No. 20-1019

IN THE

Supreme Court of the United States

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF FREEDOM FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS 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 *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), should be overruled.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION	1
REASONS TO GRANT THE PETITION	3
I. EXCLUSIVE REPRESENTATION SHIFTS THE BURDEN ONTO EMPLOYEES TO SHOW THE ABSENCE OF AFFIRMATIVE CONSENT	3
II. EXLCUSIVE REPRESENTATION BURDENS EMPLOYEES' DECISION WHETHER TO JOIN A UNION	5
III. EXCLUSIVE REPRESENTATION REVEALS EMPLOYEES' PRIVATE INFORMATION	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page(s)

Bierman v. Walz,
139 S. Ct. 2043 (2019)..... 1

Davenport v. Wash. Educ. Ass'n,
551 U.S. 177 (2007)..... 7

Ferrando v. Dep't of Transp., FAA,
771 F.2d 489 (Fed. Cir. 1985)..... 6

Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016)..... 1

Harris v. Quinn,
134 S. Ct. 2618 (2014)..... 2

Janus v. AFSCME,
138 S. Ct. 2448 (2018).....*passim*

Knox v. Serv. Emps. Int'l Union, Local 1000,
567 U.S. 298 (2012)..... 2, 7

Martel v. Dep't of Transp., FAA,
735 F.2d 504 (Fed. Cir. 1984)..... 6

Minnesota State Bd. for Cmty. Colleges v. Knight,
465 U.S. 271 (1984)..... 2

Regan v. Taxation with Representation of Wash.,
461 U.S. 540 (1983)..... 10

Reisman v. Associated Faculties of Univ. of Maine,
141 S. Ct. 445 (2020)..... 1

Shelton v. Tucker,
364 U.S. 479 (1960)..... 2

TABLE OF AUTHORITIES—Continued

Page(s)

Univ. Prof'ls of Ill., Local 4100 v. Edgar, 114 F.3d 665 (7th Cir. 1997) 7

Uradnik v. Inter Faculty Org., 139 S. Ct. 1618 (2019) 1

CONSTITUTION

U.S. Const. amend. I ..... *passim*

Cal. Const. art. I, § 1 7

STATUTES

Cal. Gov't Code § 1157.3 4

Cal. Gov't Code § 1157.10 ..... 2, 4

Cal. Gov't Code § 3356 6

Cal. Gov't Code § 3555.5 6

Cal. Gov't Code § 3556 ..... 3, 5, 6

Cal. Gov't Code § 3557 5

Cal. Gov't Code § 3558 ..... 3, 8

Cal. Gov't Code § 6254.3 8

Cal. Gov't Code § 6255 8

Cal. S.B. 866, Cal. State Leg., 2017-18 Reg. Sess. (Cal. 2018) ..... *passim*

Ill. Public Act 101-0620 (Dec. 20, 2019) 5

N.J. Workplace Democracy Enhancement Act of 2018, P.L. 2018, c. 015 (A3686 1R) (May 18, 2018) 5

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Complaint of Doug S. Ferrie, Washington Attorney General's Office, Consumer Protection Division (January 27, 2015), *available at* https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf..... 9

Complaint of Richard William Knauf, Washington Attorney General's Office, Consumer Protection Division (July 21, 2011), *available at* https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf.. 9

Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* (2004)..... 6

Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B. C. L. Rev. 857 (1988)..... 7

Maxford Nelsen, *Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity*, The Freedom Foundation (July 2018), *available at* https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf 10

TABLE OF AUTHORITIES—Continued

Page(s)

Maxford Nelsen, *Six Ways SEIU 775 Is Getting Around Harris v. Quinn*, Freedom Foundation (May 18, 2016), https://www.freedomfoundation.com/labor/six-ways-seiu-775-is-getting-around-harris-v-quinn/ 9

INTERESTS OF *AMICUS CURIAE*[1]

The Freedom Foundation (the Foundation) is a 501(c)(3) nonprofit, nonpartisan organization working to advance individual liberty, free enterprise, and limited, accountable government. To promote this mission, the Foundation regularly files *amicus curiae* briefs with this Court. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016); *Reisman v. Associated Faculties of Univ. of Maine*, 141 S. Ct. 445 (2020) (cert denied); *Uradnik v. Inter Faculty Org.*, 139 S. Ct. 1618 (2019) (cert denied); *Bierman v. Walz*, 139 S. Ct. 2043 (2019) (cert denied).

