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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* UPPER MIDWEST LAW CENTER AND MANHATTAN INSTITUTE SUPPORTING THE PETITIONERS

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August 21, 2024

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STATEMENT OF INTEREST[1]

Upper Midwest Law Center (the "UMLC") is a nonprofit, public interest law firm founded in Minnesota in 2019. UMLC litigates for individual liberty and against government overreach, special interest agendas, constitutional violations, and public union corruption and abuses. UMLC has worked with public employees whose unions violated their First Amendment rights by coercing waiver under threat of unemployment or by outright forgery. UMLC has litigated on behalf of these employees for the full recognition of the procedural and substantive rights guaranteed by the First Amendment and this Court's *Janus* decision.

The Manhattan Institute (MI) is a nonprofit policy research foundation whose mission is to develop and disseminate ideas that foster individual responsibility and agency across multiple dimensions. It has sponsored scholarship and filed briefs opposing regulations that interfere with constitutionally protected liberties. MI has a particular interest in defending constitutional speech protections because its scholars have been targets of speech-suppression efforts.

These cases concern *amici* because they demonstrate violations of public employees' constitutional rights.

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[1] All parties received timely notice of this brief per Supreme Court Rule 37.2. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Freedom of association is essential to academic freedom. For the American university to flourish, it must be "based on the illimitable freedom of the human mind, to explore and to expose every subject susceptible of its contemplation." Letter from Thomas Jefferson to Destutt de Tracy (Dec. 26, 1820), *Founders Online*, National Archives, https://tinyurl.com/ycxuvh35. It was on this principle that Jefferson's University of Virginia was founded. *See id.*

Such freedom is impossible with compelled association; "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 18, 1779), *Founders Online*, National Archives, https://tinyurl.com/ys4uky5t. Observing that principle, this Court held in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, that the "right to eschew association for expressive purposes is likewise protected." 585 U.S. 878, 892 (2018)) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate")).

All but one of the petitioners here are Jewish Zionists. Pet. 5. Professors Avraham Goldstein, Michael Goldstein, Kass-Shraibman, Langbert, and Lax believe and assert that "Zionism is an integral component of [their] Jewish identity." Pet.App. 69a-73a. They therefore vehemently object to their union, the Professional Staff Congress/CUNY—which by law must be their exclusive representative in bargaining—formally engaging in a Boycott, Divestment, and Sanctions ("BDS") campaign. Pet.App. 94a-95a. BDS's

end-goal is to "delegitimize and isolate Israel" and "deny[] the Jewish people the universal right of self-determination." *BDS: The Global Campaign to Delegitimize Israel*, Anti-Defamation League (2016), https://tinyurl.com/mwwzf6fp.

PSC "has legal authority both to speak for the Professors and to enter into binding contracts on their behalf." Pet. 5. Thus arises a major conflict—and, as *amici* describe below, this conflict is widespread: both public and private unions made up of college-campus regulars support BDS and have adopted BDS resolutions even after the mass murder, rape, and kidnapping of innocent Israeli civilians by Hamas terrorists on October 7, 2023.

The petitioning professors' request here is modest and resolves the conflict: they just "want nothing to do with PSC." Pet. 5. This Court should grant *certiorari* and relieve the petitioners of this "sinful and tyrannical" forced association.

REASONS FOR GRANTING THE PETITION

I. Anti-Semitism and Anti-Zionism Are Raging Through University-Related Unions

Over the last few years, American college campuses have become a hotbed for anti-Semitism. It has gotten worse since October 7, 2023, when the terrorist organization Hamas, which is also the controlling government authority in Palestinian-held Gaza,[2] invaded Israel to brutally murder nearly 1,200 civilians and

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[2] Congressional Research Service, *Hamas: Background, Current Status, and U.S. Policy*, updated August 7, 2024, https://tinyurl.com/53mrc26w.

