect members favorable to her views. Under Ohio law, it is an unfair labor practice for the Board to adopt a proposal proffered by Ms. Thompson without the Union's consent. Ohio Rev. Code. § 4117.11(A)(5).

C. Ohio's compelled union-representation scheme fails either degree of First Amendment scrutiny, strict or exacting, because it is unsupported by any compelling state interest. There is no interest in avoiding "free-riders" at play here, because Ms. Thompson and other non-members are not seeking to "enjoy[] the benefits of union representation without shouldering the costs," *Janus*, 138 S. Ct. at 2466. And while the Union has a duty of fairness to all employees, that is only because the state, as the counterparty in the bargaining, cannot discriminate on the basis of union membership. *See Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944) (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive").

As for any state interest in "labor peace," it is neither compelling nor served in any tailored fashion by forcing public employees to accept union representation. *Janus* assumed, without deciding, that a state might have a compelling interest in avoiding "inter-union rivalries" and "conflicting demands from different unions." 138 S. Ct. at 2465 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 200–21 (1977)). But, like the rest of *Abood*, this "labor peace" concept was

borrowed from another area of the Court's jurisprudence—concerning Congress's Commerce Clause power to regulate economic affairs, *e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937)—and, without any consideration, given a second life as a First Amendment doctrine. 431 U.S. at 220–21. That the promotion of labor peace might justify congressional regulation of economic affairs, subject only to rational-basis review, says nothing about whether labor-peace interests suffice to clear the higher bar of First Amendment scrutiny. They do not. The Court's cases recognize that the First Amendment does *not* permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley*, 487 U.S. at 791, 795. Yet that is, in a nutshell, the labor-peace rationale.

In any instance, labor peace provides no justification for mandating union representation. Irrespective of exclusive-representation regimes, the First Amendment affords public workers a near-absolute right to speak out themselves on matters of public concern and to join alternative labor organizations, just like they may enter into any number of private associations free from government retaliation. *See, e.g.*, *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). Even when some other group has been recognized as the exclusive representative, such organizations can still make demands on public employers, spark rivalries, and even foster dissention within the workforce—those potential ills are a consequence of

public workers' well-recognized First Amendment rights and are not addressed in any way by exclusive-representation requirements. In this respect, there is a fundamental disconnect between compelling unwilling public workers to accept a labor union as their representative and any claimed interest in labor peace.

Moreover, many states do not permit collective bargaining in the public sector. *See, e.g.*, N.C. Gen. Stat. § 95-98 (1959) (barring collective bargaining by North Carolina government employers); *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292–93 (S.C. 2000) (barring collective bargaining by South Carolina government employers); Tex. Govt. Code § 617.002 (generally barring collective bargaining by Texas government employers). There is no evidence that these states have faced labor strife or even slightly less functional labor relations with public-sector employees than states that utilize exclusive-representation schemes. Because there is no foundation to the contention that labor peace requires collective bargaining, the labor-peace rationale cannot justify severe impingements on First Amendment rights.

II. *Knight* Should Be Clarified or Overruled

The court below agreed that Ohio's compelled-representation system is "in direct conflict" with the First Amendment principles articulated in *Janus*, Pet.App.3, but erroneously determined that *Knight* nonetheless approves such schemes. It and other lower courts understood *Knight* to hold that state laws compelling public workers to accept an unwanted representative do not even impinge First

Amendment rights. *Knight*, however, involved a claimed right to be heard by the government, not any kind of First Amendment objection to compelled union representation. *Knight* does not speak to that latter issue. And if *Knight* does immunize Ohio's forced-representation scheme from *all* First Amendment objections, it should be overruled. It "conflicts with the reasoning in *Janus*," Pet.App.8., and numerous intervening precedents.

A. The Lower Courts Have Misread *Knight* To Exempt State-Compelled Union Representation from Constitutional Scrutiny

Knight does not exempt state-compelled union-representation schemes from First Amendment scrutiny. It was, to be sure, a challenge to provisions of a state statute similar to the one challenged here. The plaintiffs, college instructors, brought three claims, the first two of which were subject to summary affirmance by this Court. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983).

The first claim was that the state, by appointing a union as exclusive representative, "impermissibly delegated its sovereign power" in contravention of decisions like *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 3–4 (D. Minn. 1982). And the second was "that compulsory fair share fees…result in forced association with a political party," a claim that the district court held was controlled by this Court's decision upholding agency-fee

arrangements in *Abood*, 431 U.S. 209. The district court rejected both of those claims, 571 F. Supp. at 5, 7, and this Court summarily affirmed, *see Knight*, 465 U.S. at 278–79 (discussing lower court decision and summary affirmance).

