No. 18-1492

In the Supreme Court of the United States

KATHERINE MILLER,

PETITIONER,

v.

JAY INSLEE, in his official capacity as Governor of the State of Washington; CHERYL STRANGE, in her official capacity as Secretary of the Washington State Department of Social and Health Services; DAVID SCHUMACHER, in his official capacity as Director of the Office of Financial Management; and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925, a labor organization,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON'S BRIEF IN OPPOSITION

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL*
Solicitor General

CALLIE A. CASTILLO
ALICIA O. YOUNG
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
Noah.Purcell@atg.wa.gov

**Counsel of Record*

QUESTION PRESENTED

Does the State's recognition of a democratically-elected exclusive bargaining representative compel child care workers to associate with the union when the workers are not required to join, financially support, or associate with the union, the workers are free to associate with whomever they please, and reasonable observers understand that not every member of the bargaining unit agrees with the union's speech?

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The district court's unreported order granting the Defendants' summary judgment motions, and denying the Plaintiffs' cross-motion for partial summary judgment is available at 2016 WL 3017713 and reproduced at Pet. App. 21a-29a. The Court of Appeals decision affirming the district court is reported at 916 F.3d 783 (9th Cir. 2019) and reproduced at Pet. App. 1a-18a.

JURISDICTION

Katherine Miller invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case satisfies none of this Court's criteria for granting certiorari.

There is no conflict in the courts of appeals on the issue here. To the contrary, four other courts of appeals have recently considered the same First Amendment claim presented here and reached the same conclusion as the court below. This Court denied certiorari in each of those cases within the last three years. It should do the same here.

There is also no conflict with this Court's decisions. The court below faithfully applied *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which rejected Miller's argument here. Miller has not asked this Court to revisit that decision, and there is no reason to do so.

Finally, considerations of public importance militate against this Court granting review. The federal government and roughly 40 states utilize the

type of exclusive representation Miller challenges. This Court has repeatedly emphasized that this basic framework is lawful so long as nonmembers are not required to fund the union. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2485 n.27 (2018) ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."). If the Court were to grant review and contradict its own recent statements as well as decades of settled law, it would upend longstanding state and federal employment policies without any principled justification. The Court should decline.

STATEMENT OF THE CASE

A. Background

1. Washington State family child care providers

Washington State helps qualified families pay for child care through several child care subsidy programs. Wash. Rev. Code §§ 43.216.020, .135, .660; Pet. App. 35a. The largest is the Working Connections Child Care Program, which exists to "promote stability and quality of care for children from low-income households." Wash. Rev. Code § 43.216.135(1); Pet. App. 35a. The State also subsidizes child care for families who are seasonally employed in agriculturally-related work and for children in need of support as part of a child protective services case plan. Wash. Admin. Code §§ 110-15-0003, -3520, -4510.

Parents and guardians enrolled in child care subsidy programs are entitled to choose the child care setting in which to enroll their children. Wash.

Admin. Code § 110-15-0025(8); Pet. App. 4a. The available settings include in-home, mini-centers, centers, and schools. Wash. Rev. Code § 43.216.660(2). Providers who accept child care subsidies and provide care in their home or the children's home are collectively referred to as "family child care providers." Wash. Rev. Code § 41.56.030(7). These include licensed providers who operate day care programs out of their homes, and license-exempt family, friend, and neighbor providers, who care for children in their own homes or in the children's homes. Wash. Rev. Code § 41.56.030(7).

Prior to 2006, the State unilaterally set the amount that it paid for subsidized child care, subject to federal funding requirements. Pet. App. 4a. There was no mechanism in place for the thousands of child care providers to collectively or individually negotiate the terms governing their provision of subsidized child care. *Id*.