capture another 250 as hostages.[3] Since the events of October 7 and Israel's response, anti-Israel protests have broken out on college campuses across America. One City University of New York (the university system at which the petitioners teach) college scrapped its Hillel Memorial Day event because of anti-Israel protests and security fears.[4]

To cite a higher-profile event from last October:

> Jewish students at Cooper Union in New York City sheltered in a library as pro-Palestinian demonstrators banged on the glass walls of the building. At a pro-Palestinian protest near Tulane University, at least two students were assaulted in a melee that began when someone tried to burn an Israeli flag. And anonymous posters flooded a Cornell message board with threats, prompting the school's president to alert the FBI. "If you see a Jewish 'person' on campus follow them home and slit their throats," one message said. Another threatened to "bring an assault rifle to campus and shoot all you pig jews."

Jack Stripling, *Colleges Braced for Antisemitism and Violence. It's Happening.*, Wash. Post, Oct. 31, 2023, https://tinyurl.com/2pjyf3ps.

This hostile environment doesn't just threaten the safety and well-being of Jewish students; it also

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[3] Congressional Research Service, *Israel and Hamas Conflict in Brief: Overview, U.S. Policy, and Options for Congress*, updated August 1, 2024, https://tinyurl.com/376hbf7x.

[4] Luke Tress, *CUNY college scraps Hillel Memorial Day even over anti-Israel protest, security fears*, The Times of Israel (May 16, 2024), https://tinyurl.com/352782h8.

threatens Jewish and Zionist professors. And this rise in anti-Semitism likewise isn't isolated to student "protest": there has been a similar and disquieting rise in anti-Semitic and anti-Zionist behavior among professors and higher-education-related unions.

At the University of Minnesota, on October 13, 2023, less than a week after the Hamas atrocities, the Gender, Women & Sexuality Studies department of the College of Liberal Arts used the University of Minnesota's website—university property—to issue a statement condemning Israel and "stand[ing] in solidarity with the Palestinian people."[5] The GWSS statement referred to "Hamas fighters" who merely "launched an incursion into Israeli territory" and labeled Israel's response as "total war" that is "the continuation of a genocidal war against Gaza." The statement claims that October 7 was not an "unprovoked terrorist attack" and suggests Israeli "settlements" are to blame. The GWSS statement finishes with a flourish by "reaffirm[ing] support for the Boycott, Divestment and Sanctions Movement." *Id.*

In December 2023, University of Minnesota Law Professor Richard Painter and former Regent Michael Hsu called for a federal investigation into anti-Semitism exemplified by the GWSS statement.[6] On

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[5] *GWSS Faculty Statement on Palestine*, Univ. of Minn. College of Liberal Arts (Oct. 13, 2023), https://tinyurl.com/mtf4rtdm.

[6] Liz Navratil, *Complaint seeks federal investigation of antisemitism at University of Minnesota*, StarTribune (Dec. 11, 2023), https://tinyurl.com/2jk9j4c2.

January 16, 2024, the U.S. Department of Education announced it had launched such an investigation.[7]

Likewise, some public-sector unions, such as teachers unions in San Francisco and Seattle, have endorsed the BDS movement.[8] Parroting anti-Zionist talking points, the San Francisco union explained that it so resolved based on the lie that "the US government gives to Israel, thus directly using our tax dollars to fund apartheid and war crimes." *Id*.

That tired anti-Zionist trope is objectively false. Israeli Arab citizens make up about 20% of Israel's population and serve Israel as "judges, ambassadors, legislators, journalists, professors, [and] artists[,] and play prominent roles in all aspects of Israeli society."[9] In a November 2023 poll, 70% of Arab Israelis said they "feel part of the country," an all-time high for that sentiment.[10]

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[7] Liz Navratil, *U.S. Department of Education investigates University of Minnesota after antisemitism complaint*, StarTribune (Jan. 17, 2024), https://tinyurl.com/5xb4zk8t.

