No. 24-71

IN THE

Supreme Court of the United States

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

WILLIAM L. MESSENGER
MILTON L. CHAPPELL
GLENN M. TAUBMAN
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
THE FAIRNESS CENTER
500 N. Third Street
Suite 600
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Petitioners

December 20, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. The Professors' Case Involves Important Associational Rights Only This Court Can Protect	2
II. The Professors' Proposal Harmonizes This Court's Caselaw	6
III. This Case Is an Ideal Vehicle	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page(s)

D'Agostino v. Baker,
812 F.3d 240 (1st Cir. 2016) 9

Janus v. AFSCME, Council 31,
585 U.S. 878 (2018)..... 2–4, 7, 8

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984)..... 1, 6–7

Moody v. NetChoice, LLC,
603 U.S. 707 (2024)..... 9

Mulhall v. Unite Here Loc. 355,
618 F.3d 1279 (11th Cir. 2010)..... 8

United States v. Sineneng-Smith,
590 U.S. 371 (2020)..... 6

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943)..... 6

STATUTES

N.Y. Civ. Serv. Law § 201(7)(a)–(g) 4

OTHER AUTHORITIES

Br. Amici Curiae of State of N.Y., et al., *Janus*, 585 U.S. 878 (2018) (No. 16-1466), 2018 WL 529834 4

Terry O'Neil & E.J. McMahon, *Taylor Made: The Cost & Consequences of New York's Public-Sector Labor Laws* (May 2018), https://www.empirecenter.org/wp-content/uploads/2018/05/Taylor-Made_2018-Edition_Final-1.pdf 5

TABLE OF AUTHORITIES—Continued

Page(s)

The Editorial Board, *The UAW Has a Gaza Policy*, WALL ST. J. (May 3, 2024), https://www.wsj.com/articles/shawn-fain-uaw-hamas-gaza-israel-campus-protests-39d68e2f 3

U.S. DEP'T OF LAB., BUREAU OF LAB. & STATISTICS, NEWS RELEASE (Jan. 23, 2024), https://www.bls.gov/news.release/pdf/union2.pdf 4

REPLY BRIEF FOR PETITIONERS

Forty years ago, this Court held that the First Amendment does not entitle college professors to a seat at the table in union meetings with their public employer. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). Courts since then have applied *Knight* as a shield against every other constitutional challenge involving exclusive representation.

But the clash between the Professors' associational rights and the controversial speech the Professional Staff Congress/CUNY ("PSC") engages in while empowered as their exclusive representative was not before this Court in 1984. Neither were the compelled speech and association claims the Professors bring to address the constitutional problems they face. Rather than seeking a seat at the table, the Professors want the right not to appear at the table at all.

While acting as the exclusive representative for the Professors, PSC publicly takes sides in highly contentious political issues. This includes endorsing the "Boycott, Divestment, and Sanctions" Movement and labeling Israel an "apartheid" state. Pet.App. 74a, 93a. While doing so, PSC highlights that it represents tens of thousands of faculty members and actively considers how to enact its policy positions into the contract that governs the Professors' employment. *See* Pet. 4–6.

The Jewish Professors do not merely disagree with PSC's positions; the union's positions are antithetical to the Professors' religious and moral beliefs. The Professors want to end all connections to PSC due to its political speech and activism, at the bargaining table and elsewhere. The Professors object to being included with the tens of thousands for whom PSC

speaks, in any context, while PSC continues to spout views the Professors find abhorrent.

New York's Taylor Law prevents the Professors from dissociating themselves from PSC's representation to protest its anti-Semitic conduct and other failings. The Professors are being compelled, against their will, to associate with an advocacy group they oppose.

The Court did not bless such an unconscionable state of affairs in *Knight*. Nor did the Court hold that states have unfettered discretion to dictate which advocacy group represents individuals in their relations with the government. Yet, lower courts now wrongly interpret *Knight* to that effect—to wholly exempt regimes of government-mandated representation from all constitutional scrutiny. It is imperative that the Court grant certiorari to clarify that *Knight* is not so broad as to allow a state to force ardent Zionists to accept the representation of a union that advocates against Israel.

I. The Professors' Case Involves Important Associational Rights Only This Court Can Protect

The Professors' state-mandated relationship with PSC creates a direct conflict between PSC's statutorily authorized position and the Professors' associational rights. The Professors' tailored solution to this conflict remedies their constitutional injury without changing the relationship between PSC and the Professors' public employer.

As this Court has continually recognized, a union's bargaining with the government is necessarily political. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 920 (2018). PSC takes this to the extreme, blending political activities and speech with invocations of the

number of employees it represents, along with open attempts to enshrine its political views into the contract it negotiates. *See* Pet. 4–6.

Because the courts below broadly rejected the Professors' claim, the Professors have no recourse to end their connection with PSC's speech and activities.[1] PSC could even sit at the bargaining table, with the strength of the 30,000 voices it claims to represent, including the Professors' own, and negotiate for the City University of New York ("CUNY") to divest from Israel or break ties to Israeli universities. The Professors have no recourse to prevent that bargaining from being undertaken in their own names.