2. 2006 Access to Quality Family Child Care Act

In 2006, to "improv[e] access to and the stability of quality child care," the Washington State Legislature provided collective bargaining and other representation rights to family child care providers through the Access to Quality Family Child Care Act. 2006 Wash. Sess. Laws p. 247 (codified at Wash. Rev. Code § 41.04.810; Wash. Rev. Code §§ 41.56.028, .030, .113; Wash. Rev. Code § 43.01.047; Wash. Rev. Code § 43.216.375). The Act permits, but does not require, family child care providers to democratically select an exclusive bargaining representative to negotiate with state executive branch officials regarding statutorily-

identified matters that would otherwise be unilaterally set by the State. Wash. Rev. Code §§ 41.56.028(1)–(2), .040, .070. These matters include the maximum subsidy rates the State will pay qualified providers, health and welfare benefits for those providers, and other economic terms. Wash. Rev. Code §§ 41.56.028(1)–(2), .040, .070. For purposes of collective bargaining on these issues, family child care providers are treated as public employees and the governor is designated as their employer. Wash. Rev. Code § 41.56.028(1)–(2). Because the law covers only family child care providers, it does not apply to providers in other child care settings, such as child care centers. Wash. Rev. Code §§ 41.56.028(1), .030(7). Nine other States extend collective bargaining rights to similar child care providers.[1]

Bargaining representatives are selected through a democratic process in which each bargaining unit member has the opportunity to weigh in on whether the unit should be represented for purposes of collective bargaining at all, and, if so, by whom. Wash. Rev. Code § 41.56.060, .070. Thus, when voting to elect an exclusive bargaining representative, bargaining unit members are allowed to vote for no representation. Wash. Rev. Code § 41.56.070. If an exclusive bargaining representative is chosen and certified, bargaining unit members may seek to decertify the representative through the same

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[1] *See* Conn. Gen. Stat. § 17b-705a; 305 Ill. Comp. Stat. 5/9A-11(c-5); Md. Code Ann., Educ. §§ 9.5-701–707; Mass. Gen. Laws ch. 15D § 17; N.J. Rev. Stat. § 30:5B-22.1; N.M. Stat. Ann. § 50-4-33; Or. Rev. Stat. § 329A.430; R.I. Gen. Laws § 40-6.6-4; N.Y. Labor Law art. 19-C, § 695-a.

electoral process. *See* Wash. Admin. Code § 391-25--070(6)(c).

Family child care providers are not required to become members of the organization serving as their bargaining unit's representative. Wash. Rev. Code §§ 41.56.040, .080. They also are not required to financially support the organization. Wash. Rev. Code §§ 41.56.110, .113. Moreover, the law explicitly protects family child care providers from interference, restraint, coercion, or discrimination in their right to participate or decline to participate in collective bargaining-related activities. Wash. Rev. Code §§ 41.56.040, .140, .150.

If a bargaining representative is selected and certified, the State and the democratically-chosen bargaining representative must negotiate in good faith for terms that will apply to all family child care providers. Wash. Rev. Code §§ 41.56.028, .070–.100; Wash. Admin. Code § 391-25-530(2). The law requires the exclusive bargaining representative to act for the benefit of all members of the bargaining unit, including those who have chosen not to join or financially support the organization. Wash. Rev. Code § 41.56.080.

Any agreement reached between the exclusive bargaining representative and the State's negotiators must undergo additional layers of review before it can become final and binding. First, the Director of the Office of Financial Management must determine whether the agreement is financially feasible for the State. Wash. Rev. Code § 41.56.028(6)(b). If the agreement is deemed financially feasible, the Governor sends it to the state Legislature for final

approval. Wash. Rev. Code § 41.56.028(7). If the Legislature rejects or fails to act on the submission, the parties must resume negotiations. *Id.*

In 2006, family child care providers who received state subsidy payments democratically elected Service Employees International Union Local 925 (SEIU) as their exclusive bargaining representative. Pet. App. 36a. Since then, the State and SEIU have negotiated several agreements generally covering provider payments, health care, and training. Pet. App. 5a, 36a. Child care providers are not required to join or financially support SEIU in order to receive subsidy payments from the State. Wash. Rev. Code § 41.56.113 (providing for deduction and remittance of payments to bargaining representative only upon family child care provider's voluntary authorization).[2]

Consistent with the statutorily-defined scope of bargaining for family child care providers, nothing in the Act prevents family child care providers from separately advocating for or against legislative approval of the tentative collective bargaining agreement, or otherwise seeking to influence the child care subsidy program. Family child care providers like Miller may reach out directly to public officials with regard to the program. Family child care providers are also statutorily entitled to file grievances directly with the State without having to go through the exclusive

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[2] Prior to 2014, the collective bargaining agreement covering child care providers included an agency fee provision that required non-union members of the bargaining unit to pay their proportionate share of the costs of collective bargaining representation. That provision was eliminated in response to *Harris v. Quinn*, 573 U.S. 616 (2014). Pet. App. 5a.

bargaining representative. Wash. Rev. Code § 41.56.080. The Act expressly maintains parents' and guardians' rights to choose and terminate the services of any family child care provider caring for their children. Wash. Rev. Code § 41.56.028(4)(a).