The third claim, which this Court heard on the merits, involved the statute's "meet and confer" process in which public employers exchange views with an exclusive representative "on policy questions relating to employment but outside the scope of mandatory bargaining." *Id*. at 273. The district court had held that the limitation restricting participation in "meet and confer" sessions to representatives selected by the union violated the plaintiffs' First Amendment rights. 571 F. Supp. at 12.

Accordingly, as this Court stated in reviewing that decision: "The question presented in this case is whether this *restriction* on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views." *Knight*, 465 U.S. at 273 (emphasis added). In answering that question, the Court held, first, that the First Amendment confers "no constitutional right to force the government to listen to [the instructors'] views" and, second, that "Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" did not infringe "[the instructors'] speech and associational rights." *Id*. at 283, 288. The majority decision does not discuss or even cite

compelled-speech or compelled-association precedents other than *Abood*.

That's because there was no First Amendment challenge to compelled representation. The instructors' principal brief recognized that the "constitutionality of exclusive representation" was undecided, but expressly "pretermit[ed]" argumentation on that issue. Brief for Appellees, *Minn. State Bd for Cmty. Colls. v. Knight*, No. 82-898 (filed Aug. 16, 1983), at 46–47, *available at* 1983 U.S. S. Ct. Briefs LEXIS 130. A separate brief filed by the instructors did challenge exclusive representation, but only on nondelegation grounds. Brief for Appellants, *Minn. Comm. Coll. Faculty Ass'n v. Knight*, No. 82-977 (filed Aug. 16, 1983), *available at* 1983 U.S. S. Ct. Briefs LEXIS 126. No First Amendment challenge to compelled representation having been raised in the case, the Court had no reason to consider the matter.

This interpretation of *Knight*—as addressing only the right of non-members to participate and not their right to be free from representation—does not, as the court below believed, "functionally overrule" the decision. Pet.App.8. It is the only fair reading. Applying the principle that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy," 465 U.S. at 283, *Knight* concluded only that non-union faculty members' "right to speak is not infringed when government simply ignores [them] while listening to others [the union]," *id.* at 288. It should be understood as going no further than that.

Nonetheless, the lower courts have come to regard *Knight* as controlling on the question of state-compelled representation. Pet.App.7. The Eighth Circuit, for example, recently held in *Bierman v. Dayton* that a "State has 'in no way' impinged" on associational rights "by recognizing an exclusive negotiating representative," 900 F.3d 570, 574 (8th Cir. 2018), quoting language from *Knight* that actually addressed "Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative." 465 U.S. at 288 (emphasis added). The First Circuit committed the same error, conflating *Knight*'s language upholding that restriction on participation with approval of compelled representation. *D'Agostino v. Baker*, 812 F.3d 240, 243 (1st Cir. 2016). So too the Seventh Circuit, relying upon the same language. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017); *see also Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) (same); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018); *Mentele v. Inslee*, 2016 WL 3017713, at *4 (W.D. Wash. May 26, 2016). Thus, the lower courts regard themselves as bound by what is, at most, off-hand *dicta*, taken out of context, on an issue the Court had no occasion to consider.

B. *Knight* Should Be Overruled

To read *Knight* as sanctioning compelled union representation is to read it into conflict with *Janus* and virtually every other decision this Court has issued on compelled speech and association. The Sixth Circuit

found that conclusion inescapable: "*Knight*'s reasoning conflicts with the reasoning in Janus." Pet.App.8. As it recognized, exclusive representation can stand only because of this happenstance that *Janus* "left [*Knight*] on the books." Pet.App.3. Because the lower courts have uniformly adopted this mistaken reading of *Knight*, the choice before the Court is to either reject that reading or reject *Knight*. If the lower courts are correct in their understanding of *Knight*, then *Knight* should be overruled.

"*Stare decisis* is not an inexorable command," and it is "at its weakest when [this Court] interpret[s] the Constitution." *Janus*, 138 S. Ct. at 2478. And *stare decisis* applies with "least force of all to decisions that wrongly denied First Amendment rights." *Id.* Because all of the considerations that inhere in the Court's traditional *stare decisis* analysis weigh against standing by *Knight*, the case should be overruled.

