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 United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Counsel of Record
ERIN E. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

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." *Id.* 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Other Authorities

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other things, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make payments to support political or expressive activities with which they disagree. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995). PLF also has participated as amicus curiae in virtually all of this Court's cases involving labor unions compelling workers to support political speech from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Janus v. American Fed'n. of State, Cty., and Mun. Emp's., Council 31*, 138 S. Ct. 2448 (2018).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

As a condition of her employment as a public high school Spanish teacher, Jade Thompson is compelled by Ohio law[2] to accept a labor union as her "exclusive

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Ohio Rev. Code § 4117.05(A) empowers a union to become the "exclusive representative" for "all the public employees in a bargaining unit" by submitting proof that a majority of

bargaining representative" to speak for her on "matters of substantial public concern," *Janus*, 138 S. Ct. at 2460, including the terms and conditions of her employment. That is, the union is the exclusive representative in bargaining over all matters relating to "wages, hours, or terms and other conditions of employment," "the continuation, modification, or deletion of any existing provision of a collective bargaining agreement," matter 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."[3]

Ms. Thompson vehemently opposes the union's positions ranging from fiscal policy to school administration and therefore has exercised her First Amendment right to refrain from joining the union. Nonetheless, the union is statutorily authorized to speak on her behalf. Particularly infuriating to Ms. Thompson, the union advocated against Ms. Thompson's late husband when he campaigned for election to the state legislature and, in doing so, purported to speak for all teachers in the local school district, including Ms. Thompson.

---

employees in the unit wish to be represented by the union. The public employer "shall bargain" with that union. *Id.* § 4117.04(B).

[3] *Id.* § 4117.08(A), (C).

Janus restored the individual rights approach to compelled subsidies, demanding that states obtain an affirmative waiver of First Amendment rights before permitting a union to take money from worker paychecks. *Id.* at 2486. *Janus* does not directly address the related question of exclusive representation, typified by the statute at issue in this case. However, the principles outlined in that case command that courts emphasize that all statutes governing public employment must protect employees' political autonomy. Collective bargaining in the public employment context "occupies the highest rung of the hierarchy of First Amendment value" because it often involves "sensitive political topics," that "are undoubtedly matters of profound value and concern to the public." *Id.* at 2476 (quotation and citation omitted). Specifically, "exclusive representation" is incompatible with *Janus* because public employee unions use their status as exclusive representative to deny nonmember employees a vote and voice in "matter[s] of great public concern" regarding their workplace conditions. *See id.* at 2464 ("When speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.").

Analogous to the unconstitutional conditions doctrine, employees should not be forced to choose between their political autonomy and their ability to communicate about the terms of their own employment. *See, e.g.*, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("the government 'may not

deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech'") (citation omitted); *Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014) (holding that a ban on federally-registered lobbyists from serving on an agency advisory committee properly pled a viable First Amendment unconstitutional conditions claim). Exclusive representation statutes unconstitutionally silence public employees as a consequence of their exercise of First Amendment rights. This allows public employee unions to accomplish indirectly what they are forbidden to do directly. *Cf. Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (invalidating a state's attempt to indirectly compel speech through the denial of an independent, already existing tax exemption).

Public employers are not constitutionally bound to *accept* individual non-union member's requests relating to their employment. But the law cannot constitutionally prohibit individual non-union employees from expressing their thoughts, or grant to the union the power to speak on their unwilling behalf. In short, exclusive representation statutes effectively silence public employees who prefer to speak for themselves, sublimating their individual rights to free speech and association to the union's statutory right to speak collectively on their behalf. This significant infringement on individual employees' First Amendment rights is not justified by any legitimate or compelling interest.

The Court should grant the petition.

