No. 24-71

In the Supreme Court of the United States

AVRAHAM GOLDSTEIN, ET. AL,
Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, ET. AL,
Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *Heritage Foundation v. Parker*, U.S. No. 21A249 (2021); and *Trump v. Vance*, 591 U.S. 786 (2020); or for *amici*, *e.g.*, *Fischer v. United States*, 144 S. Ct. 2176 (2024); *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018); and *McDonnell v. United States*, 579 U.S. 550 (2016), addressing various constitutional issues. The ACLJ is particularly dedicated to our first freedoms, the rights of free speech and religious liberty. The ACLJ submits this brief in support of Jewish government employees and their rights to carry out their closely held beliefs without being forced to have others speak for them in contradiction to their fundamental views.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. The parties have been given timely notice of amicus curiae's intent to file an amicus brief pursuant to Supreme Court Rule 37.2.

SUMMARY OF ARGUMENT

The Constitution protects the right not to speak. That fundamental right is at stake here, in the presence of a mandatory and exclusive union representative, speaking publicly and controversially on behalf of government employees, from whom those employees have no right or ability to truly disaffiliate. This Court should grant review and restore the First Amendment right against compulsion to its rightful place.

In *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), this Court set one aspect of labor law, compulsory fees forcing employees to financially support a union, back on the path of the First Amendment, overturning precedent that failed to properly recognize First Amendment rights. *Id.* at 886. While *Janus* was focused on mandatory funding, its reasoning was not limited solely to questions of financial compensation. Instead, this Court began from the fundamental premise that mandatory representation in whatever form inevitably restricts the fundamental rights of individual employees. The same analysis applies here. A decision not to associate is not qualitatively different from a decision not to fund. In either circumstance, an employee forced to be represented by a union is compelled to speak. Whether in the form of compelled financial support or compelled representation, mandatory representation is inevitably in conflict with the rights of employees protected by the First Amendment, forcing them to

have another speak for them, even when contradictory to their conscience or, as here, their very identity.

The threats of compelled speech are always serious, but they are particularly dangerous and egregious when union members are compelled to have a representative who speaks counter to those members' consciences. The anti-Israel speech in which the professors were compelled to participate here is a symptom of a larger trend, whereby many large unions across the nation have issued statements that attack the state of Israel in the months following the brutal attack on Israel on October 7th, including statements threatening basic Jewish identity. The unconstitutional compulsion that is exclusive representation is even more clearly revealed for what it is when such statements are compelled.

But this system of compulsion is maintained by the effects of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The exclusive representation that that case upheld has proven inherently inconsistent with the First Amendment and destructive of the rights of many public employees. The case can no longer withstand scrutiny, and the time has come for the Court, just as it did in *Janus*, to reconsider precedent in light of the First Amendment and the fundamental rights of government employees.

ARGUMENT

The State of New York has made a union the exclusive representative of its university faculty, with full authority to speak on its behalf, regardless of how controversial or antithetical to the professor's fundamental religious faith and Jewish identity that speech may be. Such a requirement cannot be reconciled with the First Amendment.

I. This Court Should Grant Review to Stop Public Employees from Being Compelled to Speak Against Their Conscience.

At the heart of the First Amendment is the bedrock principle that "the government may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023); *see also Nat'l Inst. of Family & Life Advoc. v. Becerra*, 585 U.S. 755, 780 (2018) (Kennedy, J., concurring) ("Governments must not be allowed to force persons to express a message contrary to their deepest convictions."). This doctrine has been the heart of the First Amendment since at least when this Court recognized and protected the rights of students in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and it has remained strong ever since. In *Barnette*, this Court held that school boards cannot compel speech, in that case the Pledge of Allegiance. *Id.* at 637-38. This Court made clear that to sustain such a compulsory salute, the courts would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public

authorities to compel him to utter what is not in his mind." *Id.* at 634.

The Constitution prohibits compelled speech; it "prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61, (2006); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-98 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). That core right is at stake here.