3. Exclusive representation, generally

Washington's provision of collective bargaining rights to family child care providers reflects a broader legislative judgment within the State and across the country regarding the determination of workforce-wide contract terms. Washington provides collective bargaining rights to employees in general state government, higher education, city and county government, and other workforces that contract with the State to provide services. *See, e.g.*, Wash. Rev. Code 41.80; Wash. Rev. Code 41.56; Wash. Rev. Code 47.64; Wash. Rev. Code § 74.39A.270; Wash. Rev. Code 28B.52. Nationally, the federal government and about 40 states also authorize collective bargaining for at least some public employees through exclusive representation.[3]

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[3] *See* 5 U.S.C. § 7111; Alaska Stat. § 23.40.100; Ark. Code. § 6-17-202; Cal. Gov't Code § 3515.5; Conn. Gen. Stat. § 5-271; Del. Code tit. 19, § 1304(a); D.C. Code § 1-617.10; Fla. Stat. § 447.307(1)(a); Ga. Code Ann. § 25-5-5; Haw. Rev. Stat. § 89-8; Idaho Code §§ 33-1273, 44-1803; 5 Ill. Comp. Stat. § 315/3(f); Ind. Code §§ 20-29-5-2, 20-29-2-9; Iowa Code § 20.16; Kan. Stat. Ann. § 72-2220; Ky. Rev. Stat. Ann. §§ 67A.6902, 345.030; La. Stat. Ann. § 23:890(D); Me. Rev. Stat. Ann. tit. 26, §§ 967, 979-F; Md. Code Ann., State Pers. & Pens., §§ 3-301, 3-407; Mass. Gen. Laws ch. 150E, § 4; Mich. Comp. Laws Ann. §§ 423.26, .211; Minn. Stat. § 179A.06(2); Mo. Rev. Stat. §§ 105.510–.575; Mont. Code Ann. §§ 39-31-205, -206; Neb. Rev. Stat. § 48-838(4); Nev. Rev. Stat. § 288.160; N.H. Rev. Stat. Ann. §§ 273-A:10–11; N.J. Rev. Stat. § 34:13A-5.3; N.M. Stat. Ann. § 10-7E-15; N.D. Cent. Code § 34-

The ubiquitous presence of these systems demonstrates the well-established value of collective bargaining through a majority-selected representative as a means for achieving consensus between workers and employers. *See Knight*, 465 U.S. at 291–92 (recognizing legitimate state interest in hearing from one voice "presenting the majority view of its professional employees on employment-related" issues, in addition to "whatever other advice they may receive on those questions"); H.R. Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the Nat'l Labor Relations Act 1935, at 3070 (1949) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); S. Rep. No. 573 (1935), *reprinted in* 2 Leg. Hist. of the Nat'l Labor Relations Act 1935, at 2313 (1949) ("[T]he making of agreements is impracticable in the absence of majority rule."). While no agreement can satisfy an entire workforce, it is more likely to suit the majority of the workforce when negotiated through a majority-selected representative, thus improving recruitment and retention.

B. Proceedings Below

Petitioner Katherine Miller is a family child care provider who voluntarily joined SEIU. Pet. App. 23a, 33a. In 2014, she resigned her membership. Pet.

12-05; N.D. Cent. Code § 15.1–16-11; N.Y. Civ. Serv. Law § 204; Ohio Rev. Code Ann. § 4117.04; Okla. Stat. tit. 19, § 901.30-2(E); Or. Rev. Stat. § 243.666; 43 Pa. Stat. § 1101.606; P.R. Laws Ann. tit. 3, §§ 1451b, 1451f; R.I. Gen. Laws § 28-7-14; R.I. Gen. Laws § 36-11-2; Texas Local Gov't Code §§ 174.101–.102; S.D. Codified Laws § 3-18-3; Utah Code Ann. § 34-20a-4; Vt. Stat. Ann. tit. 3, § 941(h); Vt. Stat. Ann. tit. 16, § 1991(a); Wis. Stat. § 111.83(1); Wyo. Stat. § 27-10-103.