REASONS TO GRANT THE PETITION

I

EXCLUSIVE REPRESENTATION STATUTES IMPOSE UNCONSTITUTIONAL CONDITIONS ON INDIVIDUAL WORKERS' EXERCISE OF FIRST AMENDMENT RIGHTS

The "unconstitutional conditions" doctrine holds that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). This doctrine applies to conditions infringing upon First Amendment rights. *Umbehr*, 518 U.S. at 674 ("the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech'") (citation omitted); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437–440 (5th Cir. 2014) (en banc) (unconstitutional conditions doctrine applies to laws burdening political speech and state may not condition bingo license on charity's agreement not to allocate proceeds to political advocacy); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (person cannot be required to forfeit First Amendment rights as the price for exercising other constitutional rights).

For the unconstitutional conditions doctrine to apply, the constitutional interest at issue must "rise to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1427 (1989). The constitutional interest in speaking on one's own behalf

rather than being forced into association with a mouthpiece not of one's own choosing fits well within this category. Freedom of association, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In large part this is because the right to associate "makes the right to express one's views meaningful." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 309 (1984). The right to associate logically includes a corresponding right not to associate. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) ("Freedom of association . . . plainly presupposes a freedom not to associate."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("[F]reedom of speech . . . necessarily compris[es] the decision of both what to say and what *not* to say.").

Moreover, because a public employee union's speech is inherently political, *Janus*, 138 S. Ct. at 2480, the exclusive representation law essentially forces nonunion members to be viewed as agreeing with the union's political stances while at the same time penalizing them by not allowing them any voice in the terms and conditions of their employment. *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967) ("nonunion employees have no voice in the affairs of the union"). This Court noted in *Branti v. Finkel*, 445 U.S. 507, 513–14 (1980), that the denial of a government benefit on account of a person's political beliefs was, in effect, a penalty for holding those beliefs. This penalty, then, was an unconstitutional condition that allowed the state to indirectly interfere

with an employee's constitutional rights in a manner that it could not accomplish directly. *Id.* at 514. *See also Lane v. City of LaFollette, Tenn.*, 490 F.3d 410, 418–19 (6th Cir. 2007) (discussing various cases of unconstitutional conditions applied in the context of public employment); *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 716 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights.").

The right to speak on behalf of a competent adult without that person's consent is so extraordinary that this Court forbids it in most other contexts. For example, when condemned murderer Gary Gilmore declined to appeal his death sentence, the Court refused to allow his mother to act as his "next friend" and speak for him by means of initiating an appeal on his behalf. *Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976). Even with Gilmore's life on the line, the Court would not allow a competent man to be spoken for by someone who would choose a course of action that differed from his own. *See id.* at 1014–16 (Burger, C.J., concurring). In a First Amendment case, *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1987), this Court struck down a state sales tax on general interest magazines that exempted certain types of specialty publications as violating the freedom of the press. The Court rejected the argument that there was no violation because the content of the taxed magazines could be obtained from other, non-taxed publications: "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Id.* at

231 (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring)). This Court consistently protects individuals from those who presume to speak on their behalf, even in matters of life or death. Jade Thompson, whose First Amendment free speech rights relate to matters of great public importance and to her own livelihood, has suffered an equal measure of infringement by the exclusive representation statute, and deserves no less protection.

A state law that permits a union to speak on behalf of an unwilling worker can generate particularly unjust results when a worker is involved in an employment dispute. Whatever can be said for sacrificing an individual's interests for the purported good of the majority in terms of overall workplace terms and conditions, the required sacrifice makes no sense in the context of a single individual's grievance with his or her employer. George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 U. Pa. L. Rev. 897, 903 (1975). In a grievance procedure, the individual worker is rightly concerned with his or her own allegations and interests. *Id.* at 903–04. But the union's interest is "keeping control of the administration of the collective bargaining agreement, since the resolution of one employee's grievance can affect others." *Janus*, 138 S. Ct. at 2468. In short, the union considers an individual workers' interests only insofar as those interests coincide with those of the union itself. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) ("Labor unions

certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargaining agreements and implement them on a daily basis" which is a "sacrifice of individual liberty" that federal labor law demands.).