[8] *See e.g.*, Gabriel Greschler, *San Francisco's teachers union becomes first K-12 union to endorse BDS*, Jerusalem Post (May 27, 2021), https://tinyurl.com/2s3fadw5; Michael Arria, *Seattle teachers union endorses BDS, demands end to police partnership with Israel,* Mondoweiss (June 18, 2021), https://tinyurl.com/kztu3r2u.

[9] *Allegation: Israel is an Apartheid State*, Anti-Defamation League (July 8, 2021), https://tinyurl.com/49uzhzr8.

[10] *Israel's Arab minority feels closer to country in war, poll finds*, Reuters (Nov. 10, 2023), https://tinyurl.com/yhht3pyd.

In contrast, of the 2 million residents of Hamas-controlled Gaza, there are *zero* Jews.[11] It is obvious why: Hamas's "Covenant of the Islamic Resistance Movement" issued on August 18, 1988, expressly calls for the murder of all Jews:

> "The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews." (related by al-Bukhari and Moslem).[12]

Given Hamas's abject hatred toward the Jewish people and the State of Israel, and the importance of Israel in protecting Jewish people from certain death at their hands, the petitioners' belief that "Zionism is an integral component of [their] Jewish identity," Pet. App. 69a-73a, should be much easier to understand.

And yet, one of the largest public-sector unions in the country, the American Federation of Teachers, faced proposed resolutions from within its ranks at its July 2024 convention that would

> use existing digital media resources to write and distribute an article educating members about the Palestinian-led Boycott, Divestment, and Sanctions (BDS) movement, including how

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[11] *Gaza Strip*, CIA World Factbook (July 24, 2024), https://tinyurl.com/27fe82jk.

[12] *Hamas Covenant 1988*, Yale Law School: The Avalon Project (Aug. 18, 1988), https://tinyurl.com/yuy4f94f.

> it is connected to the broader labor movement, legislative efforts to restrict speech in relation to BDS, and NEA members' participation in the movement.[13]

This and other proposed resolutions calling for boycott of specific companies and calling on the U.S. government to end all military aid to Israel have been condemned by a coalition of Jewish education groups as anti-Semitic because they revive "ancient blood-libel accusations against Jews worldwide."[14] Thankfully, these resolutions were not adopted by the AFT, but they make clear the existence of a strong undercurrent of anti-Zionism among unionized educators. Indeed, unions representing academic faculty, graduate students, and other higher-education employees have likewise supported the anti-Semitic and anti-Zionist BDS movement.[15]

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[13] Catrin Wigfall, *National teachers' union to vote on several anti-Israel resolutions*, Center of the American Experiment (July 4, 2024), https://tinyurl.com/bdeer5pv.

[14] Michael Starr, *US teacher union criticized for BDS, ceasefire, campus protest resolutions*, Jerusalem Post (July 17, 2024), https://tinyurl.com/3x5sy7f2.

[15] *See e.g.*, Cam E. Kettles, *Harvard Grad Union Endorses BDS and Calls for Ceasefire, Drawing Member Criticism*, The Harvard Crimson (Nov. 13, 2023), https://tinyurl.com/2y5ur7hp; Kaitlin Lee, *UAW-UC votes to authorize strike in response to UC's actions against pro-Palestine protesters*, The UCSD Guardian (May 19, 2024) https://tinyurl.com/2s3b2e4p; *Resolution: Committing to a Labor Strategy towards Boycott, Divestment and Sanctions at the University of California (UAW 2865 and 5810 Berkeley)*, Labor for Palestine (Jan. 31, 2024), https://tinyurl.com/yjey2nte; *Statement from APWU General Officers on the Conflict in Israel and Palestine*, APWU (Nov. 8, 2023), https://tinyurl.com/bdcu9ymj.