App. 33a at ¶ 6. She has not been required to pay any dues or fees or otherwise take any actions to support SEIU since her resignation. Pet. App. 23a, 33a, 38a.

Miller alleges that current Washington law and the collective bargaining agreement with SEIU violate her First Amendment rights by compelling her to associate with the majority-selected union and its expressive activities. Pet. App. 39a–40a at ¶¶ 31–33.[4] She bases her claim solely on the State's recognition of SEIU as the democratically-elected representative for her bargaining unit of family child care workers. *See, e.g.*, Pet. App. 37a–38a at ¶¶ 23–25, 39a–40a at ¶¶ 31–33.

On cross motions for summary judgment, the district court concluded that exclusive representation in Washington did not restrain Miller from speaking, require her to join SEIU, require her to engage in any expressive activity, or impaire her associational rights. Pet. App. 21a–29a. Because Miller's First Amendment rights were not affected, the district court dismissed her claim. *Id*.

The court of appeals affirmed the district court's threshold ruling that exclusive representation did not infringe on Miller's freedom of association. Pet. App. 4a–14a. The court of appeals also concluded that even if exclusive representation did burden Miller's associational freedom, the burden would be justified under exacting scrutiny. Pet. App. 14a–18a.

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[4] Previously, there was an additional family child care provider plaintiff in this matter who made additional claims. *See* Pet. App. 30a. Her claim was resolved separately and she did not appeal. Pet. App. 6a, 19a.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict in the Lower Courts

The court of appeals decision does not conflict with the decisions of any other appellate circuit. In fact, the same lawyers that filed this case on behalf of Miller raised the same issue in four other circuits. Each circuit rejected their claim that exclusive representation for purposes of collective bargaining violates the First Amendment. This Court has recently denied petitions for review of each of those cases and should do the same here.

The First, Second, Seventh, and Eighth Circuits all recently held that exclusive representation does not infringe on the free speech or associational rights of non-union members, regardless of their employment status.[5] *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (Souter, J., by designation), *cert. denied*, 136 S. Ct. 2473 (2016); *Jarvis v. Cuomo*, 660 Fed. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S.

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[5] Five recent district court decisions also hold that exclusive-representation collective bargaining does not infringe any First Amendment rights. *O'Callahan v. Regents of the Univ. of Cal.*, No. 19-02289, 2019 WL 2635585 (C.D. Cal. June 10, 2019) (denying motion for preliminary injunction); *Grossman v. Hawaii Gov't Emps. Ass'n/AFSCME Local 152*, 382 F. Supp. 3d 1088 (D. Haw. 2019) (dismissing First Amendment associational freedom claim; other claims pending); *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019) (granting motion to dismiss and denying motion for preliminary injunction), *appeal docketed*, No. 19-1524 (4th Cir. May 16, 2019); *Thompson v. Marietta Educ. Ass'n*, 371 F. Supp. 3d 431 (S.D. Ohio 2019) (denying motion for preliminary injunction); *Reisman v. Assoc. Faculties of the Univ. of Me.*, 356 F. Supp. 3d 173 (D. Me. 2018) (granting motion to dismiss and denying motion for preliminary injunction), *appeal docketed*, No. 18-2201 (1st Cir. Dec. 07, 2018).

Ct. 1204 (2017); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom*, *Bierman v. Walz*, 139 S. Ct. 2043 (2019); *see also Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *summarily aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, No. 18-719 (Apr. 29, 2019). Each circuit unanimously held that *Knight* foreclosed the First Amendment claims made here.

Miller nevertheless insists that all five circuits are "not correct" in following this Court's precedent, claiming the issue she raises is different from that of *Knight*. Pet. 13. But as each circuit recognized, *Knight* "rejected the constitutional attack" on exclusive representation in collective bargaining for public employees. *Knight*, 465 U.S. at 279. This Court also concluded that restricting the right to confer with the employer to the exclusive representative did not infringe on any speech or associational rights for non-union members. *Id.* Indeed, *Knight* specifically addressed the same speech and associational objections made by Miller to having a designated union represent the entire bargaining unit, including dissenting nonmembers. *Compare* Pet. 7, 13 *with Knight*, 465 U.S. at 288–90. The Court concluded that such a system "in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Knight*, 465 U.S. at 288. The circuits were correct in finding *Knight* "directly applicable." Pet. App. 13a; *see also Bierman*, 900 F.3d at 574.