If this Court does not intervene, the only way the Professors can realistically break from PSC's unwelcome representation is to quit their employment.[2] The Professors' choice is stark: either accept their forced marriage with PSC, along with its ability to speak for them, or allow PSC to drive them and their disfavored viewpoints from CUNY.

The Professors' proposed remedy for their constitutional injury is neither as unusual nor as broad as PSC claims. *See* PSC Br. 13–14. The Professors propose a

---

[1] The Professors are not alone in having a representative who takes such positions. *See, e.g.*, The Editorial Board, *The UAW Has a Gaza Policy*, WALL ST. J. (May 3, 2024), https://www.wsj.com/articles/shawn-fain-uaw-hamas-gaza-israel-campus-protests-39d68e2f.

[2] PSC's assertion that other laws protect the Professors, PSC Br. 22–23, does not exempt compelled exclusive representation from constitutional scrutiny. In fact, the allegations in this case suggest statutory restrictions on PSC's conduct have not cowed it. *See, e.g.*, Pet.App. 72a–73a (detailing one Professor's EEOC-substantiated charge of discrimination against PSC and CUNY predating the facts of this case).

scalpel, not a club. Their solution—an order that removes them from PSC's exclusive representation and bargaining unit—would remedy their constitutional injury without any upheaval or additional demands on the public employer or New York's labor law scheme.

The reason is that PSC would remain an "exclusive" representative, as the only faculty union with which CUNY collectively bargains. PSC would bargain for roughly 30,000 faculty members, minus the six Professors and other dissenters. This is feasible. New York law already exempts certain public employees from exclusive union representation, such as "persons who may reasonably be designated . . . managerial or confidential," along with numerous carveouts and exceptions in additional subsections. *See* N.Y. Civ. Serv. Law § 201(7)(a)–(g).

The Professors' position thus presents no threat to the designation of exclusive representatives—for those who want such representation.[3] And of course the vast majority of public employees around the Nation—approximately 64% in 2023—do not even have mandatory union representation.[4]

In short, the Professors' rights of free association can easily be accommodated without upsetting New York's labor relations scheme. As with other employees

---

[3] There is no need to fear "pandemonium" resulting from vindication of the Professors' constitutional rights. As this Court correctly predicted in *Janus*, despite the protestations of amici including one of the Respondents, *see* Br. Amici Curiae of State of N.Y., et al., *Janus*, 585 U.S. 878 (2018) (No. 16-1466), 2018 WL 529834, *Abood*'s rule was not essential to labor peace. *See Janus*, 585 U.S. at 895–96.

[4] U.S. DEP'T OF LAB., BUREAU OF LAB. & STATISTICS, NEWS RELEASE (Jan. 23, 2024), tbl.3 cont., https://www.bls.gov/news.release/pdf/union2.pdf.

exempted by law, the employer would provide its already-established terms and conditions of employment for nonunionized employees to the dissenters. PSC's ability to speak and bargain for 30,000 would be little diminished by the absence of six employees, while the Professors' First Amendment rights, and freedoms of conscience and religion, would remain intact.[5]

PSC and CUNY's other justification for compulsory union representation is equally unpersuasive. Both PSC and CUNY claim that the passage of the Taylor Law in 1967 quelled labor unrest. In fact, the immediate years following its passage saw "the peak period for illegal public employee strikes in New York State." Terry O'Neil & E.J. McMahon, *Taylor Made: The Cost & Consequences of New York's Public-Sector Labor Laws* 34 n.22 (May 2018), https://www.empirecenter.org/wp-content/uploads/2018/05/Taylor-Made_2018-Edition_Final-1.pdf.[6]

Nor can PSC hide behind claims it was democratically elected. It came into power 52 years ago, and not by a vote of current employees. In any event, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). It violates the Professors' First Amendment rights to subject their associational freedoms to the tyranny of the majority—whether that be legislators or their colleagues.

---

[5] This is not the "members-only" bargaining PSC claims cannot work. Both members and nonmembers would remain by default—but dissenters could not be compelled to do so.

[6] An eventual decrease in labor strikes simply followed national trends. *Id.* at 22.

II. The Professors' Proposal Harmonizes This Court's Caselaw

PSC and CUNY ignore the actual scope of *Knight* and fail to account for the Professors' constitutional right to dissociate themselves from objectionable organizations and speech.

First, PSC and CUNY are remarkably candid about the breadth of their position, stating outright that the "judicial consensus understanding" of *Knight*, CUNY Br. 2, "forecloses First Amendment challenges to exclusive representation," PSC Br. 2. In other words, they believe *Knight* immunizes exclusive representation from any First Amendment challenge. That, certainly, cannot be the case. But unless the Court grants the Professors' petition that will be the cold hard reality—a reality that gives the government carte blanche to force any citizen to accept a mandatory representative for speaking and contracting with the government.