A telling example comes out of Columbia University. Student Workers of Columbia, a student workers union in UAW Local 2710 representing over 3,000 graduate and undergraduate student workers at Columbia, joined a coalition of organizations called Columbia University Apartheid Divestment (CUAD).[16] Their mission includes "urging Columbia to divest all economic and academic stakes in Israel" and to "challenge the settler-colonial violence that Israel perpetrates…that began [with] Zionist militias…in 1948." *Id*. This hearkening back to the UN's formal recognition of Israel in 1948 appears intended to strike against the very existence of the Jewish State.

And again, this union represents over 3,000 employees and is the bargaining unit for all student workers employed by Columbia. The union's public demands are the *de facto* demands and views of all student workers, regardless of whether they agree with them or not. This becomes particularly relevant when those *represented by* the union are Jewish and the demands strike at the very core of their religious beliefs, political views, and cultural identity.

Similarly, the MIT Graduate Student Union (MIT GSU-UE) denied five Jewish students' request to be exempted from paying dues or even membership because of their sincere religious beliefs after MIT GSU-UE endorsed the BDS movement along with other anti-Semitic behavior.[17] These Jewish students are being compelled to associate with and implicitly

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[16] CUAD, https://cuad.org/ (last visited June 27, 2024).

[17] Matt Lamb, *MIT union ignored Jewish members' objection to Israel boycott: federal complaint*, The College Fix (June 12, 2024), https://tinyurl.com/44a8mhk8.

endorse these views despite their most sincere religious beliefs, so they filed discrimination charges with the EEOC. *Id.*

Even more recently, at the University of Chicago, the newly formed Graduate Students United (winter 2023) made one of their first initiatives as a union the "reaffirm[ation]" of BDS—just one week after the October 7 murders, rapes, and kidnappings of Israeli civilians by Hamas terrorists.[18] They explicitly joined calls to "honor the martyrs"; fight against campus "Zionists"; "liberate" Palestine from the "River to the Sea," and by "any means necessary"; and "bring the intifada home." *Id.* Because that union forces graduate students at Chicago to pay agency fees to it regardless of whether they are members, a group of those students sued the union to extricate themselves from complicity with such hateful rhetoric.[19]

While the professors here are not forced to pay agency fees to PSC thanks to the Court's correct decision in *Janus*, they are still forced to associate with it. All but one are Jewish and all strongly believe in the right of a Jewish state to exist in its historic homeland of Israel. To the Jewish professors, Zionism is part of their identity. Pet. 4-5; Pet.App. 69a-73a. Yet they are forced by the state to associate with PSC—which resolved in 2021 to support the BDS movement—as their exclusive representative. Pet.App. 94a-95a (Compl. Ex. C). The professors are thus forced to

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[18] Compl. ¶4, *Graduate Students for Academic Freedom, Inc. v. United Electrical, Radio, and Machine Workers of America*, No. 1:24-cv-6143 (N.D. Ill. July 22, 2024).

[19] *Id.*; *see also* Will Baude, *Graduate Students for Academic Freedom v. Graduate Students United at UChicago*, The Volokh Conspiracy (July 23, 2024), https://tinyurl.com/33trsc9z.

associate with a group which they believe openly opposes the very existence of that which is essential to their Jewish identity. This is compelled association, plain and simple, and of the worst possible kind.

Even though the professors are not full-fledged "members" of PSC, they are part of the bargaining unit represented by PSC, and PSC thus represents them in all negotiations with CUNY under New York's Taylor Law. Pet. 3. Thus, for all intents and purposes, PSC's positions are the professors' positions vis-à-vis CUNY.

It would be one thing for PSC to take positions on issues directly related to employment. But it is quite another thing when those positions have nothing to do with employment and are, at best, at complete odds with—and, at worst, downright hostile to—the sincere beliefs of those it represents.

With public-sector and higher-education unions taking progressively more anti-Semitic and anti-Zionist positions, and college campuses raging with anti-Semitism and anti-Zionism, the petitioners are surrounded on all sides by those who apparently hate them just because of who they are. Worst of all, the PSC's positions have little, if anything, to do with the actual so-called purposes of exclusive representation: "to facilitate labor peace," and to prevent "confusion from multiple agreements or employment conditions." *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019) (citing *Janus*, 585 U.S. at 895). In no other context would the law allow such compelled association against an individual's sincerely held beliefs, religious or otherwise—and neither should it here.