All of the circuits agree that *Harris v. Quinn*, 573 U.S. 616 (2014), and *Janus*, 138 S. Ct. 2448, do not alter this conclusion. Neither *Harris* nor *Janus* mentions *Knight*, much less overrules its analysis. *See* Pet. App. 12a–13a (rejecting argument that *Janus* overruled *Knight sub-silentio*); *Bierman*, 900 F.3d at 574 (same); *D'Agostino*, 812 F.3d 243–44 (rejecting same argument as to *Harris*); *Hill*, 850 F.3d at 864 (same). Importantly, neither case conflicts with *Knight's* determination that exclusive representation "without more" does not violate the right of free association for the bargaining unit's dissenting non-union members. *See D'Agostino*, 812 F.3d at 244 (rejecting claim that *Harris* spoke to, or conflicted with, *Knight's* premise that exclusive representation without additional requirements on non-union members was constitutionally valid). Rather, as the Ninth Circuit recognized, this Court "expressly affirm[ed]" the propriety of exclusive representation so long as nonmembers are not forced to financially support the union. Pet. App. 13a (discussing *Janus*, 138 S. Ct. at 2477–78); *see also Janus*, 138 S. Ct. at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.").

Finally, contrary to Miller's contention, the Eleventh Circuit's decision in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), is not in conflict with the other courts of appeal. Miller mischaracterizes that decision, which found only an associational interest sufficient to satisfy threshold standing and "nothing more." *Mulhall*, 618 F.3d at 1286–87. The court did not "purport to assess the strength" of that interest, *id.* at 1288, and certainly

did not establish the associational right that Miller claims here. *See id.* at 1287–88 ("[C]ompulsory affiliation with . . . a union does not, without more, violate the First Amendment.") (alterations omitted) (citation omitted). As Justice Souter recognized in *D'Agostino*, *Muhall* "is an odd case" for non-union members like Miller to cite in their favor, "since it notes the distinction between constitutional, compulsory 'affiliation' with a union and compulsory union membership[.]" *D'Agostino*, 812 F.3d at 245.

Given the unanimity amongst the courts, there simply is no conflict for this Court to resolve.

B. The Court of Appeals Decision Is in Lockstep with This Court's Decisions

The court of appeals faithfully applied this Court's decision in *Knight*. *Knight* holds that the First Amendment right of association is not impaired by an exclusive representative when individuals in the bargaining unit remain free to associate, or not to associate, with whomever they please. As the Court emphasized in *Janus*, there is a critical constitutional distinction between the common practice of negotiating with an exclusive representative and forcing nonmembers to financially support a union. *Janus*, 138 S. Ct. at 2478, 2485 n.27. The latter simply is not present here.

1. The issue was conclusively resolved by *Knight*

In *Knight*, some Minnesota community college faculty members who were not members of the faculty's majority-elected union challenged the constitutionality of the State's policy meetings and

negotiations with the exclusive bargaining representative. *Knight*, 465 U.S. at 278–79. The dissenting instructors contended that the State's recognition of the union as bargaining representative violated the First and Fourteenth Amendment associational rights of those who did not want to join the union. *Id*. The Court rejected that argument and affirmed the constitutionality of the State's recognition of an exclusive representative to "meet and confer" on employment related matters outside the scope of mandatory bargaining. *Id.* at 288–89. The Court held that the State "in no way restrained" the dissenting instructors' "freedom to associate *or not to associate* with whom they please, *including the exclusive representative*." *Id.* at 288 (emphasis added). Like the nonmember faculty in *Knight*, Miller is "free to form whatever advocacy groups" she likes. *Id.* at 289; *see* Pet. App. 11a. She is not required to become a member of the union, endorse the positions it takes, or pay dues. Pet. App. 5a. She is free to communicate her opinions as she sees fit, be it with the state agency administering the child care subsidy, in testimony before the state Legislature, or by attempting to influence the views of fellow child care providers.

Miller insists *Knight* addressed only the government's ability to choose to whom it listens, and has no bearing on the government's ability to determine who negotiates the terms applicable to a defined unit of workers. Pet. 14–15. The Court's decision flatly contradicts her argument. In addition to upholding the exclusive representative's participation in policy discussions, the Court summarily affirmed the constitutionality of the State's recognition of an exclusive representative for

purposes of mandatory bargaining. *Knight*, 465 U.S. at 279. The Court pointed out that the union not only conferred with the State on policy issues, but also "met and negotiated" with the State on a successive series of collective bargaining agreements. *Id.* at 276. After discussing how the exclusive representative bargained on behalf of all faculty, including those who did not agree with the representative, the Court held that exclusive representation does not impinge on the right of association. *Id.* at 288–90.