Exclusive representation statutes grant to the unions exclusive control to pursue institutional or majoritarian interests over individual workers in a wide array of contexts. For example, in *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), this Court held that a union and employer could include provisions in the collective bargaining agreement giving the union exclusive control over processing individual grievances and enforcing the contract through arbitration. By refusing to process an individual grievance, then, the union can prevent a worker from seeking redress under the collective bargaining agreement.[4] *See also Airline Pilots Ass'n Int'l v. O'Neil*, 499 U.S. 65, 78–81 (1991) (union did not breach duty of fair representation by negotiating a strike settlement to the detriment of individual working pilots which was worse than the result that would have obtained by union's unilateral surrender); *Alcozar-Murphy v. Asarco LLC*, 744 F. App'x 411, 412 (9th Cir. 2018) (union may prioritize contract renegotiation over resolving individual grievances).

[4] Although the individual employee may be able to sue the union for breach of its duty of fair representation, *Vaca*, 386 U.S. at 186, this is a costly and time-consuming endeavor, with long odds of success.

Because proving a breach of the duty of fair representation is so difficult,[5] and courts accord so much deference to union actions, disadvantaged individual workers find their livelihoods altered at the union's discretion. *See* Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do In Fact*, 34 Buff. L. Rev. 89 (1985). Requiring nonunion workers to rely on a union that they rejected for representation in individual grievance proceedings is an unwarranted novelty in the law. An individual must not be forced to rely on a representative not of his or her own choosing to settle an individual grievance or complaint when the representative may be unsympathetic—or even antagonistic—to the employee, either personally or ideologically. *Schatzki*, *supra*, at 904. Employees forced to choose between their political autonomy and their ability to communicate about the terms of their own employment are subject to an unconstitutional condition that violates their First Amendment rights.

Recognizing individual workers' constitutional rights offers benefits to unions as well. The free rider problem identified in *Abood* cannot outweigh the infringement on First Amendment rights caused by compulsory subsidization of public employee unions.

---

[5] Individual union workers alleging a breach of the duty of fair representation must prove more than negligence; they must prove that the union's conduct was "so far outside a wide range of reasonableness as to be irrational," *O'Neil*, 499 U.S. at 67, or acted with "improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Spellacy v. Airline Pilots Ass'n Int'l*, 156 F.3d 120, 126 (2d Cir. 1998).

Janus. 138 S. Ct. at 2466. But that does not mean that the free rider problem does not exist. Unions designated as exclusive representatives for nonunion employees must expend resources for employees who do not contribute to paying for them. *See, e.g.*, *Technical, Professional and Officeworkers Ass'n of Michigan v. Renner*, No. 351991, __ N.W.2d __, 2021 WL 68322, at *9 (Mich. App. Jan. 7, 2021) (absent statutory authorization, union could not condition its filing or processing of a nonmember's grievance on the payment of a fee for services). Just as the First Amendment forbids state laws that compel individual employees to support the union, so too should the First Amendment forbid state laws the compel unions to support or represent individual nonunion employees.

These dual impacts—unions providing "free" services to nonunion employees while nonunion employees are deprived of their ability to engage the political speech that inheres in collective bargaining with government agencies—are significant and deserve consideration and resolution by this Court.

II

EXCLUSIVE REPRESENTATION ENCOURAGES LABOR UNION HEGEMONY AND DISCRIMINATION

As a matter of public policy, exclusive representation's silencing of certain employees to benefit others results in discrimination and injustice. As Professor Clyde W. Summers explains, exclusive representation inherently conflicts with public policies founded on individual rights: The "most

critical characteristic of American style exclusive representation is the subservience of the individual employee to the majority union, and the total subordination of the individual contract of employment to the collective agreement." Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 60 (1998). The union exercises total control. *Id*. The desire for standardization within a bargaining unit cannot overcome the burden on constitutional rights caused by exclusive representation.