The Court should grant the Petition to ensure that people are not compelled to associate with public-

sector unions who are *representing them* by taking positions on important public issues unrelated to the terms and conditions of employment.

II. *Knight* Does Not Foreclose the Professors' First Amendment Claims against Being Forced to Associate with Those Unions

Lower courts, including the Second Circuit here and the Seventh, Eighth, and Ninth Circuits, have repeatedly misapplied *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) by holding that it is essentially a union trump card for any question as to employee rights vis-à-vis their exclusive representative. *See Goldstein v. Prof'l Staff Congress/CUNY*, 96 F.4th 345, 349 (2d Cir. 2023); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 863-64 (7th Cir. 2017); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Mentele*, 916 F.3d at 788.

The Second Circuit below cited *Knight* to conclude that "the exclusive collective bargaining that [the professors] are subject to under the Taylor Law poses *no* First Amendment problem." *Goldstein*, 96 F.4th at 349-50 (emphasis added). The court held that the petitioners' view of *Knight* is "far too narrow," *id.* at 349.

But really, it was the lower court's reading of *Knight* that was far too broad. In *Knight*, the Minnesota Public Employment Labor Relations Act (PELRA) required "public employers to 'meet and negotiate' with exclusive representatives concerning the 'terms and conditions of employment.'" *Knight*, 465 U.S. at 273-74. PELRA also granted professional employees the right to "meet and confer" on issues beyond "terms and conditions" with their employer through the exclusive representative tasked with negotiating. *Id.* at 274. The Minnesota Community

College Faculty Association (MCCFA) was established as the exclusive representative for all faculty of Minnesota's community colleges and fulfilled both of PELRA's requirements with the State Board. *Id.* at 275-76. MCCFA and the Board set up "meet and confer" committees, which the Board considered to be the faculty's "official collective position." *Id.* at 276.

Those challenging this setup were 20 Minnesota community college faculty. They believed the "meet and negotiate" and "meet and confer" processes were unconstitutional. *Id.* at 278. Specifically, the faculty contested whether PELRA could constitutionally grant the MCCFA the power to limit any conversation with the employer to only those on the "meet and confer" committees (which the challengers were not). *Id.*

The *Knight* Court framed the question as "whether [the] *restriction on participation* in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views." *Id.* at 273 (emphasis added). And the Court's opinion reflected this narrow question.

A. *Knight* ruled only on the right to be heard by government, not the right not to be associated with a bargaining representative.

The Court's split its holding in Part II-A into three parts: (1) members of the public do not have a general right to be heard by public bodies, (2) public employees do not have a special right to a voice in policy making by the government, and (3) the Constitution does not confer a right to faculty to participate in policy-making by academic institutions. *Id.* at 282-87. All

three parts revolve around a *right to participate or be heard by government* and public bodies. *E.g.*, *id.* at 283 ("Appellees have no constitutional right to force the government to listen to their views.").

This holding does not apply, on its face, to the petitioning professors here. Instead of seeking to directly participate in the policymaking process, the petitioners are merely asking not to be compelled to associate with the union's anti-Semitic and anti-Zionist viewpoints. Instead of looking to be *involved in* PSC's negotiations, the petitioners want *no involvement*; they do not want their views to be represented by PSC. The question in this case is not whether a union can restrict who can participate in the negotiation process, but whether professors and higher education employees can be compelled to associate with and be represented by anti-Semitic actors with whom they "vehemently disagree." Pet.App. 80a (Compl. ¶68).

