No. 20-1019

IN THE

# Supreme Court of the United States

JADE THOMPSON,

*PETITIONER*,

*V.*

MARIETTA EDUCATION ASSOCIATION, ET AL.,

*RESPONDENTS.*

*On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit*

## BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

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 dicta paragraphs discussing exclusive representation from this Court's opinion in *Minn. State Bd. for Cmty. Colls. v. Knight* (1984) should be withdrawn or overruled.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*DECISIONS*

*LAW REVIEW ARTICLES, NEWS REPORTS & OTHER SOURCES*

## INTERESTS OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center is particularly interested in this case because of its respect for the freedoms of speech and association. *See Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) (co-counsel for petitioner). The Center represents over a dozen public-sector workers challenging exclusive-representation schemes in federal courts nationwide.[2] *See, e.g., Adams v.*

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission. Counsel timely provided notice to all parties of its intention to file this brief and counsel for each party consented.

[2] Not only are workers like Petitioner asserting that exclusive representation is a burden on their First Amendment rights, unions are also bringing cases asserting that exclusive-representation statutes, which force them to represent non-paying non-members (whom they call "free-riders"), are a violation of the union's right not to associate, as well. *See, e.g.*, *Sweeney v. Madigan*, 359 F. Supp. 3d 585 (N.D. Ill. 2019). *See generally* Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn *and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439 (2015); Daniel Horowitz, "Compelled Association," Slate.com (Oct. 9, 2017), https://slate.com/news-and-politics/2017/10/if-fair-share-fees-are-unconstitutional-so-is-forcing-unions-to-advocate-for-nonmembers.html.

*Teamsters Local Union 429,* No. 1:19-CV-336, 2019 U.S. Dist. LEXIS 211035 (M.D. Pa. Dec. 5, 2019) (objections filed); *Oliver v. SEIU Local 668*, 415 F. Supp. 3d 602 (E.D. Pa. 2019) (on appeal); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392 (C.D. Cal. Sep. 30, 2019) (on appeal); *Grossman v. Haw. Gov't Emples. Ass'n*, 382 F. Supp. 3d 1088 (D. Haw. 2019) (on appeal).

## SUMMARY OF ARGUMENT AND INTRODUCTION

The First Amendment includes both the freedom to associate and the freedom not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). A state-imposed mandate requiring an individual to associate with a private organization must pass exacting scrutiny, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2483 (2018), which requires a compelling state interest and narrow tailoring. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015).

Exclusive representation forces public-sector workers to associate with a labor union that speaks on their behalf on issues of substantial public concern. This policy has been justified on two grounds: labor peace and the convenience of the government employer. Both of these are unwarranted empirical assumptions that cannot justify such a significant impingement on associational freedoms.

## ARGUMENT

The court below believes that *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984), forecloses the possibility of relief for the Plaintiff/Petitioner. *See* App. 3 ("*Knight* directly controls the outcome of this case"). The actual holding of *Knight* is straightforward and even obvious: though the First Amendment includes a right to petition the government, it does not guarantee that a particular government official or body will listen in the way and at the time you want. 465 U.S. at 283 ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."); *id*. at 284 ("Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted."). This holding was all that was necessary to decide the case; the petitioning faculty members had no right to force themselves into a private bargaining session ("nonpublic forum") between the government and the union. There is no need to overrule *Knight* because its holding is correct.

Unfortunately, however, the opinion also includes certain dicta unrelated to this holding. *Id*. at 289-91. Some have read more into these dicta than they actually say, creating confusion among lower courts on whether exclusive-representation schemes are constitutional. *See, e.g., Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Kabler v. United Food & Commercial Workers Union*, No. 1:19-CV-395, 2019 U.S. Dist. LEXIS 214423, at *25 (M.D. Pa. Dec. 11, 2019); *Adams*

*v. Teamsters Local Union 429*, No. 1:19-CV-336, 2019 U.S. Dist. LEXIS 211035, at *27-28 (M.D. Pa. Dec. 5, 2019); *Uradnik v. Inter Faculty Ass'n*, No. 18-cv-1895 (PAM/LIB), 2019 U.S. Dist. LEXIS 209957, at *5 (D. Minn. Dec. 5, 2019); *Oliver v. SEIU Local 668,* 418 F. Supp. 3d 93, 98 (E.D. Pa. 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1009 (D. Alaska 2019).

"But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases." *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (plurality). *Accord Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (quoting Chief Justice John Marshall in *Cohens v. Virginia*, 19 U.S. 264 (1821)). This case is just such a case — the ambiguous and errant dicta in *Knight* run headlong into subsequent cases, especially *Janus*. 138 S. Ct. at 2460 ("Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees."); *id*. at 2478 (Exclusive representation is "a significant impingement on associational freedoms."). *See also Harris v. Quinn*, 573 U.S. 616, 638 (2014).