A. Compelled Union Representation is Just as Egregious a First Amendment Violation as Compelled Financial Support.

This Court has made clear that when public employees are compelled to participate in a union, "[f]undamental free speech rights are at stake." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 886 (2018). This Court, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), rigorously defended the First Amendment rights of public employees to object to the actions of their unions. While *Janus* was focused on mandatory funding, its reasoning was not limited solely to questions of financial support. Instead, the core of this Court's analysis was the premise that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 585 U.S. at 887. Although the Court went on to apply this

principle to the specific issue of *Abood* and mandatory funding, its analysis did not center just on funding, but applied to all compulsion of speech.

This Court relied on fundamental principles of compelled speech, emphasizing that "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Janus*, 585 U.S. at 892 (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984)). The core of this Court's constitutional analysis was that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Id.* at 892. This principle applies, of course, to compelled financial support. But it applies just as strongly to compelled participation and representation. An individual forced to be represented is compelled to mouth speech in contradiction to his conscience, regardless of whether he is also made to provide financial support.

This Court made clear that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 585 U.S. at 893. And it is demeaning of the rights of employees, regardless of whether money changes hands.

Moreover, although this Court overruled *Abood* in *Janus*, even *Abood*, at the bare minimum, recognized that "the First Amendment prohibits the exaction of agency fees for political or ideological purposes." *Janus*, 585 U.S. at 902 (citing *Abood*, 431 U. S. at 234-35). Even *Abood* acknowledged that individuals cannot be compelled to make contributions that support the political activities of a union, making clear that the Constitution prohibits a requirement that a public employee "contribute to the support of an ideological cause he may oppose as a condition of

holding a job." *Abood*, 431 U.S. at 235. For a union to engage in ideological, political activities, those activities must be supported "by employees who do not object to advancing those ideas and who are not coerced into doing so against their will." *Id.* at 236.

This aspect of *Abood* is what ultimately led to the stronger rule in *Janus* and it is bigger than merely funding; this Court highlighted the basic truth that government employees must never be compelled to support ideological, partisan speech with which they disagree. When it comes to speech that is not part of collective bargaining but instead concerns political or ideological issues, the law has always been clear that "a public employer is flatly prohibited from permitting nonmembers to be charged for this speech." *Janus*, 585 U.S. at 909. But even *Abood*'s recognition of the dangers of mandating support for political speech is being ignored here, since mandatory exclusive representation forces public employees to have their representative speak for them, no matter what the political or ideological issue or viewpoint may be.

This Court, by overruling *Abood*, made clear that "compelled union support" cannot and must not be countenanced under the First Amendment, applying the basic truth that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.* at 893. This principle applies with just as much rigor to a decision not to associate as a decision not to fund.

B. The Right Against Mandatory Representation is Particularly Strong for The Rights Of Religious Dissenters.

If unions adhered to simply representing public employees in direct contract bargaining, the First Amendment issues implicated by mandatory exclusive representation would perhaps be more limited or academic. But they do not. In *Janus*, this Court noted that unions can and do engage in public speech "on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Janus*, 585 U.S. at 913-914. Similar activity concerning all those topics continues, and that controversial political activity has only increased in the years since *Janus* was decided. But an example of such speech particularly relevant here is that unions have been regularly using their political power to take positions hostile to Israel and make statements antithetical to the fundamental beliefs and identity of Jews like the petitioners here.

With no apparent reason and no connection to collective bargaining, multiple unions therefore have issued statements that attack the state of Israel in recent months, after the brutal attack on Israel on October 7th. In particular, a recent petition called for the United States to oppose Israel's actions, calling "for an immediate ceasefire and end to the siege of Gaza. We cannot bomb our way to peace." *The US Labor Movement Calls for Ceasefire in Israel and Palestine*, EVERY ACTION, https://secure.everyaction.com/w1qW7B3pek2rTtv9ny5bqw2 (last visited July 27, 2024).

Signatories to this letter, demanding that the United States end support for the nation of Israel's defense of itself from terrorist threats, include:

- The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), one of the largest unions in the country;
- The United Electrical, Radio and Machine Workers of America Union (UE)
- Association of Flight Attendants
- National Nurses United (NNU)
- American Postal Workers Union
- Industrial Workers of the World
- Professional Staff Congress CUNY (the Respondent in this matter)
- Restaurant Workers United

Id. The petition was signed by many more organizations, including many teachers' unions and other educational organizations.