B. *Knight* was decided in the context of being kept out of negotiations, not kept in.

The portion of *Knight* that most lower courts have relied on in holding that the case forecloses First Amendment challenges to exclusive representation is Part II-B. *See e.g.*, *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 968 (10th Cir. 2021); *Mentele*, 916 F.3d at 786; *Bierman*, 900 F.3d at 574; *Goldstein*, 96 F.4th at 349. But Part II-B does not foreclose the claims at issue here. As Chief Justice Marshall once stated, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). *Knight* is no exception to this maxim.

In Part II-B, Justice O'Connor stated that the Minnesota faculty members' "associational freedom has not been impaired" because they were still "free to form whatever advocacy groups they like" and were not required to join MCCFA. *Knight*, 465 U.S. at 289. Lower courts have taken this statement and others like it to conclude that *Knight* is broad enough to foreclose the petitioners' claims and other similar claims from being brought.

Justice O'Connor also stated that "[a]ppellees speech and associational rights, however, have not been infringed by Minnesota's *restriction of participation*" in the exclusive representation process. *Knight*, 465 U.S. at 288 (emphasis added). The basis for allowing this restriction is "*government's* freedom to choose its advisors." *Id.* Indeed, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.*

Courts have either misunderstood or brushed away these obvious limitations on *Knight*'s impact. Indeed, every circuit to take up this issue has come to the same erroneous conclusion. See *Goldstein*, 96 F.4th at 349; *D'Agostino v. Baker*, 812 F.3d 240, 243 (1st Cir. 2016); *Adams v. Teamsters Union Loc. 429*, 2022 WL 186045 at *2 (3d Cir. Jan. 20, 2022); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 382 (4th Cir. 2021); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813-14 (6th Cir. 2020); *Hill*, 850 F.3d at 863-64; *Bierman*, 900 F.3d at 574; *Mentele*, 916 F.3d at 788; *Hendrickson*, 992 F.3d at 969. *Knight*'s blessing on government ignoring some employees' attempts to negotiate their own contracts is a far cry from those employees being lumped in with an exclusive representative on issues far afield from "terms and conditions" of employment.

Again, the professors here are not claiming a right to participate, but rather a right *not* to participate. The question is not whether their associational freedoms are violated by not being able to participate, but whether they are violated by being forced to participate.

Knight "cannot be reduced to that one [paragraph]" taken without context. *Groff v. DeJoy*, 600 U.S. 447, 468 (2023). And because the lower courts have been unable to appreciate *Knight*'s limitations, this Court should either clarify *Knight*'s original meaning or amend it. After all, the lower courts' repeated misinterpretation of *Knight* goes far beyond the question actually presented in the case, and "[a] judge's power to bind is limited to the issue that is before him . . . ." *United States v. Rubin*, 609 F.2d 51, 69 n. 2 (2d Cir. 1979) (Friendly, J. concurring).

The Court has clarified important cases despite agreement across lower courts where it is clear those lower courts are simply wrong. In *Groff*, for example, the Court clarified its previous ruling in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), stating that "more than a *de minimis* cost" is not enough to be an "undue hardship." *Groff*, 600 U.S. at 468. Prior to *Groff*, "many lower courts" had come to the opposite conclusion, yet this unanimity did not stop the Court from hearing the case and coming to the opposite (but correct) conclusion. *Id.* at 454, 464.

The Court should likewise grant the petition here to clarify or amend *Knight* because of lower courts' ongoing and common errors. *Knight* simply does not foreclose a freedom to dissociate from those with whom one vehemently disagrees, as the Court's associational-freedom jurisprudence makes clear.

III. The Court's Compelled-Speech and -Association Jurisprudence Supports the Petitioners' Claims

The Court's jurisprudence in other compelled-speech and -association cases strongly supports the petitioners. *Knight*, like *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), once was, is a constitutional outlier.[20] The Court has deemed compelled associations far less intrusive than that forced upon the professors here to be unconstitutional.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court held that school children could not be compelled to salute the American flag and say the pledge of allegiance. The challenged statute in *Barnette* merely required students to salute while saying the pledge—nothing more. *Id.* at 628-29. Appellees were children and parents of children who were practicing Jehovah's Witnesses who believed that their religion prohibited them from saluting the flag. *Id.* at 629. The Court rejected the claim that "national unity" made the compulsion constitutional, with Justice Robert Jackson famously saying:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are

[20] It is no surprise that *Knight* relied on the now-overruled *Abood*. *See Knight*, 465 U.S. at 278, 291.

