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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

Cynthia Fleming Crawford
Counsel of Record
Lee A. Steven
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org
lsteven@afphq.org

Counsel for Amicus Curiae

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QUESTIONS PRESENTED

1. Whether the government violates the First Amendment when it designates a labor union to represent and speak for public-sector employees who object to its advocacy on their behalf.

2. Whether *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984) should be limited to its holding or overruled.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(a), Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Those key ideas include the freedoms and rights protected by the First Amendment to the United States Constitution. As part of this mission, AFPF appears as *amicus curiae* before federal and state courts.

AFPF has particular interest in defending the constitutional principles of free speech and freedom of association. It also believes that workers should have greater freedom to structure their work relationships as they determine and to have a greater say in choosing those who speak for them and those with whom

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[1] *Amicus curiae* gave counsel of record for all parties notice of its intention to file this brief at least 10 days before the brief's due date and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

they wish to associate, issues directly impacted by the instant case.

SUMMARY OF THE ARGUMENT

This Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), together with its compelled-speech and compelled-association jurisprudence, compels it to limit or overrule its decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). As the instant case demonstrates, lower courts—even those that recognize the authority and rationale of *Janus*—will be inclined or feel forced to apply *Knight* to reach results contradictory to that which *Janus* demands. Only this Court has the authority to resolve that systemic tension. The Court should grant the Petition and reverse the lower court so federal courts will properly enforce *Janus* in all areas to which it should apply.

ARGUMENT

I. *JANUS* CREATES A DIRECT CONFLICT WITH *KNIGHT* THAT ONLY THIS COURT CAN RESOLVE.

Can state law designate a labor union as the exclusive representative of those public employees who have exercised their right *not* to join the union? The answer should be no. Under *Janus*, the decision of a public employee not to join a union is a protected First Amendment right. It is a decision about whom the employee wishes to associate with—or not associate with—and who she wants to speak—or not to speak—on her behalf. There is no compelling state interest in burdening that fundamental right.

In the decision below, the Sixth Circuit Court of Appeals was aware of this fundamental right and that a state law establishing unions as the exclusive bargaining representative of public employees, even of those who are not members of the union, is "in direct conflict with the principles enunciated in *Janus*." Pet. App. 3; *see also id.* at 7 ("Given the Supreme Court's language, one might think that Thompson should prevail."). The Court of Appeals nevertheless felt bound to ignore *Janus* and instead apply *Knight*, which it interpreted as upholding the constitutionality of exclusive representation relationships. *Id.* at 7–9.

Janus holds non-union public employees cannot be required to pay fees to a union as a condition of employment because any such requirement "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct. at 2460. In reaching this holding, the Court found the forced payment of agency fees by non-union members, even if they covered only the union's collective bargaining activities—and thus presumptively benefited the non-union members—constituted compelled speech and that no compelling government interest justified that infringement of an individual's First Amendment rights. *Id.* at 2466–78.

The application of *Janus* to the present case is straightforward and should have compelled a decision in Petitioner's favor. *Janus* is a robust affirmation of an individual's free speech and free association rights under the First Amendment. It upholds a public employee's political autonomy. *Janus* teaches that, even if there might be a benefit conferred on a non-member by her forced association with a labor union or by the union's speech on her behalf, the First Amendment

forbids that association and speech if they are compelled against the employee's wishes. Any state law that designates a union to be the exclusive representative of those employees who choose to reject union membership, as in the instant case, is therefore constitutionally infirm. To the extent *Knight* holds otherwise, it is in direct conflict with *Janus* and this Court's First Amendment jurisprudence developed in the years since *Knight* was issued.

The state laws at issue in both *Janus* and the instant case designated the public employee union as the exclusive representative of all employees, even of those who do not join the union. Under those state laws, once the union is so designated, individual employees may not be represented by another agent or negotiate directly with their employer. Moreover, even outside the bargaining context, the union stands as agent for all members of the bargaining unit, union members and non-members alike, because of its official recognition as spokesman and representative for the unit in question. It is that compelled association and designation of an agent to speak on the non-member's behalf that is anathema to the Constitution:

> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Janus, 138 S. Ct. at 2464; *see also Healy v. James*, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." A formal recognition of some groups while denying it to others "burdens or abridges that associational right.").