The Foundation works to protect the rights of union members and non-members alike, regularly assisting employees in understanding and exercising those rights. The Foundation is active in California and other states where public sector workers are forced to associate with unions against their will. As such, the Foundation has an interest in the Court accepting review of the instant case and settling the constitutionality of exclusive representation regimes.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The instant case is an ideal vehicle for this Court to settle an important federal question left open by the decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018): What are the limits of the ability of private third-party

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[1] Pursuant to Rule 37.2, all parties received notice of the filing of this brief and granted consent to file. Pursuant to Rule 37.6, *Amicus* affirms that no party's counsel authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

organizations to use state law to compel the association of public employees who do not agree with their speech.

"[T]he First Amendment protects freedom of association because it makes the right to express one's views meaningful." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 309 (1984). Hence, the freedom to associate, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). But the freedom to associate necessarily entails the converse right *not* to associate. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). This Court has, with good reason, questioned relaxing this bedrock prohibition in the context of public sector labor unions. *See Janus*, 138 S. Ct. at 2478 (exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts."); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox*, 567 U.S. at 310–11.

Exclusive representation regimes have enabled state officials to avoid recognition and enforcement of the *Janus* decision and bolster union ranks to the detriment of the First Amendment. A good example of state efforts to avoid the operation of *Janus* is California. Through legislation enacted on the same day the *Janus* decision was issued (SB 866), California shifts the burden to show the lack of affirmative consent onto employees rather than placing the burden to show affirmative consent onto employers and the unions. *See* Cal. Gov't Code § 1157.10, California also burdens employees' ability to make the free and voluntary decision to waive their First Amendment rights by agreeing to subsidize the speech of unions by giving unions exclusive access to new

employee orientations. *See* Cal. Gov't Code § 3556. Finally, California compels employers to provide supposedly private third-party unions with employees' sensitive personal information so the unions can pressure individuals into joining. *See* Cal. Gov't Code § 3558.

Each of these attempts to circumvent *Janus* are allegedly justified by unions' designation as exclusive representatives. The Court should grant the petition.

REASONS TO GRANT THE PETITION

I. EXCLUSIVE REPRESENTATION SHIFTS THE BURDEN ONTO EMPLOYEES TO SHOW THE ABSENCE OF AFFIRMATIVE CONSENT

Public unions routinely use their "unique status" as exclusive representative to speak on behalf of *all* employees within a bargaining unit, even if those employees specifically disagree with the union's speech. But placing the burden on public employees to *dissociate* from unions directly contradicts this Court's holding in *Janus*, where the Court found that by agreeing to subsidize the speech of unions, employees are waiving their associational rights under the First Amendment. *Janus*, 138 S. Ct. at 2486. This waiver cannot be presumed but must instead be demonstrated by clear and compelling evidence. *Id.* In other words, the burden to confirm the waiver is on the employers and unions, not the employees. *Janus*, 138 S. Ct. at 2486.

Under current exclusive representation regimes, a public employee can vote against exclusive representation, and can later decline union membership if the union is certified. Yet they are still presumed by the

law to support the union's inherently political positions in their speech, the bargaining process, and in lobbying efforts. Other kinds of membership organizations may only speak on behalf of members who have taken affirmative action to join and associate. For instance, it is commonly understood that trade associations engaged in lobbying represent only those businesses that join the association as members, not the entire industry regardless of associational status. The same should be true of unions.

In some cases, states have not only codified the presumption of association, but have gone to great lengths to *ensure* that the burden is on employees to dissociate. A particularly striking example is occurring in California. On the same day *Janus* was decided, California Gov. Jerry Brown signed SB 866 into law. The goal of SB 866, which modified several important parts of California law governing relations between public employers, unions, and employees, was to prevent workers from exercising the First Amendment rights that case affirmed.