> any circumstances which permit an exception, they do not now occur to us.

Id. at 642. This case presents no new circumstance which permits an exception to this "fixed star." *Id.*

The petitioners, by virtue of being compelled to associate with PSC, have no less of a claim than the students in *Barnette*. While not forced to say out loud the PSC's positions, the professors are represented by PSC in negotiations with CUNY. In non-bargaining contexts as well, the professors are thus compelled to take on PSC's anti-Semitic and anti-Israel views as their own. In any other arena—taken out of the apparently unicorn context of union negotiations—this compelled speech would be deemed to "transcend[] constitutional limitations." *Id.*

But the context of exclusive representation should not change the calculus. Even if the state may have an interest in promoting "labor peace," *see Janus*, 585 U.S. at 895, it should not lead to "fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Barnette*, 319 U.S. at 641; *see also Janus*, 585 U.S. at 895 ("*Abood*'s fears were unfounded" related to the purported worry over multiple contract negotiations causing rivalries in the work force and dissension). There should be no fear that allowing dissenting Jewish or Zionist faculty to dissociate from an anti-Semitic union will somehow collapse the labor system.

Wooley v. Maynard, 430 U.S. 705 (1977), furthers this point. In *Wooley*, New Hampshire law ironically compelled citizens to display on their license the state motto, "Live Free or Die." *Id.* at 707. The Court had no trouble holding that the statute violated the plaintiffs' First Amendment right to refrain from speaking

at all. *Id.* at 714-16. In other words, the state could not compel individuals to display the state motto on their license plate and use private property as a "mobile billboard" for the state. *Id.* at 715. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* This is the norm for this Court's compelled association and speech jurisprudence.

If Jehovah's Witnesses in New Hampshire can't be forced to display a rather harmless state motto on a license plate, shouldn't the professors here be free from association with an anti-Semitic and anti-Zionist faculty union? Are there really such compelling state interests here as to move the facts of this case beyond *Wooley* and out of the reach of First Amendment protections? The answer should be a resounding "no" if the First Amendment really is the "fixed star" in our constitutional constellation. *Barnette*, 319 U.S. at 642.

To be sure, there are instances outside of union cases where this Court has held that compelled association and speech may be permitted. In *Roberts v. U.S. Jaycees*, 468 U.S. at 623-25, for example, the state's compelling interest in ending gender discrimination in places of public accommodation allowed it to compel women to be "regular members" of the Jaycees. The Court noted that "[freedom] of association therefore plainly presupposes a freedom not to associate" but that this freedom "is not [] absolute." *Id.* at 623. But infringements of this freedom must be "justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

In *Roberts*, the state had a compelling interest in ending gender discrimination that could be achieved only by forcing the Jaycees to allow women to become regular members. There is nothing like that here; it is unclear how compelling professors to associate with PSC will accomplish any "labor peace" interest. Instead, the forced association inherent in the Taylor Law only serves to increase rancor between the union and those it purports to represent.

In view of the Court's other compelled-speech and -association cases, the Court should allow the petitioners to dissociate with views they find reprehensible.

IV. Academic Freedom Requires Heightened Protections for Freedom of Association and Speech

"It should come as little surprise . . . 'that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.'" *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Janus*, 585 U.S. at 905 & n.8). Thus, "[u]niversities have historically been fierce guardians of intellectual debate and free speech, providing an environment where students can voice ideas and opinions without fear of repercussion." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019).