This case presents the Court with an opportunity to repudiate the dicta from *Knight* by reaffirming what it later held in *Janus*. Two justifications have been offered by lower courts as compelling state interests to support exclusive representation: labor peace and the convenience of the government employer. Neither holds up under scrutiny.

## I. Labeling "labor peace" a compelling state interest justifying exclusive representation is an unwarranted empirical assumption.

Some lower courts have said that exclusive representation by itself — separate from any other agency-fee or union-shop arrangement — promotes "labor peace." *See, e.g., Reisman v. Associated Faculties of the Univ. of Me.,* 939 F.3d 409, 411 (1st Cir. 2019); *Mentele v. Inslee*, 916 F.3d at 790; *Uradnik v. Inter Faculty Org.*, No. 18-1895 (PAM/LIB), 2018 U.S. Dist. LEXIS 165951, at *9 (D. Minn. Sep. 27, 2018); *Branch v. Commonwealth Emp't Relations Bd.*, 481 Mass. 810, 821 n.21 (2019).

But the state must do more than just make a bald assertion of "labor peace" to win its case. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 71, (1983) (Brennan, J., dissenting) ("Although the State's interest in preserving labor peace in the schools in order to prevent disruption is unquestionably substantial, merely articulating the interest is not enough to sustain the exclusive-access policy in this case. There must be some showing that the asserted interest is advanced by the policy…"). *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("This Court has never accepted mere conjecture as adequate to carry a First Amendment burden…"). The state must show that exclusive representation is sufficiently necessary to labor peace to justify burdening Petitioners' First Amendment rights. This it cannot do.

### A. Inter-union rivalry is a reality, regardless of exclusive representation.

*Janus* described the core concern that *Abood* considered "compelling" to justify the state's interest in "labor peace" (sometimes also called "labor stability"): avoiding inter-union rivalry.

> By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, inter-union rivalries would foster dissension within the work force, and the employer could face conflicting demands from different unions. Confusion would ensue if the employer entered into and attempted to enforce two or more agreements specifying different terms and conditions of employment. And a settlement with one union would be subject to attack from a rival labor organization.

*Janus*, 138 S. Ct. at 246 (internal punctuation omitted). *Abood's* "unsupported empirical assumption" is "unwarranted" under scrutiny. *See Harris*, 573 U.S. at 638.

Inter-union rivalry already happens under the status quo of exclusive representation. We no longer live in an era in which each industry is serviced by only one or two industry-specific unions. For example, the Teamsters, which historically represented truckers,

now represents government social workers and university student life staff. *See, e.g., Adams v. Teamsters Local Union 429,* No. 1:19-CV-336, 2019 U.S. Dist. LEXIS 211035 (M.D. Pa. Dec. 5, 2019) (objections filed); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392 (C.D. Cal. Sep. 30, 2019). The Communications Workers of America, which historically was for the communications and media industries, now represents higher education researchers and health care workers. *See Wolf v. Univ. Prof'l & Tech. Emples.*, No. C 19-02881 WHA, 2020 U.S. Dist. LEXIS 203109 (N.D. Cal. Oct. 29, 2020). The Service Employees International Union (SEIU) started as a union of janitors; it now numbers among its members over 57,000 university professors and graduate students on sixty campuses. *See* http://seiufacultyforward.org. The American Federation of Teachers now represents "nearly 200,000 health professionals" — "registered nurses, medical researchers, physicians, dietitians, psychologists, X-ray technicians, therapists and others," making it the second-largest nurses union in the AFL-CIO. *See* https://www.aft.org/healthcare/about.

The entry of so many unions into the public-sector space and the gradual shift in union power from the private sector to the public sector has led to greater union competition in the public sector than in the private sector. *See* Kye D. Pawlenko, *Reevaluting Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 668 (2006).

Much of this reflects the ongoing legacy of the 2005 split in the national labor movement between the AFL-

CIO and the "Change to Win" labor federation. Stephen Franklin and Virginia Groark, "Teamsters woo other unions' members," Chicago Trib. (Oct. 8, 2005).

It also reflects the tough truth that as overall labor union membership shrinks, some unions are actively endeavoring to cannibalize affiliates and members from other industries to survive. Alana Semuels, "Labor union 'raids' on rise as rivals seek to boost membership, clout," L.A. Times (Aug. 2, 2013). As part of this rivalry, unions are already criticizing one another's negotiating strategies and arguing over who can deliver a better contract for workers. Terry Maxon, "Machinists beat Teamsters in US Airways voting to represent mechanics and related employees," Dallas Morning News (Aug. 12, 2013). *See* "Portland 911 operators leave AFSCME, join Portland police union," N.W. Labor News (May 23, 2019), https://nwlaborpress.org/2019/05/portland-911-operators-leave-afscme-join-portland-police-union/.