Under SB 866, public employers are prohibited from verifying with their own employees whether they have affirmatively consented to waive their First Amendment rights. Instead, public employers have no choice but to rely on union representations. Cal. Gov't Code § 1157.3. Additionally, if public employees attempt to communicate their preferences to their own employers, the employers are forced to direct them to the union and are powerless to independently verify whether a bona fide waiver has occurred. Cal. Gov't Code § 1157.10. Instead, California law places the burden on employees to demonstrate to the unions, who have financial and political incentives to retain members, that they do not consent.

Justified by exclusive representation, the result is a system in California, and elsewhere,[2] that keeps public employees locked into union memberships, keeps the dues money flowing, and shifts the burden onto employees to demonstrate their *lack* of consent, not the affirmative waiver the state and unions must demonstrate by clear and convincing evidence under the First Amendment. Just as this Court recognized in *Janus* that making union deductions from a public employee's wages violates the First Amendment "unless the employee affirmatively consents to pay," *Janus*, 138 S. Ct. at 2486, a union claiming to speak on behalf of employees violates the First Amendment's free association protections unless the employee affirmatively consents *before* such speech is made.

II. EXLCUSIVE REPRESENTATION BURDENS EMPLOYEES' DECISION WHETHER TO JOIN A UNION

States' promotion and facilitation of union membership does not stop with burden shifting. California's SB 866 also compels public employers to provide *mandatory* access to all new employee orientations so that unions have a captive audience by which to pitch new memberships. *See* Cal. Gov't Code § 3556. Additionally, unions are empowered to veto any plans for the structure, time, and manner of their access to new employee orientations. *See* Cal. Gov't Code § 3557. Finally, SB 866 requires the entire process remain a secret, as "[t]he date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor

[2] Both Illinois (Public Act 101-0620) and New Jersey (Workplace Democracy Enhancement Act of 2018) have enacted legislation substantially similar to California's SB 866.

that is contracted to provide a service for purposes of the orientation." Cal. Gov't Code § 3556.

Participation in involuntary captive audience sales pitches in other contexts is, to put it mildly, difficult to arrange using legal means. Yet incoming, nonmember public employees are commonly subjected to these coercive meetings solely because of the union's "unique status" as exclusive bargaining representative. New employee orientations are supposed to consist of advising new employees "of their employment status, rights, benefits, duties and responsibilities, or any other employment-related matters." Cal. Gov't Code § 3555.5. But because of the operation of § 3356, California favors union speech and unionization generally at the expense of individual employees' First Amendment rights. This system is all the more concerning considering the all-too-common tactics employed by union agents and members.

Unions rely heavily on peer pressure, intimidation, and coercion to prevent members or nonmembers from dissent. *See* Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union or to stifle their beliefs, lest their perceived disagreement incur retaliation. *See, e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (union members intimidated employee into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (union would "monitor[] the work of non-participating [workers] and report[], and even invent[], infractions until the [worker] los[t] his job or [was] suspended").

Provisions like SB 866 enable the tactics described above and are directly attributable to justifications

based on exclusive representation regimes. Unlike individuals possessing the First Amendment freedom of association, "[c]ollective bargaining is not a fundamental right." *Univ. Prof'ls of Ill., Local 4100 v. Edgar*, 114 F.3d 665, 667 (7th Cir. 1997). Since unions "have no constitutional entitlement to the fees of nonmember-employees," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007), unions should also not be entitled to force individuals to associate against their will. *See* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B. C. L. Rev. 857, 870 n.87 (1988) ("One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle.").

If risks must be borne, they should be borne by "the side whose constitutional rights are not at stake." *Knox*, 567 U.S. at 321. Here, any risk of infringement must not be borne by public employees, whose constitutional rights are at stake; rather, it must fall on the unions who have no constitutional stake in the matter.

III. EXCLUSIVE REPRESENTATION REVEALS EMPLOYEES' PRIVATE INFORMATION

Finally, states also base their decision to reveal the sensitive personal information of public employees to supposedly private third-party unions on exclusive representation justifications. Again, California exemplifies the problem.