A group of seven significant labor unions also signed a letter on July 23, 2024, demanding President Biden stop military support to Israel, accusing the Israeli government of a "vicious" response to the terrorist attacks of October 7th. Michael Sainato, *Seven Major US Labor Unions Call on Biden to "Shut Off Military Aid to Israel*," THE GUARDIAN (Jul. 23, 2024), https://www.theguardian.com/us-news/article/2024/jul/23/labor-unions-israel-letter-biden. Unions that signed on to the letter include the Association of Flight Attendants (AFA), American Postal Workers Union (APWU), International Union of Painters (IUPAT), National Education Association (NEA),

Service Employees International Union (SEIU), UAW and UE. *Id.* This letter demanded that the government "immediately halt all military aid to Israel." *Id.*

In other instances, individual unions have taken aggressively anti-Israel views that threaten Jews.

- The Oakland Education Association issued a statement that the union condemns "the decades-long violent occupation of Palestine that has led to this escalation of horrific violence. Israel is an apartheid state." *Oakland Education Association Demands Ceasefire, End to Occupation*, WORKER'S WORLD (Oct. 26, 2023), https://www.workers.org/2023/11/74598/.
- The union for the restaurant Starbucks, Starbucks Workers United, reacted to news of the attacks of Oct. 7 by posting (and later deleting) "Solidarity with Palestine" in reaction to the terrorist events, resulting in a lawsuit against it by Starbucks. Dee-Ann Durbin, *Starbucks, Workers United Union Sue Each Other in Standoff Over Pro-Palestinian Social Media Post*, ASSOCIATED PRESS (Oct. 18, 2023), https://apnews.com/article/starbucks-workers-united-union-lawsuit-israel-palestinian-f212a994fef67f122854a4df7e5d13f5.
- The Association of Legal Aid Attorneys, a union representing public defenders in New York City, adopted a resolution accusing Israel of "genocidal rhetoric" and of maintaining "a colonial apartheid occupation regime against the Palestinian people." *Resolution Calling for*

a Ceasefire in Gaza, an End to the Israeli Occupation of Palestine, and Support for Workers' Political Speech, ASS'N OF LEGAL AID ATTN'YS, https://www.alaa.org/media-releases/resolution-calling-for-a-ceasefire-in-gaza-an-end-to-the-israeli-occupation-of-palestine-and-support-for-workers-political-speech (last visited July 27, 2024). This statement is particularly egregious in that it calls for severing all American ties with Israel, demanding the end to "all existing and any future military aid to Israel." *Id.*

- The Massachusetts Teachers Union adopted a motion to "pressure President Biden to stop funding and sending weapons in support of the Netanyahu government's genocidal war on the Palestinian people in Gaza." *Motions*, MASS. TCHRS. ASS'N, https://www.massteacher.org/mta-membership/meeting-agendas-and-alerts/ec-and-board-motions (last visited July 26, 2024).

These are just a handful of examples, among many. Other unions across the country have made similar statements, calling for the elimination of United States support to the world's only Jewish state.

While it is always true that compelling speech raises concerns, and that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights[,]" *Janus*, 585 U.S. 878, 901, that problem is even more exacerbated when it comes to the rights of Jews who feel their existence to be threatened by the anti-Israel statements of their unions. In such a circumstance, they are being

compelled to speak in contravention of their closest-held beliefs and even their very identity. No one would claim that a state could obligate its employees to join a political party: as *Janus* emphasized, many cases have resoundingly rejected that conclusion. *Janus*, 585 U.S. at 926 (and cases cited therein). But under the current system, public employees may as well be. Compelled membership is not somehow better if it is not accompanied by dues; there is no reason for the law to privilege "compelled union support over compelled party support." *Id.* at 926. Unions function as political activity groups and *de facto* auxiliaries of a political party and should be treated as such. No one should be forced to participate in such public advocacy against their will.

C. To the Extent *Minnesota State Board for Community Colleges v. Knight* Approves of Exclusive Representation, It Should Be Narrowed or Overruled.

Exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 585 U.S. 878, 916. The time has come to stop tolerating that impingement, at least under the severe circumstances here. As the Sixth Circuit has highlighted, the reasoning of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) inevitably conflicts with *Janus*. *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 ("*Knight*'s reasoning conflicts with the reasoning in *Janus*. But the Supreme Court did not overrule *Knight* in *Janus*."); *see also Bierman v. Dayton*, 900 F.3d 570, 578 (8th Cir. 2018) ("[W]here

a precedent like *Knight* has direct application in a case, we should follow it, even if a later decision arguably undermines some of its reasoning."). The time has come for this Court to correct *Knight's* aberration.

Knight concerned an objection to an exclusive representation requirement. This Court upheld the obligation, based on its view of the State's "legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291. That justification is a justification limited to "employment-related" speech. The Court *never* suggested that the State has an interest in hearing only one voice on questions affecting the public. But even that reasoning was inherently inconsistent. The facts showed that the mandatory representation was used for the "resolution of virtually all issues outside the scope of collective bargaining." *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 571 F. Supp. 1, 10 (D. Minn. 1982). But regardless, this Court held that Minnesota had "in no way restrained [the instructors'] freedom to speak . . . or their freedom to associate or not to associate with whom they please." *Knight*, 465 U.S. at 288. *Knight* set aside the First Amendment implications of compelled representation and held that compelled representation did not infringe on rights at all. Under it, an individual is forced to be represented by a union, regardless of whether he "may disagree with its view[s]," *Id.* at 273, or disagrees with the messages it is proclaiming.

In *Janus*, this Court addressed stare decisis at length, explaining why the factors of stare decisis did not counsel retaining *Abood*. This Court made clear that "stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights" *Janus*, 585 U.S. at 917. That truth should lead this Court to reassess *Knight*. Under *Knight*, a state can compel its employees to engage in compelled speech through unions, despite fundamentally objecting. As a dissent in *Knight* emphasized, "[t]he effect of the Minnesota statute is to make the union the only authorized spokesman for all employees on political matters as well as contractual matters. In my opinion, such state-sponsored orthodoxy is plainly impermissible." *Knight*, 465 U.S. at 322 (Stevens, J., dissenting).

Knight was poorly reasoned. *See Janus*, 585 U.S. 878, 917-920. *Knight* offered no sound basis to reach the conclusion 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 that state law itself compels association with the representative. *Knight* relied on the idea that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288. The problem with that idea is that choosing to listen to some people speak is different from the state attributing the speech of those persons it hears to those it declines to hear. In other words, the problem of *Knight* is not the State interacting with the unions, it is the State insisting that the speech of those unions

be attributed to dissenters. *Knight* is inherently self-contradictory. The Court simultaneously acknowledged that an exclusive representative had a mandatory right to speak on behalf of those who object, but nonetheless concluded that their freedom not to associate had not been infringed.

Developments in the Court's First Amendment jurisprudence have "eroded" whatever "underpinnings" *Knight* may have had when it was decided, leaving it, like *Abood*, an "outlier among [the Court's] First Amendment cases." *Janus*, 585 U.S. at 881. This Court has issued a series of robust compelled speech cases since *Knight* was decided. 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. Instead, this Court has made clear that "the government may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). *Janus*'s crucial point that the "significant impingement" of compelled representation "would not be tolerated in other contexts" highlights the extent to which First Amendment doctrine has been clarified since *Knight*. *Janus* 585 U.S. at 916. But until *Knight* is overturned, collective bargaining is a First Amendment-free zone.

Forced exclusive representation violates the rights of those who are plainly harmed by forced association with an unwanted speaker and message. If fidelity to the Constitution is to be a hallmark of this Court as an institution of laws, not of men, then precedents that eviscerate First Amendment rights must not be allowed to stand. "No interest which could

be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). To follow stare decisis here, in the face of a decision inconsistent with itself, other precedent, and the First Amendment, would be to further solidify an error.

When it comes to stare decisis, the "most important" interest is "the reliance interests of the American people . . . in the preservation of our constitutionally promised liberties." *Ramos v. Louisiana*, 590 U.S. 83, 110-11 (2020). Those are the interests at stake if *Knight* remains. Public unions are effectively political bodies by which public employees must be represented, no matter how contradictory to their conscience and identity the advocacy of those unions may be. Such a system cannot stand.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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