Even if Miller were able to distinguish the facts of *Knight*—and she cannot—it would be a distinction without a difference. As Justice Souter explained in writing for the First Circuit, given that non-union members cannot claim that their associational rights are violated when an exclusive bargaining representative speaks for the bargaining unit regarding policy issues, "the same understanding of the First Amendment should govern" when the "objection goes only to bargaining representation." *D'Agostino*, 812 F.3d at 243. Miller offers no plausible reading of *Knight* that does not squarely address—and reject—her arguments. Thus, to reverse the lower courts, this Court would need to overturn *Knight*. The petition, however, does not ask the Court to do so.

2. *Knight* is entirely consistent with precedent addressing compelled association

Miller's contention that it is "inconceivable" that *Knight* could apply outside the context of full government employment finds no footing in the case law. Pet. 16. Miller's employment status is not

relevant to the First Amendment analysis. And *Knight* is entirely consistent with fundamental principles of First Amendment analysis outside the employment context. Compelled expressive association has never been recognized where the complainant, like Miller, is not required to do anything and remains free to associate and speak as she sees fit.

Consistent with *Knight*, the Court's decisions outside the employment context explain that "perceptions matter" in distinguishing between expressive association, which is protected by the First Amendment, and association in a general sense, which is not. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 459–60 (2008) (Roberts, C.J., concurring) (explaining that "if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated"); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006) (holding that federal funding requirement that law schools allow military recruiters access to students, where "[n]othing about recruiting suggests that law schools agree with any speech by recruiters[,]" did not violate freedom of expressive association). As Justice Souter recognized in *D'Agostino,* when the State recognizes an exclusive bargaining representative "it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority." *D'Agostino*, 812 F.3d at 244. The freedom to speak out publicly against the union's position "further counters the claim that

there is an unacceptable risk the union speech will be attributed" to nonmembers. *Id.* at 244.

Miller's argument that *Knight* cannot be applied to Washington's family child care providers fails to acknowledge the broader principles applied by the Court in addressing First Amendment claims.

3. There is no conflict with *Janus*

Miller's reliance on *Janus* is also misplaced. Pet. 8–11 (citing *Janus*, 138 S. Ct. 2448). In *Janus*, the Court held that states may not deduct union fees from a nonmember's paycheck "unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486. *Janus* is inapplicable for the simple reason that Washington does not require Miller to subsidize the union in any way. Wash. Rev. Code § 41.56.113. As the Court explained in *Janus*, "designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked." *Janus*, 138 S. Ct. at 2480.

Miller attempts to gin up conflict with *Janus* by offering misleading, selective quotations from the opinion. Pet. 8. She contends that *Janus* "made clear that regimes of exclusive representation inflict a 'significant impingement on associational freedoms.'" Pet. 8 (quoting *Janus*, 138 S. Ct. at 2478). But she neglects to add that in the same passage, the Court stated that "[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" and that the opinion "simply draw[s] the line at allowing the government to go further still" and require nonmembers to provide financial support to the union. *Janus*, 138 S. Ct.

at 2478. Read in full, the passage forecloses Miller's claim.

To the extent *Janus* provides any guidance on the issue here, it buttresses the holding in *Knight*. Recognizing that many states have designated an exclusive bargaining representative, the Court emphasized that the limited scope of its holding would not require an extensive response from the States: "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way . . . States can follow the model of the federal government and 28 other States." *Id.* at 2485, n.27. Rather than implicitly overruling *Knight*, as Miller suggests, the text of *Janus* confirms that the Court did not intend to upend the States' ability to designate exclusive bargaining representatives.

In addition to mischaracterizing *Janus*, Miller is wrong in arguing that other decisions of this Court call into question the premise of exclusive bargaining representation. Pet. 9–10. Each of the cited cases distinguishes itself on the facts. For example, *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), simply held that nonmembers cannot be charged compulsory fees that subsidize union speech, but here Miller is not required to subsidize the union at all. Equally distinguishable is *National Labor Relations Board v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175 (1967), which held that union action against employees who cross a picket line is a violation of the National Labor Relations Act.