In California, the private information of public employees is protected from unjustified public disclosure. This includes a protection stemming from the California Constitution, *see* Cal. Const. art. I, § 1 ("All people are by nature free and independent and have

inalienable rights. Among these are…pursuing and obtaining safety, happiness, and *privacy*.") (emphasis added), as well as statutory protections under the California Public Records Act, Cal. Gov't Code § 6254.3 (exempting home addresses, phone numbers, personal email addresses, and birth dates). A public interest organization like the Foundation, whose mission is to inform public workers about their rights, has to justify access to basic employee contact information based up a vague balancing test empowering local officials' ad hoc discretion to arbitrarily deny access. *See* Cal. Gov't Code § 6255. At least on paper, California takes public employees' right to privacy seriously.

That is, unless the state is providing the information to an exclusive representative. In that case, California is all too happy to *compel* the disclosure of employees' personal information.

SB 866 not only shifts the burden for affirmative consent onto employees, while also burdening their ability to make their own decision by empowering the unions to perform captive audience sales pitches to solicit new members, but also requires the disclosure of employees' personal information regardless of whether they are union members or non-members. This includes the provision of "the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer." Cal. Gov't Code § 3558. Even more shocking, the private information of new employees who have been hired for less than 30 days must also be disclosed in an effort to coerce memberships as soon as possible. *Id.* Section 3558 thus requires individuals to sacrifice personal privacy as the cost of serving in public employment.

Public employees' privacy concerns are well-founded. One particularly egregious union tactic is to use employees' personal information to bombard them with membership solicitations via emails, phone calls, postal mail, and home visits. For example, in a complaint filed with the Washington Attorney General's Office, a husband recounted how an "adversarial" union organizer came to his home demanding to know why his wife, an "individual provider" home caregiver, was not a member of SEIU 775. The complainant described the visit as "harassment" and "extremely threatening." Another independent provider filed a similar complaint outlining how the unions frequent phone calls made her feel like she was "being stalked."[3] SEIU 775 supervisors have even directed staff to 'solicit and lie' to secure dues deduction authorizations from caregivers telephonically."[4]

These same mandatory disclosures are often also included in collective bargaining agreements (CBAs) negotiated by public employers and their union partners. Forced association renders employee information a lucrative bargaining chip. For example, CBAs governing caregivers in Oregon, Illinois and Massachusetts permit unions access to sensitive personal information without any employee authorization and often over

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[3] The complaints were filed with the Consumer Protection Division of the Washington Attorney General's Office on January 27, 2015 and July 21, 2011, respectively. https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf

[4] Maxford Nelsen. "*Six Ways SEIU 775 Is Getting Around Harris v. Quinn,*" Freedom Foundation. (May 18, 2016). https://www.freedomfoundation.com/labor/six-ways-seiu-775-is-getting around-harris-v-quinn/

their objections.[5] Public employers commonly justify this access by referencing unions' "unique status" as exclusive representatives. Worse, objecting employees may not avoid disclosure of their information to the union by resigning union membership. They have no choice.

CONCLUSION

After *Janus*, the question remains regarding the extent that states like California and its union allies can "place obstacles" in between public employees and their First Amendment rights based on questionable theories of exclusive representation. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549–50 (1983). This is the important federal question squarely raised by the instant petition. Unions' designation as exclusive representatives come with a host of special privileges obtained at the expense of individual employees' associational freedoms. *See Janus*, 138 S. Ct. at 2467. But more than the freedom of association is at stake, given the operation of laws like SB 866. Employees' right to the presumption that they have not waived their First Amendment rights is negated. Employees' ability to make the free and voluntary decision to join a union without undue pressure is burdened. Employees' right to keep their personal information private is sacrificed.

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[5] Maxford Nelsen. "*Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity*." The Freedom Foundation. (July 2018). https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

The petition should be granted to settle the important federal question of exclusive representation, which impacts core First Amendment rights and other essential freedoms.

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