PSC and CUNY's expansive reading of *Knight* is not correct. Courts "normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (citation omitted). *Knight* did not decide whether it violates the First Amendment for a state to prohibit individuals from disaffiliating from an exclusive representative, because that was not a question the parties presented to the Court. *See* Pet. 10–12. The Court stated in *Knight* that "[t]he question presented in this case is whether [a] *restriction on participation* in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273 (emphasis added). "[T]he appellees' principal claim is that they have a right to force officers of the state acting in an official policymaking

capacity to listen to them in a particular formal setting." *Id.* at 282. The Court rejected that argument, concluding "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy." *Id*. at 292.

Knight did not address, much less decide, the question of dissociating presented in this case. The only associational argument *Knight* addressed was the proposition that "Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative" infringed on associational rights. *Id*. at 288 (emphasis added). That is not the argument here. The Professors do not claim it unconstitutional to exclude them from PSC's meetings with CUNY. Rather, the Professors want nothing to do with that union and claim it unconstitutional to prohibit them from dissociating themselves from PSC's representation. The Professors' claim is the polar opposite of the one addressed in *Knight*.

More generally, it beggars the imagination to believe that, when this Court decided *Knight* in 1984, it intended to declare it constitutional for states to prohibit Zionist Jews from dissociating from a union's representation to protest its anti-Semitic stances. Such an issue was not remotely contemplated in *Knight*.

Second, PSC and CUNY's wrongheaded view of *Knight* cannot be reconciled with the Court's recognition that exclusive representation imposes a "significant impingement on associational freedoms." *Janus*, 585 U.S. at 916; Pet. 2, 16. CUNY's implausible claim that the Court was referring to "economic rights," not First Amendment freedoms, makes no sense. CUNY Br. 16–17. *Janus* recognized that, in the public sector, an exclusive representative's function is expressive and

political in nature: to bargain with the government over employment and other public policies. 585 U.S. at 920. Here, New York is forcing the Professors to accept PSC as their agent for purposes of "speech" and "petition[ing] the Government for a redress of grievances" within the meaning of the First Amendment. This is the epitome of compelling association for an expressive purpose.

PSC implausibly claims that it is not empowered to speak and petition for the Professors and others as individuals, but only for the bargaining unit as a whole. PSC Br. 16–17; *see also* CUNY Br. 20. That is illogical. PSC cannot speak for everyone in the unit, but no one in particular. The greater includes the lesser. In the eyes of both New York law and the public, PSC is the Professors' exclusive representative.

PSC argues the Professors do not have to be members of the union. PSC Br. 3, 19. But as the Eleventh Circuit reasoned in *Mulhall v. Unite Here Local 355*, "regardless of whether [an individual] can avoid contributing financial support to or becoming a member of the union, . . . its status as his exclusive representative plainly affects his associational rights" because the individual is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he or she disagrees. 618 F.3d 1279, 1287 (11th Cir. 2010).

PSC and CUNY try to invert reality by claiming that "*[b]ecause* exclusive representation 'is clearly imposed by law, not by any choice on the dissenters part,'" and because "it is 'readily understood that employees in the minority, union or not, will probably disagree with some positions taken by' the union," there is no compelled association. CUNY Br. 20–21 (quoting *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016));

see PSC Br. 17. These facts prove the First Amendment violation. Compulsory associations are, by definition, "imposed by law," and "not by any choice on a dissenter's part." *D'Agostino*, 812 F.3d at 244. That individuals "disagree with some positions" taken by their exclusive representative shows that individuals are being forced to associate with advocacy they oppose. Here, the Professors' First Amendment rights are being violated precisely because they are forced by New York law to associate with an advocacy group that expresses views they abhor.

III. This Case Is an Ideal Vehicle

This case squarely presents the question whether it violates the First Amendment for a state to prohibit individuals from dissociating from a union's representation to protest that union's expressive activities.

CUNY misses the mark in arguing that the Professors are advancing a new legal theory that compulsory representation suppresses their ability to protest PSC's anti-Semitic positions. CUNY Br. 22–23. The Professors have been advancing this claim[7] of compelled expressive association from the outset. Pet.App. 82a–87a. As the Professors stated in their complaint and briefs,[8] by compelling them to remain under the yoke of PSC's representation, PSC and CUNY quash the Professors' ability to express their revulsion with PSC's advocacy. They should be

---

[7] This claim requires the Professors to show that the compelled association interferes with their expressive activity, *Moody v. NetChoice, LLC*, 603 U.S. 707, 729–32 (2024), as PSC itself acknowledges, *see* PSC Br. 18.

[8] *See* Pet.App. 69a–81a; Appellants' Opening Br. 13–24, *Goldstein v. PSC/CUNY*, No. 23-384 (2d Cir. June 12, 2023), ECF No. 58.

free to completely dissociate themselves from that advocacy group.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM L. MESSENGER
MILTON L. CHAPPELL
GLENN M. TAUBMAN
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
THE FAIRNESS CENTER
500 N. Third Street
Suite 600
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Petitioners

December 20, 2024