This Court has jealously protected academics against intrusions on their free association and expression. Thus, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), after Professor Paul Sweezy "declined to reveal the contents of a lecture," and the New Hampshire Attorney General held him in contempt for his refusal, this Court "held that a legislative inquiry into the contents of a professor's lectures 'unquestionably

was an invasion of [his] liberties in the areas of academic freedom and political expression." *Meriwether*, 992 F.3d at 504 (quoting *Sweezy*, 354 U.S. at 250).

A decade later, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court held that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned . . . . The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 603. The Court ferociously defended academics' freedom from compulsion, holding that "when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake. Our nation's future 'depends upon leaders trained through wide exposure to [the] robust exchange of ideas'—not through the 'authoritative' compulsion of orthodox speech." *Meriwether*, 992 F.3d at 505 (quoting *Keyishian*, 385 U.S. at 603 and citing *Sweezy*, 354 U.S. at 249-50 (plurality opinion) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.")).

Countless other cases uphold American law's broad and unflinching defense of academic—and academics'—freedom of speech, expression, and association. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition") (other holdings "overruled," "for all

intents and purposes," by *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 287 (2023) (Thomas, J., concurring)); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is . . . so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."); *Buchanan v. Alexander*, 919 F.3d 847, 852 (5th Cir. 2019) ("academic freedom is a special concern of the First Amendment"); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (citing *Grutter* and *Rust*); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) ("We are . . . persuaded that *Garcetti* would not apply in the academic context of a public university").

Academic freedom is essential to American liberty and democratic-republican principles. For the American university to flourish, it must be "based on the illimitable freedom of the human mind, to explore and to expose every subject susceptible of its contemplation." Letter from Thomas Jefferson to Destutt de Tracy (Dec. 26, 1820). Only based on this principle can universities serve their purpose, protected by the Constitution; only then will universities "not [be] afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it." Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), *Founders Online*, National Archives, https://tinyurl.com/uttu5s58.

The university is not designed merely to teach students how to pass exams or write excellent papers. Rather, it is designed for students to learn to think

critically about issues and to produce "decent world citizens who can understand the global problems . . . [and] who have the practical competence and the motivational incentives to do something about those problems."[21] In short, American higher education must enable students to learn the "analytical questing and questioning" necessary to think through the problems of the world.[22]

Creating an environment where students learn to think critically requires drawing from every source of knowledge. It means, then, allowing those like the professors here the freedom to be a part of the university setting without sacrificing their core identities. And if the end goal of teaching students to think critically is the furtherance of knowledge and the truth, the professors, whose knowledge and experience are drawn from their core identities, must be allowed to pursue knowledge and the truth consistent with the dictates of their consciences. This requires freedom of association and dissociation. "People need independence and liberty to challenge authorities, question leadership, and develop new ideas."[23]

Forcing the professors to literally quit their jobs to escape the compulsion inherent in their association

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[21] Christopher J. Thomas, *Building a Better World through Education: 6 Big Ideas*, Brookings Inst. (July 16, 2020), https://tinyurl.com/4wf7dt9r.

[22] John J. DeGioia, *The Practices of Freedom: Freedom of Speech, Academic Freedom, and Shared Governance*, Higher Education Today (Apr. 17, 2019), https://tinyurl.com/2yyf7k2y (citing John O'Malley, *Four Cultures of the West*).

[23] Darrell M. West, *Why academic freedom challenges are dangerous for democracy*, The Brookings Institution (Sept. 8, 2022), https://tinyurl.com/mv39p456.

with PSC would eviscerate the First Amendment's academic-freedom protections. But under the Second Circuit's reasoning, that is their only escape. The professors must either accept association with the PSC and its anti-Semitic, anti-Zionist agenda, or they must resign from CUNY all together.

This forced choice is antithetical to the American tradition of academic freedom under the First Amendment. If colleges and classrooms really are supposed to be the "marketplace of ideas," then the careers of the faculty instrumental in creating the marketplace should not be determined by whether they are willing to associate with a union whose positions take aim at their very existence and core identity as Jews. Pet.App. 69a-73a.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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August 21, 2024