1. *Knight* was poorly reasoned. *See Janus*, 138 S. Ct. at 2479. *Knight* offered no sound basis to conclude 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." 465 U.S. at 288. It failed to consider the fact (which it had no occasion to consider) that state law itself compels association with the representative, by assigning its speech to all members of the bargaining unit on a take-it-or-leave-it basis. *Knight* posited only that "amplification" of a union's voice under an exclusive-representation scheme "is inherent in

government's freedom to choose its advisers." *Id.* Although that is a reasoned basis for denying non-union members' access to private meetings between a union and administration, it does not explain why attributing the union's speech to non-members in those meetings honors non-members' First Amendment rights. Stated differently, the state's necessary prerogative to listen to some private persons and not others does not in any way require the state to attribute the speech of those persons it hears to those it declines to hear. *Knight* did not answer, or even consider, this enigma.

Notably, courts that have considered the compelled-representation issue from first principles recognized that they are incompatible with this prevailing view of *Knight*. *See Mentele v. Inslee*, 916 F.3d 783, 790–91 (9th Cir. 2019) (holding that compelled representation impinged First Amendment rights, but that the state's interest in "labor peace," as recognized by *Abood*, justified the intrusion). The court below emphatically joined that view. Pet.App.7–11.

2. Developments in the Court's First Amendment jurisprudence have further "eroded" whatever "underpinnings" *Knight* may have had when it was decided, leaving it an "outlier among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482. Since 1984, this Court has issued a series of First Amendment cases that establish the precise contours of its modern compelled-speech and -association jurisprudence. *See, e.g.*, *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796–797 (1988); *Janus*; 138 S. Ct.

at 2463 (collecting cases). That jurisprudence does not treat a person's right *not* to speak and *not* to associate as honored merely because the state has chosen not "to suppress any ideas," as *Knight* reasoned, 465 U.S. at 288. This intervening precedent clarifies both that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,'" *Hurley*, 515 U.S. at 573 (citation omitted), and that this right is impinged when the state requires objecting persons to "*associate* with speech with which [they] may disagree," *Pac. Gas & Elec. Co.,* 475 U.S. at 15 (emphasis added). Thus, whatever credence *Knight* might have found in First Amendment doctrine as it existed in 1984 is obsolete.

Janus provides merely the exclamation point to this series of decisions. Its observation that the "significant impingement" of compelled representation "would not be tolerated in other contexts" evidences how far First Amendment doctrine has been clarified since *Knight*, which failed to notice the anomaly. *Janus*, 138 S. Ct. at 2478. Furthermore, *Janus* indicated that the validity of exclusive representation would rise or fall not on the question of impingement—which is obviously present—but on the question of state *justification*. *Knight*, however, did not reach the question of justification but found no impingement in the first place. *Knight*, 465 U.S. at 288 ("Appellees' speech and associational rights…have not been infringed….").

All of this left the Sixth Circuit at a loss on how to reconcile *Knight* and *Janus*, leaving only the conclusion "that Thompson should prevail" under standard First Amendment doctrine, but for *Knight*'s aberrant holding. Pet.App.7. To achieve even the most minimalistic consistency between *Knight* and this Court's intervening First Amendment precedents would require shifting the burden to the state to justify exclusive representation. Yet court after court has concluded from *Knight*, with no foundation in generally applicable First Amendment principles, that collective bargaining is a First Amendment-free zone. *Janus* holds otherwise and "conflicts" with *Knight*. Pet.App.8.

3. *Knight*'s supposed exoneration of compelled representation has not proven to be workable in practice. *See Janus*, 138 S. Ct. at 2481. Although the system of compelled representation is familiar and widespread, it nonetheless rests upon a set of fictions that are completely nonsensical and unworkable. The Union and Board in this case, following the reasoning of many lower courts, contend that the Union does not actually represent Ms. Thompson or other non-members. Brief for Appellees at 19, *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020), ECF 33. ("[T]he Board does not attribute the Union's bargaining positions to her…the Superintendent does not interpret the Union's various bargaining positions or other speech as reflecting…Thompson's position."); *Reisman v. Assoc. Facs. of the Univ. of Me.*, 939 F.3d

409, 413 (1st Cir. 2019) (asserting that designated union was not non-member's "personal representative"). Accordingly, it is a total mystery as to why the Union needs compelled representation to achieve its missions in collective bargaining or otherwise. Faced with that conundrum, the Union and Board, following the reasoning of many lower courts, respond that non-members like Ms. Thompson cannot be harmed by the Union's representation, which amounts to only a "semantic" association. Brief for Appellees at 28, *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020), ECF 33; *D'Agostino*, 812 F.3d at 244 ("No matter what adjective is used to characterize it…it is readily understood that employees in the minority, union or not, will probably disagree with some positions of the majority."). But the Sixth Circuit saw through that mirage: exclusive representation is "a take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job." Pet.App.3. That is, to say the least, a severe First Amendment injury.