All these examples illustrate a simple reality: unions already must compete for affiliates, and this is a dynamic, ongoing competition based on leaders' personalities, political power, contract successes, and perceived aggression. *See* U.S. Dep't of Labor, "Labor Union Mergers and Affiliations," (2019), https://www.dol.gov/olms/regs/compliance/catips/CompTip_Mergers_Affiliations_2019.pdf ("Labor unions exist in complex hierarchies that may consist of local, intermediate, and national/international unions. The relationships among the unions often change; for instance, one or more unions may merge or one union may affiliate with another union."). Exclusive representation does not advance the

cause of "labor peace" by preventing union competition; union competition is a reality of life for unions today because of the breakdown in industry siloes and national association that characterized unions in a bygone era.[3]

If exclusive representation does not prevent inter-union rivalry, then there is no need for this Court to con-

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[3] Moreover, nowhere is it set in stone that inter-union competition automatically leads to dissension, conflict, and attack. This "unsupported empirical assumption" is hard to disprove using data from the United States because of our long-standing system of exclusive representation. However, research from a 2011 legislative change to multi-unionism in New Zealand indicates that this unsupported empirical assumption is an inaccurate assumption. Mark Harcourt, et al., *US union revival, minority unionism and inter-union conflict*, 56 J. OF INDUSTRIAL RELATIONS 653, 665 (2014) ("More than 70% of the New Zealand union leaders surveyed report not having had even one conflict with another union over the previous three years."). The authors conclude:

> [C]onflicts do happen in a multi-union setting, most commonly over membership and bargaining, but . . . both the level and consequences of conflict are low. This empirical evidence should help to dispel the belief that minority unionism (and multi-unionism) inevitably leads to more conflict and labour fragmentation.

*Id.* at 668.

tinue to condone a "significant impingement on associational freedom" to prevent something that is happening anyway.

### B. Inter-union competition may actually serve workers better.

Implicit in *Abood's* empirical assumption about preventing inter-union rivalry is also an objective assumption that such competition between unions would be bad — that it would "foster dissension" between workers and create ugly rivalries and attacks. Not only is inter-union competition already happening in reality anyway, but *Abood* is also incorrect in automatically assuming this competition is a bad thing.

Inter-union competition could provide employees with a number of positive benefits:

- Employees would have more information about the effectiveness of different unions and could more intelligently choose which unions to join. Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers are Required to Bargain with Minority Unions*, 27 ABA JOURNAL LAB. & EMP. LAW 1, 4 (2011).
- Employees would receive better service from their unions, who could no longer take their membership for granted but would instead feel a need to be responsive and add value for their dues dollars. Kenneth Follett, *The Union as Contract: Internal and External Union Markets After* Pattern Makers', 15 BERKELEY J. EMP. & LAB. L. 1, 36 (1994).

- Competition may actually result in *increased* overall union membership as unions not only add value and provide good customer service, but achieve a higher level of awareness in employees' minds through their attraction efforts. Pawlenko, 8 U. PA. J. LAB. & EMP. L. at 666.
- Competition may lead to higher wages and better benefits for workers as rival unions try to prove their effectiveness. *Id*. at 685-686.
- Employees can also choose between competing unions based on their individual needs. Some unions may be perceived as beholden to older, long-time members, who often hold officer positions, to the disadvantage of newer, younger members. Eric Fruits, *Inter-Union Competition and Workplace Freedom*, Cascade Policy Institute (Dec. 30, 2019), https://cascadepolicy.org/right-to-work/inter-union-competition-and-workplace-freedom-ending-exclusive-representation/, at 6.

### C. The advantages of collectivization for employees are also not a compelling state interest.

Though the substantial part of *Abood's* discussion of labor peace tracks Justice Alito's summary of it in *Janus*, there is also a brief line in *Abood* warning against "eliminating the advantages to the employee of collectivization," by which it means preventing employers from buying off individual workers with lower-wage contracts. 431 U.S. at 221. *Accord* Catherine Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2019). Once again, recent empirical experience shows that this assumption is unwarranted.

The *Wall Street Journal* summarizes a recent academic paper which concluded that when Wisconsin ended exclusive representation and empowered teachers to act as free agents in their own self-interest, many experienced the opposite impact on wages:

> As Stanford University economic researcher Barbara Biasi explains in a new study (which is awaiting peer review), Act 10 created a marketplace for teachers in which public-school districts can compete for better employees. For instance, a district can pay more to recruit and retain 'high-value added' teachers—that is, those who most improve student learning. Districts can also cap salaries of low-performing teachers, which might encourage them to quit or leave for other districts.