The above warning on the evils of compelled speech is especially poignant in the instant case, where the union opposed Petitioner's late husband when he ran as a candidate for the state legislature. The union went so far as to publish radio and television advertisements against Petitioner's husband and to advocate against him in communications to public school faculty. *See* Cert. Pet. at 2, 6. The union, in other words, was acting as Petitioner's agent in making these communications opposing her husband's candidacy, without any way for Petitioner to disavow that message. No such action should be countenanced as consistent with the First Amendment, and *Janus* teaches that it is in fact not consistent. This Court must grant the Petition to right that wrong.

II. THIS COURT SHOULD GRANT THE PETITION TO LIMIT *KNIGHT* TO ITS HOLDING OR TO OVERRULE IT.

Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Janus*, 138 S. Ct. at 2363 (collecting cases). In the same way, "[f[reedom of association . . . presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986)

(plurality opinion) (recognizing right to be free from forced association with views with which one disagrees).

In light of this jurisprudence, *Janus* explained that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." 138 S. Ct at 2463. It then posited a hypothetical:

> Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Id. at 2463–64.

Unfortunately, that is exactly what the lower court held it was bound to uphold under *Knight* and the Ohio law in question. Because that law grants the union the right to be the exclusive representative of all public school employees, even non-union members, and because the court interpreted *Knight* as upholding the constitutionality of exclusive representation arrangements, the net result of the decision by the Sixth Circuit Court of Appeals is that non-member public employees are assigned a representative against their will who routinely takes positions on matters of public import contrary to the views of those non-members.

The result is contrary to *Janus* and this Court should grant the Petition to correct the error. In doing

so, it will be able to clarify whether *Knight* should be overruled or limited to its narrow holding.

As the Petition describes, *Knight* did not address a First Amendment challenge to the state law in question; the actual question at issue was the right of non-union members to participate in "meet and confer" meetings with the public employer, not their right to avoid a compelled association with the union. *See* Cert. Pet. at 20–21; *Knight*, 465 U.S. at 281 ("'Meet and confer' sessions are occasions for public employers, acting solely as instrumentalities of the State, to receive policy advice from their professional employees. Minnesota has simply restricted the class of persons to whom it will listen in its making of policy."); *id.* 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.").

Knight therefore does not directly speak to the question at issue in this case and the Court should grant the Petition to make that clear. And it is crucial for the Court to make this effort because numerous lower courts have proven themselves incapable of limiting *Knight* to its holding or of attempting to reconcile the case with *Janus* and the Court's other compelled-speech and compelled-association jurisprudence.

Indeed, in addition to the Sixth Circuit case below, the Petition cites decisions from the First Circuit, the Second Circuit, the Seventh Circuit, and the Eighth Circuit that have erroneously relied on *Knight* as authority for the constitutionality of exclusive representative arrangements. *See* Cert. Pet. at 22. Many lower courts, in other words, feel bound by an interpretation of *Knight* that upholds the constitutionality

of exclusive representation mandates like the one at issue here. Yet that is an interpretation at odds with *Janus* and First Amendment jurisprudence more directly on point. Granting the Petition and deciding this case on the merits is the only way to resolve and correct this endemic error.

Finally, to the extent lower courts cited in the Petition have correctly interpreted *Knight*, then the grant of the Petition is necessary so this Court can overrule that case. *See* Cert. Pet. at 23–28 (explaining why overruling *Knight* would be justified). Compelled association with a union that takes positions that the public employee disagrees with cannot survive constitutional scrutiny, and any prior case that holds to the contrary cannot stand.

* * * *

The issue at the heart of this case—whether nonunion public employees can be forced to associate with unions acting as their exclusive representative—is ripe for review by this Court. Not only is there a direct conflict between *Janus* and *Knight*, the constitutionality of exclusive representation relationships is being litigated in multiple Circuits and district courts throughout the country. Until this Court limits or overrules *Knight* and applies its reasoning from *Janus* to this question, the lower courts will continue to be burdened with on-going litigation of this issue and the First Amendment rights of countless public employees will continue to be infringed.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,

Cynthia Fleming Crawford
Counsel of Record
Lee A. Steven
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org
lsteven@afphq.org

Counsel for Amicus Curiae

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