So the supposed workability of exclusive representation boils down to no benefit to the Union, which disclaims any need of it and denies that it even exists except in a semantic sense, at the cost of severe First Amendment injury to non-members, who are plainly harmed by forced association with an unwanted speaker and message. There is nothing practical or workable about this system.

4. For the same reasons, there is no reliance interest in *Knight*'s status quo. *See Janus*, 138 S. Ct. at

2484. The Union, like so many other unions in cases like this one, has disclaimed any need to represent non-members like Ms. Thompson. Its day-to-day operations, and its relationship to the Board, would not be obstructed, or even materially altered, if the scope of its representation were limited in law to its own members. To be sure, the Board and the State of Ohio would be forced to acknowledge that they entertain the views of only one special-interest group with limited membership, but that arrangement is, in truth, the current reality.

In any event, the semantic value the Union sees in compelled representation is not sufficient to justify the continued severe intrusion on the First Amendment rights of its non-members. It is "unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time." *Janus*, 138 S. Ct. at 2484. Given that multiple other states do without collective bargaining, *see supra* § C, Ohio can still enjoy a fully functioning public employment system absent the coercion of compelled representation.

III. The Questions Presented Are Important and Frequently Recurring

The importance of the question as to whether state-compelled union representation passes constitutional muster cannot be gainsaid. In the wake of *Janus*, it is a striking anomaly that public-sector workers, now free from compelled subsidization of union advocacy on "matters of substantial public concern," 138 S. Ct. at 2460, may nevertheless be compelled to accept that

same advocacy as their own and compelled to associate with a union for the sole purpose of facilitating that advocacy. A compelled-representation regime is literally "a law commanding 'involuntary affirmation' of objected-to beliefs." *Id.* at 2464 (quoting *Barnette*, 319 U.S. at 633). Now that a court of appeals has examined the issue and unanimously found no basis to reconcile *Knight* (as the lower courts have read it) with a single other First Amendment decision of this Court, compelled representation cannot be pretended to be anything but a stark anomaly. This intrusion on workers' First Amendment rights—and ultimately their freedom of conscience—is greater than that at issue in *Janus* and calls for review.

The question presented is also one that arises frequently. No fewer than six of the courts of appeals have addressed this issue in recent years. *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Reisman v. Assoc. Facs. of the Univ. of Me.*, 939 F.3d 409 (1st Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016). Each of those courts (except in *Mentele* as discussed above) has punted on the fundamental constitutional question, and all believed it to be controlled by *Knight*. Even so, additional challenges—many of them brought following this Court's decision in *Janus*—are currently pending in the lower courts. Given the importance of the issue to workers forced by the government against their will to accept union representation, the fact that this

Court has never squarely addressed the constitutionality of that practice, combined with the Court's recognition in *Janus* that such regimes impinge First Amendment rights, it is inevitable that there will be even more cases raising this same issue. Unless and until this Court passes judgment on compelled union representation, workers, municipalities, states, and the lower courts will continue to devote significant resources to litigation that this Court can and should resolve in one fell swoop.

IV. This Case Is the Ideal Vehicle To Clarify *Knight*'s Reach and the First Amendment's Application in This Area

This case presents an ideal vehicle for the Court to finally resolve an issue of overriding importance. It squarely presents both the issues as to whether the First Amendment permits a state to recognize a labor union as the "representative" and "agent" of public workers who have declined to join the union and object to its speech on their behalf and whether *"Knight*'s reasoning conflicts with the reasoning in *Janus*." Pet.App.8. There is neither a colorable challenge to the Petitioner's standing nor any other potential justiciability defect, and the lower court expressly found that Thompson preserved her arguments for appellate review. Pet.App.10.

Moreover, this case involves the typical factual scenario in which this issue arises. Ms. Thompson is a state employee, and state employees are by far the most numerous subjects of unwanted union represen-

tation under state law. By contrast, other recent challenges to exclusive-representation regimes involved subsidy recipients like home healthcare workers, raising a host of issues separate from the core one of whether states may compel representation at all. *Compare Harris v. Quinn*, 134 S. Ct. 2618 (2014) (challenge to agency fees by subsidy recipients), *with Janus*, 138 S. Ct. at 2461 (challenge to agency fees by state employee). Hearing this case would permit the Court to address the question presented in the most common factual context in which it is likely to arise and thereby provide the clearest possible guidance to the lower courts, avoiding the confusion that may ensue from a decision premised on idiosyncratic facts.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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JANUARY 2021