"Scott Walker's School Bonus," Wall St. J. (Jan. 29, 2017), https://www.wsj.com/articles/scott-walkers-school-bonus-1485735556 (the full paper by Professor Biasi, now at the Yale School of Management, is available as "The Labor Market for Teachers Under Different Pay Schemes," Nat. Bureau of Economic Research Working Paper No. 24813 (Rev. March 2019), https://www.nber.org/papers/w24813). Anecdotal evidence and a second academic study confirm Prof. Biasi's finding: bad teachers are leaving the profession and good teachers are being rewarded with higher pay thanks to "teacher free agency." Dave Umhoefer, "What Iowa could learn from Wisconsin's collective bargaining changes," Milwaukee J. Sentinel (March

27, 2017); E. Jason Baron (Florida State Univ.), "Union Reform, Performance Pay, and New Teacher Supply: Evidence from Wisconsin's Act 10," SSRN Working Paper (Rev. April 22, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317540. The Wisconsin experience disproves *Abood's* empirical assumption: wages went up, not down, for teachers who are high-quality, or teach in-demand subjects, or bring unique skill sets.

All of these points underline the fundamental truth that *Abood's* assumptions about "labor peace" are at base inaccurate: inter-union rivalry is a reality already, and inter-union competition and free agency may both be a good thing for workers. When placed under scrutiny, it becomes clear these assumptions do not create a compelling state interest to justify exclusive representation.

## II. The government employer's convenience is not a compelling interest justifying exclusive representation.

In addition to labor peace, the dissent in *Janus* offers a second justification for exclusive representation from the government's perspective: "streamlin[ing] the process of negotiating terms of employment." *Janus*, 138 S. Ct. at 2489 (Kagan, J., dissenting). *Abood* notes the government's convenience not in negotiating only one contract, but also the convenience of administering only contract. *Accord Abood*, 431 U.S. at 220 ("The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment.").

First, the state's convenience is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could "no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party"). While it may be quicker or more efficient for the State to negotiate only with one exclusive representative, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

Even if the state could claim that it saves monetary resources by negotiating and administering only one contract, the preservation of government resources is not an interest that can justify First Amendment violations. In other contexts where the state's burden was only rational basis review, the Supreme Court has rejected such justifications. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the "interest in conserving public resources" in a case applying only heightened rational basis review); *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"). Such claimed interests are not enough to "shanghai[ Petitioner] for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

Second, the inconvenience argument is again an "unwarranted empirical assumption" with no particular showing to back it up. Virtually every government employer already negotiates and administers numerous different contracts with different unions that cover different bargaining units. Oftentimes the unions find greater leverage in entering those negotiations together as a coalition to reach a joint contract covering multiple bargaining units. *See, e.g.*, "Chicago Park District Has Reached Deal With 24 Of 25 Unions; Remaining Union Has Served Strike Notice," CBS-2 (Oct. 2, 2019) (reporting that government agency negotiated a joint contract with a coalition of 22 unions). Or the government employer may negotiate with a union or unions on certain common topics, such as the terms and conditions in an employee handbook, but then vary the particulars of individual nonrepresented employees' compensation based on merit or individual concerns, as already happens in the private sector. Fisk & Tashlitsky, 27 ABA JOURNAL LAB. & EMP. L. at 15. The government employer may also decide to extend a flat percentage cost-of-living increase or raise to all employees even if it has the flexibility to vary amounts. So in many instances, the government may have less inconvenience than supposed.

In other situations, the government may find the task of negotiating salaries with individual employees not a burden but an opportunity. A government employer may find that flexibility in setting salaries allows it to recruit better candidates in a highly competitive market for talent. For current employees, variability in increases will give public managers a new tool to align rewards with performance. In both cases, the incremental additional burden of negotiating salary on top

of the potential or past performance evaluation already undertaken may be slight, and the payoff for talent management significant. In all events, these are the sorts of trade-offs that should be considered by public officials, not predetermined by courts.

In sum, the state's convenience is not a compelling interest justifying such shanghaiing. It is not an acceptable excuse in other First Amendment contexts, and there is no strong empirical proof that government employers would be paralyzed by inconvenience without exclusive representation.

## CONCLUSION

The Court should grant certiorari to revisit *Knight's* dicta that are out of step with *Janus*. The compelling state interests offered in *Abood* and the *Janus* dissent to justify exclusive representation are unsupported empirical assumptions that do not stand up under scrutiny. *Knight's* dicta should be reevaluated under the doctrine of stare decisis.

Respectfully submitted,

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