Here, Miller is indisputably *not* restricted from exercising her First Amendment rights or forced to

provide financial support for the union's speech. The "mandatory association" Miller decries is nothing more than the union's duty of fair representation, which precludes it from negotiating terms more favorable to its own members than to bargaining unit members who have chosen not to join the union. *See*, *e.g.*, Wash. Rev. Code §§ 41.56.028, .080. Washington's collective bargaining laws place significant restrictions on the State and the union. *See*, *e.g.*, Wash. Rev. Code §§ 41.56.040 (restricting State and others from interfering, restraining, coercing, or discriminating against any employee or employee group in the free exercise of their right to organize and designate representatives, or any other rights), .080 (requiring the union to represent interests of nonmembers), .140(1), .150(1) (prohibiting State and union from engaging in unfair labor practices). There are no corresponding restrictions or obligations on the individual child care providers. The only impact exclusive representation collective bargaining has on Miller is that the financial terms of her participation in the subsidy program are decided through collective bargaining, rather than unilaterally by the State. Miller has never claimed that she has a unilateral right to negotiate the rates applicable to subsidized care.

In sum, Miller's argument is foreclosed by *Knight*, which makes clear that exclusive representation in and of itself does not infringe the associational rights of nonmember individuals in a bargaining unit. Nothing in *Janus* calls *Knight's* holding into question.

C. This Case Is a Poor Vehicle to Address a Key Part of the Question Presented

To obtain full relief, Miller asks this Court to "resolve whether Washington's" law "survives exacting scrutiny," but this case is a terrible vehicle to address that question. Pet. 17. Whether a law survives exacting scrutiny depends in part on factual evidence about the law's benefits and what alternatives are available, and the State never had a full opportunity to present evidence on those issues.

At the district court, the parties filed cross motions for summary judgment. Pet. App. 21a. The State moved for summary judgment on the ground that its policy imposed no infringement on the workers' First Amendment rights. Pet. App. 22a. The district court agreed and granted summary judgment to the defendants, holding as a matter of law that "Miller cannot demonstrate an infringement of any First Amendment right." Pet. App. 28a. As a result, it did not reach questions regarding the level of scrutiny applicable to the alleged infringement or take evidence about whether the State's policy would satisfy the relevant level of scrutiny. *Compare Janus*, 138 S. Ct. at 2464 (finding first that compelled union subsidization impinges First Amendment rights, and then considering whether the State had shown a compelling interest in the infringement and the viability of less restrictive means of meeting that interest), *with Knight*, 465 U.S. 271 (holding that statute did not infringe First Amendment rights, and not addressing the State's interest in the alleged infringement or availability of less restrictive means). The State specifically noted that if the district court denied the State's motion for summary judgment and

proceeded to consider whether the State's policy could survive exacting scrutiny, that would involve factual questions as to which the State should be given the opportunity to present evidence. No. 3:15-cv-05134 W.D. Wash. ECF No. 72, at 16.

The Ninth Circuit affirmed the district court's holding that there was no First Amendment infringement. Pet. App. 10a–14a. It also concluded, in the alternative, that even if there were an infringement the State's system would satisfy exacting scrutiny under existing precedent. Pet. App. 14a–18a. That alternative holding was amply justified by this Court's case law. But it would be inappropriate for the Court to grant certiorari, overturn the case law the Ninth Circuit relied on, and deny the State the opportunity to present factual evidence about the benefits of its system. If exacting scrutiny applies, the State should have the opportunity to show the compelling reasons for negotiating wages, benefits, and other terms with an exclusive bargaining representative. *See Harris*, 573 U.S. at 648–49 (quoting *Knox*, 567 U.S. at 310). And Petitioner would have a corresponding burden to show that the State's interest can be "'achieved through means significantly less restrictive of associational freedoms.'" *Id.* Given that approximately 40 States and the federal government utilize the type of exclusive representation Miller challenges, *see supra* note 3, at 7, it would be particularly inappropriate for the Court to deny the State the opportunity to fully develop the record if the Court were to change the underlying precedent establishing the lack of infringement.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL*
Solicitor General
Counsel of Record

CALLIE A. CASTILLO
ALICIA O. YOUNG
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
Noah.Purcell@atg.wa.gov

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