There are any number of reasons beyond those designated "political" or "ideological" why employee preferences may diverge from those of the union leadership.[6] Some workers simply want to bargain "as individuals rather than to have to pool that leverage and deal with the elected leaders of some representative." Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 Ind. L.J. 103, 124 (2001). Some workers object to associating with a union that exhibits hostility to part-time work, *Conley v. Mass. Bay Transp. Auth.*, 405 Mass. 168, 175 (1989), or that calculates seniority differently depending on whether interim breaks in service were due to pregnancy or other reasons, *Lynn Teachers Union, Local 1037, AFT, AFL-CIO v. Mass. Comm'n Against Discrimination*, 406 Mass. 515, 522 (1990), or that metes out informal "discipline" that

[6] The Marietta Education Association's campaign against Thompson's husband's candidacy for state office was both political and a personal affront.

affects an employee's economic interests in order to "protect the interests of the union or its membership." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 97 (1989) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

The sublimation of individual rights through exclusive representation has had foreseeable, undesirable consequences. For example, in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), this Court described a situation whereby a labor union, as exclusive representative, bargained for work conditions that discriminated against African-American employees. When the injured employees tried to bypass the union and bargain with their employer directly, they were fired. *Id.* at 60. The Court upheld this result as entirely justified by the exclusive representation rule embodied in the National Labor Relations Act, because Congress had "full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Id.* at 62 (citation omitted).

Justice Douglas dissented, writing that the Court's opinions rendered the employees "prisoners of the Union," a "tragic consequence." *Id.* at 73 (Douglas, J., dissenting). *See also*, Cynthia Estlund, *How the Workplace Constitution Ties Liberals and Conservatives in Knots: The Workplace Constitution from the New Deal to the New Right* (book review), 93 Tex. L. Rev. 1137, 1142 (2015) (noting the role of "right to work" in the history of African-American gains in

the labor market and the subsequent troubled—often contentious—relations with labor unions).

Worse, unions have a history of engaging in coercion and retaliation against employees—members and nonmembers alike—who do not take a unified stand with the union. Accepting *Knight*'s theory that no constitutional infringement arises if dissenters can speak on their own invites retribution from union loyalists if those dissenters do speak.[7] Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and nonmembers from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed., 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44–46 (2004). In fact, public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector unions, because many public sector workers cannot readily find similar jobs in the private sector. *See, e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509–10 (Fed. Cir. 1984) (Federal Aviation Administration (FAA) employee was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492–93 (Fed. Cir. 1985) (noting that FAA union would "monitor [] the work of non-participating

[7] Employers may also take adverse actions against employees who are "antagonistic to the dominant union" for the sake of "stabiliz[ing]" labor relations. *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 267 (1944).

[workers] and report [], and even invent [], infractions until the [worker] lost his job or was suspended"). *See also* Maxine Kurtz & Alan Miles Ruben, *Recent Developments in Public Employee Relations*, 19 Urb. Law. 1021, 1048–49 (1987) (describing situation where a member who urged an investigation of mishandled union funds was expelled from the union, which then filed a defamation suit against him; other members who favored an audit were unlawfully threatened with legal action by the union, part of a "policy of intimidation against its members designed to stifle dissent and criticism of the union leadership.") (citation omitted). This is why nonconformists must rely on the Constitution for protection. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process.).

It does not matter whether the employees' fears of retribution are real or imagined. As this Court noted in *Janus*, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." 138 S. Ct. at 2464. When employees are not willing supporters of the union, they "should not be characterized as a group of the union's supporters whose continued existence should be legitimized by the law." Schatzki, *supra*, 123 U. Pa. L. Rev. at 928.

Janus held that the First Amendment protects employees' political autonomy. Ohio's exclusive representation statute unconstitutionally infringes

upon individual workers' rights to think and speak for themselves. As Archibald Cox wrote, "an individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss." *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 610 (1959).

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: February 2021.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
ERIN E. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation