No. 18-766

IN THE
Supreme Court of the United States

TERESA BIERMAN, *et al.*,

Petitioners,

v.

GOVERNOR TIM WALZ, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT SEIU HEALTHCARE MINNESOTA

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QUESTION PRESENTED

In Minnesota, state-compensated homecare workers democratically elected a union representative to negotiate with state officials over certain unit-wide employment terms. As a result, Minnesota law requires state officials to meet and negotiate with the representative over those terms and prohibits officials from dictating the terms unilaterally as they are free to do when workers do not elect a representative. Individual homecare workers are not compelled to do *anything* to associate with the majority-chosen union, and they are free to express their own views.

The question presented is whether Minnesota is compelling homecare workers to enter into an expressive association with the union, in violation of the First Amendment, even though individual homecare workers need not join, support or do anything else to associate with the majority-chosen union, and even though reasonable observers understand that not every worker necessarily agrees with the union's speech.

CORPORATE DISCLOSURE STATEMENT

Respondent SEIU Healthcare Minnesota is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF IN OPPOSITION

Like many other states, Minnesota includes state-compensated homecare workers within the State's public employee collective bargaining system.[1] Minnesota's collective bargaining system follows the exclusive-representative model, so state officials negotiate with a single representative democratically chosen by the homecare workers to set unit-wide contract terms. The Minnesota Legislature's choice to use an exclusive-representative system based on majority rule reflects the essentially universal judgment by Congress and state legislatures about how to structure collective bargaining systems. Alternative systems involving multiple bargaining representatives have proven to be impracticable failures. In the public sector, more than 7.5 million federal, state, and local employees are covered by collective bargaining agreements negotiated through democratic, exclusive-representative systems.

Petitioners alleged that the State is violating the First Amendment by forcing homecare workers to associate with a union. But petitioners did not claim that the workers are required to join or financially support the union chosen to represent their unit, or to personally do or say anything else to associate themselves with the union. Petitioners also did not dispute that state officials and reasonable outsiders understand that not all homecare workers necessarily agree with the positions of the majority-chosen union—just as in every other democratic system of representation—so the union's speech is not attributed

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[1] *See* Pet. 20 n.5 (identifying 15 states that authorize, or previously authorized, collective bargaining by state-compensated homecare workers).

personally to individual workers. Nor did petitioners dispute that they are free to express their own views, whether individually or though groups of their choosing. The district court rejected petitioners' First Amendment compelled-association claim, and the Eighth Circuit affirmed.

The Eighth Circuit's ruling that exclusive-representative collective bargaining, by itself, does not infringe the First Amendment rights of bargaining unit members by compelling expressive association agrees with the decisions of every other court to consider this issue and faithfully applies this Court's precedents. The petition does not present a question worthy of this Court's review.

STATEMENT OF THE CASE

A. Background

1. Minnesota adopted its Public Employment Labor Relations Act (PELRA) in 1971 to "promote orderly and constructive relationships between all public employers and their employees." Minn. Stat. §179A.01(a). PELRA establishes an exclusive-representative system in which the public employees in each bargaining unit may elect, by majority vote, a single representative to negotiate unit-wide contract terms with their public employer. *See* Minn. Stat. §§179A.06, subd. 2, 179A.06, subd. 5, 179A.07, subd. 2, 179A.12, subd. 10. The employees may also decide by majority vote to decertify the representative or change representatives. *Id.* §179A.12, subd. 3. If the unit does not have a PELRA representative, then the employer may dictate unit-wide contract terms unilaterally.

The federal government, about 40 states, the District of Columbia, and Puerto Rico all authorize

collective bargaining for at least some public employees through exclusive-representative systems based on majority rule. *See* D.Ct. ECF No. 61 at 7 (¶12). The National Labor Relations Act and Railway Labor Act also adopt exclusive-representative systems. *See* 29 U.S.C. §159; 45 U.S.C. §152, Fourth. These systems reflect a longstanding legislative judgment that a democratic, exclusive-representative system provides the only practical mechanism for negotiating contract terms for an entire workforce. *See, e.g.*, House Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act 3070 (1935) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); Sen. Rep. No. 573 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 2313 ("[T]he making of agreements is impracticable in the absence of majority rule."). Decades ago, some states experimented with collective bargaining systems that did not follow the exclusive-representative model, but those alternative systems proved to be unmanageable for employers, and they were abandoned as failures. *See* D.Ct. ECF No. 61 at 6-7 (¶¶10-11).

Exclusive-representative systems presently serve as the basis for collective bargaining agreements that cover more than one million federal employees and more than 6.5 million state, county, and local employees. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2018 (Jan. 18, 2019), Table 3 (union affiliation 2018), *available at* https://www.bls.gov/news.release/pdf/union2.pdf. At the local government level, more than 40 percent of all employees—including police officers, firefighters, teachers, bus drivers, and sanitation workers—are covered by collective bargaining agreements with a

democratically chosen exclusive representative. *Id.* As of 2014, collective bargaining agreements with a democratically chosen exclusive representative also set employment terms for about 500,000 state-compensated homecare workers. D. Ct. ECF No. 62 at 5 (¶9).

2. In Minnesota, thousands of homecare workers earn an hourly wage by delivering "direct support services" to eligible elderly or disabled individuals as part of several State programs. *See* Minn. Stat. §256B.0711, subd. 1(b), (c). These "direct support services" include assistance with "grooming, dressing, bathing, transferring, mobility, positioning, eating, and toileting," and activities such as "meal planning and preparation; basic assistance with paying bills; shopping for food … and traveling, including to medical appointments." *Id.* §256B.0711, subd. 1(c); §256B.0659, subd. 1(b), (i).

Minnesota sets the economic terms of employment for this homecare workforce. Minn. Stat. §256B.0711, subd. 1(d), subd. 4. State officials are responsible for adopting "compensation rates," "payment terms and practices," "benefit terms," "orientation programs," "training and educational opportunities," and "other appropriate terms and conditions of employment." *Id.*, subd. 4(c).

In 2013, the Minnesota Legislature adopted the Individual Providers of Direct Support Services Representation Act to allow homecare workers, if they choose, to elect (or change or decertify) a PELRA representative to negotiate with State officials about these employment terms. 2013 Minn. Law ch. 128, art. 2, codified at Minn. Stat. §179A.54, §256B.0711. The Act limits the scope of collective bargaining to

employment terms that are under the State's control (*e.g.*, wages, benefits, training programs, and referrals), so as not to interfere with the authority the State delegates to service recipients to choose and supervise their individual homecare workers. Minn. Stat. §179A.54, subd. 3, 4.

In June 2014, Minnesota homecare workers presented more than 9,000 signed union authorization cards to the Minnesota Bureau of Mediation Services seeking to designate SEIU Healthcare Minnesota ("SEIU") as their unit's bargaining representative. Pet. App. 3a-4a. The workers filed an official election petition, and the Bureau commenced a secret-ballot election by mail. Pet. App. 4a, 39a-40a. In August 2014, the Bureau tabulated the returned ballots and found that 60 percent of the homecare workers casting valid ballots had voted for SEIU. Pet. App. 29a. The Bureau therefore certified SEIU as the bargaining unit's PELRA representative. *Id.*

Under PELRA, the Minnesota homecare workers are not required to become union members. Minn. Stat. §179A.06, subd. 2. Homecare workers are also entitled, regardless of union membership status, to SEIU's fair representation. *See Eisen v. State*, 352 N.W.2d 731, 735 (Minn. 1984). PELRA also leaves workers free to "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment," so long as the communication does not interfere with workers' performance of their duties or circumvent the PELRA rights of the exclusive representative. Minn. Stat. §179A.06, subd. 1. Consistent with this Court's decision in *Harris v. Quinn*, 134 S.Ct. 2618 (2014), homecare workers who are not union members need not pay any money to SEIU.

3. In March 2015, state officials advised the Minnesota Legislature that they had reached an initial collective bargaining agreement to cover homecare work. Pet. App. 15a-16a. Under that agreement, the minimum wage for homecare workers would be increased from $9 per hour to $11 per hour; the workers would receive paid time off; and a joint committee would be established to create new training and orientation programs and to develop an online registry to match workers and clients. Pet. App. 15a-16a; D.Ct. ECF No. 96 at 9-25. The Legislature ratified the collective bargaining agreement, as required by PELRA for the agreement to take effect. 2015 Minn. Law ch. 71, art. 7, secs. 52, 53; Minn. Stat. §§179A.22, subd. 4, 179A.54, subd. 5.

In May 2017, the Minnesota Legislature ratified a successor collective bargaining agreement. The successor agreement, among other things, increased the minimum wage for homecare workers by $1 per hour, funded the online registry to match workers and clients, and provided stipends for workers who complete training. 2017 Minn. Law, 1st special sess., ch. 6, art. 1, sec. 53; ch. 6, art. 18, sec. 2; FRAP 28(j) letter to 8th Circuit (Nov. 16, 2017), Exhs. 1, 2.

Minnesota's improvements in the compensation and training for homecare workers, and establishment of registries to match workers with clients, are consistent with the efforts of other states to respond to the aging of the U.S. population and to the tremendous cost to public health programs of unnecessary institutionalization caused by chronic homecare workforce shortages and turnover. *See* D.Ct. ECF No. 34 at 2 (¶¶4, 7); D.Ct. ECF No. 62 at 3-4 (¶¶4, 5).

B. Proceedings Below

1. Petitioners are homecare workers in the bargaining unit now represented by SEIU. Pet. 4.[2] After Minnesota homecare workers petitioned for a representation election, petitioners filed this suit against State officials and SEIU. Pet. 4; Pet. App. 51a. They alleged that "State certification of an exclusive representative will affiliate [petitioners] … with the petitioning, speech, and policy positions of their State-appointed exclusive representative" in violation of their First Amendment rights. Pet. App. 57a (¶29).[3]

The district court denied petitioners' initial and renewed motions for a preliminary injunction to stop the representation election, concluding that petitioners had not shown a likelihood of success on the merits. Pet. App. 48a; D.Ct. ECF No. 69 at 16-22. Petitioners appealed the denial of their preliminary injunction motion to the Eighth Circuit, which dismissed the appeal as moot because the State already had conducted the election. Pet. App. 30a.

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[2] Petitioners point out that they are paid to care for disabled relatives. Pet. 4. The State does not distinguish between related and unrelated homecare workers in setting unit-wide employment terms. Minn. Stat. §179A.54, subd. 8. For public homecare programs to succeed, states must attract, train, and retain a sufficient workforce of both related and unrelated providers to work within their programs. *See* D.Ct. ECF No. 62 at 3-4 (¶5).

[3] Petitioners also alleged that they would be required to pay nonmember fees to a union, Pet. App. 57a (¶30), but nonmember homecare workers in Minnesota have never been required to pay any union fees. *Id.* 19a.

2. In January 2017, the district court granted the State's and SEIU's motions for judgment on the pleadings. Pet. App. 8a-25a. The district court rejected petitioners' claim that their First Amendment associational rights were being violated because, "although SEIU has been certified as the exclusive representative, [petitioners] are not forced to associate with SEIU." Pet. App. 19a. The district court reasoned that petitioners "are not required to join SEIU …. are not required to financially contribute to SEIU …. [and] remain free to petition the State on all issues related to the homecare programs and to vociferously criticize SEIU." Pet. App. 19a-20a. The district court recognized that this Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), held that PELRA's exclusive-representative collective bargaining system, by itself, "does not impair the nonmembers' First Amendment rights." Pet. App. 20a. The district court further reasoned that "[t]he very system by which bargaining unit members select a PELRA exclusive representative through majority vote makes clear that not all bargaining unit members necessarily support the representative's positions." Pet. App. 20a (citing *Knight*, 465 U.S. at 276). Accordingly, the district court declined to "interfere with a state's policy decision of how to gather information in order to make Medicaid policy." Pet. App. 21a.

3. Petitioners again appealed to the Eighth Circuit. While petitioners' appeal was pending, this Court decided *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), which held that no public employees can be required to pay fees to a union representative that they do not wish to join. At the same time, the Court said that it was "not in any way

questioning the foundations of modern labor law," and that, apart from eliminating nonmember fees, the "States can keep their labor-relations systems exactly as they are." *Id.* at 2471 n.7, 2485 n.27.

The Eighth Circuit (Smith, C.J., and Colloton, J.) affirmed the district court's judgment. Pet. App. 1a-7a.[4] The court of appeals held that the State had "'in no way' impinged on the providers' right not to associate by recognizing an exclusive negotiating representative." Pet. App. 6a (quoting *Knight*, 465 U.S. at 288). The court of appeals reasoned that "[t]here is no meaningful distinction between this case and *Knight*," which upheld the same provisions of PELRA at issue here. Pet. App. 6a. The court further reasoned that PELRA "allows the homecare providers to form their own advocacy groups independent of the exclusive representative … and it does not require any provider to join the union." Pet. App. 6a. Finally, the court of appeals concluded that *Janus* and *Harris*, which each addressed requirements that workers pay fees to a union, "do not supersede *Knight*." Pet. App. 7a.

REASONS FOR DENYING THE PETITION

The petition is not worthy of this Court's review. The lower courts are unanimous in rejecting petitioners' argument that exclusive-representative collective bargaining, by itself, compels expressive association in violation of the First Amendment. Those rulings follow from this Court's decision in *Minnesota State Board v. Knight*, which concerned the same statute at issue here. The petition does not ask this Court to

[4] Judge Murphy died after oral argument. Pet. App. 2a.

overrule *Knight,* much less offer any special justifications for abandoning stare decisis.

Additionally, petitioners' arguments find no support in this Court's precedents about compelled expressive association outside the collective bargaining context. Petitioners do not contend that the State requires them to do or say anything, or that it restricts their speech in any way. Nor do they contend that the First Amendment prevents State officials from negotiating with the union about contract terms that apply to all the workers in the bargaining unit. Their sole complaint is that the union's role as representative of their bargaining unit purportedly "associates" them with the union. But this Court has never validated a claim of compelled expressive association where, as here, the complaining party is not required to do *anything*—not to speak, endorse someone else's speech, give money, join an organization, or do anything else. Nor is there any public perception of expressive association, because neither the State nor reasonable outsiders would believe that every homecare worker necessarily agrees with the union's speech.

The Court should not grant review of petitioners' second question because it was not addressed below and is not suitable for review on this record.

I. There Is No Conflict in the Lower Courts

1. The same advocacy group that filed this case also filed essentially the same case in four other circuits. The central contention of all five lawsuits was that exclusive-representative collective bargaining compels expressive association in violation of the First Amendment, even if nonmembers need not join or support the majority-chosen union. All five district

courts and all five courts of appeals, including the Eighth Circuit in the ruling below, unanimously rejected that contention as contrary to this Court's decision in *Minnesota State Board v. Knight*, 465 U.S. at 288-90. *See* Pet. App. 1a-7a; *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Hill v. Service Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016).

As Justice Souter, sitting by designation for the First Circuit, explained: *Minnesota State Board v. Knight* held that "non-union professionals … could claim no violation of associational rights by an exclusive bargaining agent" speaking on behalf of their bargaining unit "when dealing with the state." *D'Agostino*, 812 F.3d at 243. In doing so, *Knight* applied and extended the premise that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *Id.* at 244.

Justice Souter also pointed out that these challenges to exclusive-representative bargaining found no support in other precedents about compelled expressive association because bargaining-unit workers "are not compelled to act as public bearers of an ideological message they disagree with," nor "are they under any compulsion … to modify the expressive message of any public conduct they may choose to engage in." *Id.* at 244. Moreover, the union's message would not be attributed in the public eye to individual workers because "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." *Id.*

All these courts also recognized that, for purposes of evaluating whether an exclusive-representative system compels expressive association, any distinction between "partial" and "full-fledged" public employees is irrelevant. The question is whether the relationship between the majority-chosen union and nonmember employees in the bargaining unit rises to the level of a mandatory expressive association that triggers heightened First Amendment scrutiny. *Knight* held that it does not. 465 U.S. at 289-90.

Similar advocacy groups have filed similar suits alleging that exclusive-representative bargaining, by itself, compels expressive association even if bargaining unit workers need not join or support the majority-chosen union. All those challenges have also been rejected. *See Uradnik v. Inter Faculty Organization*, No. 18-3086 (8th Cir. Dec. 3, 2018), *petition for cert. filed*, No. 18-719; *Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF No. 52 (S.D. Ohio Jan. 14, 2019); *Reisman v. Associated Faculties*, 356 F.Supp.3d 173 (D. Me. 2018), *appeal pending*, No. 18-2201 (1st Cir.).

In all, since 2015, eight district court judges, fifteen circuit court judges, and one retired Supreme Court justice have all considered and rejected petitioners' argument that exclusive-representative collective bargaining, by itself, compels expressive association in derogation of First Amendment associational rights.

2. Petitioners try unsuccessfully to manufacture a circuit conflict by citing *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), which did not

involve a First Amendment claim. *See* Pet. 12. *Mulhall* held only that a private-sector employee who objected to union representation had an "interest" sufficient to support standing to allege the violation of a federal statute, not that exclusive-representative bargaining infringes First Amendment rights. 618 F.3d at 1287-88; *see* Pet. App. 21a (distinguishing *Mulhall*); *D'Agostino*, 812 F.3d at 245 (same).[5] That being so, there is no conflict warranting this Court's review. Indeed, since 2016, this Court has rejected three petitions for certiorari raising the same questions presented here and asserting the same non-existent conflict. *See Hill,* 138 S.Ct. 446 (2017); *Jarvis*, 137 S.Ct. 1204 (2017); *D'Agostino*, 136 S.Ct. 2473 (2016).

3. Cases raising the same questions presented here also are still percolating through the lower courts. On February 6, 2019, in *Reisman*, No. 18-2201 (1st Cir.), the First Circuit denied the appellant's motion for summary affirmance and stated that the court of appeals would consider a challenge to exclusive-representative bargaining in light of *Janus*. Additional post-*Janus* challenges are pending before district courts within the Third, Sixth, and Tenth Circuits, which have yet to address the issue. *Oliver v. Serv. Emps. Int'l Union Local 668*, No. 2:19-cv-00891-GAM (E.D. Pa.); *Thompson v. Marietta Education Assn.*, No. 2:18-cv-00628-MHW-CMV (S.D. Ohio); *Hendrickson v. AFSCME Council 18*, No. 1:18-cv-01119-JHR-LF (D. New Mexico). In the absence of any judge of any court finding any merit whatsoever

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[5] *Mulhall*'s holding on standing was called into question when this Court, having granted certiorari on the merits of the case, dismissed the writ as improvidently granted. *See UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting).

in petitioners' argument, there is certainly no good reason to grant review of this case instead of waiting for other courts to consider the issue.

II. The Eighth Circuit's Decision Follows This Court's Precedents

Petitioners contend that review is warranted because, in their view, the lower courts are misinterpreting *Knight*. Not only is petitioners' disagreement with the unanimous decisions of the lower courts an insufficient basis for this Court's review, but petitioners are incorrect. *Knight does* foreclose the only argument petitioners raised below—that PELRA's exclusive-representative system inherently "associates" them with a union in violation of the First Amendment. Petitioners do not ask the Court to overrule *Knight,* much less demonstrate any "special justification" for abandoning stare decisis. *Cf. Janus*, 138 S.Ct. at 2486.

1. In *Knight*, community college instructors who had opted not to join the majority-elected union challenged the same provisions of PELRA at issue here—providing for their public employer to "meet and negotiate" with an exclusive representative over employment terms. They also challenged an additional PELRA provision requiring their employer to "meet and confer" with the representative over certain employment-related policy issues. A three-judge district court rejected a First Amendment challenge to the use of exclusive representation for the "meet and negotiate" process, and this Court summarily affirmed that decision. *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 5-7 (D. Minn. 1982), *aff'd mem.*, 460 U.S. 1048 (1983). The district court invalidated the use of exclusive representation for the

"meet and confer" process, and this Court reversed that ruling after plenary review. *Minn. State Bd. v. Knight*, 465 U.S. at 292.

The *Knight* Court began its analysis by recognizing that the meet-and-confer process (like the meet-and-negotiate process) is not a "forum" to which there is any First Amendment right of access, and that the dissenting instructors had no constitutional right "to force the government to listen to their views." 465 U.S. at 280-83. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285. The *Knight* Court also recognized that "the applicable constitutional principles are identical to those that controlled" in *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464-66 (1979), which held that the government did not violate the First Amendment rights of union supporters by "refus[ing] to consider or act upon grievances when filed by the union rather than by the employee directly." *Id.* at 465; *see Knight*, 465 U.S. at 287.

The *Knight* Court went on to consider whether PELRA violated those First Amendment rights that the dissenting instructors *could* properly assert—including the right to "associate or not to associate." 465 U.S. at 288. The district court had ruled that restricting participation in meet-and-confer sessions to the exclusive representative "inherently creates a chilling effect on the associational … interests of faculty members" by pressuring them to join and thereby associate with the union. 571 F. Supp. at 10. The instructors quoted that compelled-association holding twice in their principal brief to this Court, and they also responded at length to an amicus brief that dealt exclusively with that holding. Brief for Appellees, *Minnesota State Board for Community Colleges v.*

Knight, No. 82-898 (filed Aug. 16, 1983), at 12-13, 23-24, 34-39; Brief for the AFL-CIO as Amicus Curiae in Support of Appellants, *Minnesota State Board for Community Colleges v. Knight*, Nos. 82-898, 82-977 (filed June 22, 1983), at 2-4. This Court expressly held that—as in *Arkansas State Highway Employees*—the dissenting instructors' "associational freedom has not been impaired." 465 U.S. at 288-90.

This Court reasoned that the government's decision to consult with an exclusive representative "in no way restrained [the instructors'] freedom … to associate or *not to associate* with whom they please, including the exclusive representative," because the dissenting instructors were "free to form whatever advocacy groups they like" and were "not required to become members" of the organization acting as the exclusive representative. 465 U.S. at 288-89 (emphasis supplied). This Court rejected the district court's compelled-association theory based on an analogy to our democratic system of government, reasoning that even if dissenting instructors felt some "pressure to join the exclusive representative," that pressure "is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.* at 289-90.

Knight thus rejected petitioners' only theory here—that a system of exclusive-representative collective bargaining, by itself, compels nonmembers to enter into an expressive association with the majority-chosen union. Indeed, if the dissenting instructors already were compelled to associate with the faculty union simply by virtue of its role in the collective bargaining system, there would have been no need for the

Court to consider and reject the claim that the pressure the instructors allegedly felt to *join* the union also compelled them to associate with it. Moreover, the Court squarely held that the instructors had the "freedom … not to associate with … the exclusive representative" and that the instructors were "[u]nable to demonstrate an infringement of any First Amendment right." 465 U.S. at 289, 291.

2. Petitioners rely heavily on the Court's decision in *Janus*, but *Janus* addressed a different issue. *Janus* held that public employees who are not union members cannot be required to pay fees to an exclusive representative for collective bargaining representation because "compelled subsidization of private speech seriously impinges on First Amendment rights." *Janus*, 138 S.Ct. at 2464. The workers here are not required to subsidize union activities or otherwise do or say *anything* to support a union or its activities. The Court emphasized in *Janus* that it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." *Id.* at 2478. The Court also recognized that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees" are not "inextricably linked." *Id.* at 2465. The Court made the same distinction between exclusive-representative bargaining and the exaction of agency fees in *Harris*. *See* 134 S.Ct. at 2640.

Petitioners point to a passage in *Janus* that describes exclusive-representative bargaining as "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S.Ct. at 2478; Pet 6. But the Court also explained that, for this reason, the "necessary concomitant" of exclusive-representative status is a requirement that

the union fairly represent the entire unit, *without which* "serious constitutional questions would arise." *Janus*, 138 S.Ct. at 2469 (citation, internal quotation marks omitted). Minnesota's PELRA includes the "necessary concomitant" duty of fair representation. *See supra* at 5.

Moreover, the Court expressly stated in *Janus* that it was "not in any way questioning the foundations of modern labor law" but instead "simply draw[ing] the line at allowing the government to … require all employees to support the union irrespective of whether they share its views." 138 S.Ct. at 2478. The Court stated that its decision would not require an "extensive legislative response," and that the States "can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2471 n.7, 2485 n.27; *see also id.* at 2466, 2485 n.27 (States may "follow the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees" but there are no agency fees). Like many other states, Illinois—the state defendant in *Janus* (and *Harris*)—includes state-compensated homecare workers in its exclusive-representative bargaining system. *See Hill*, 850 F.3d at 862 n.1; *see also supra* at 1 n.1.

In sum, *Janus* did not overrule *Knight,* and the Eighth Circuit's decision faithfully applies this Court's precedents to reach the same conclusion as every other court.

III. Petitioners' Argument Lacks Support in Precedents About Compelled Expressive Association

The petition also should be denied because, contrary to petitioners' contention, their argument here finds no support in this Court's precedents about compelled expressive association outside the collective bargaining context.

Petitioners conceded that they have no First Amendment right to negotiate contract terms individually or to prevent state officials from negotiating exclusively with SEIU about homecare worker employment terms. *See* D.Ct. ECF No. 101 at 21 (acknowledging that State officials "could chose [*sic*] to listen only to SEIU … and turn a deaf ear to all others, without violating anyone's First Amendment rights"); *see also* Pet. 14-15. Petitioners' sole contention below was that they are forced into a "mandatory association" with SEIU, infringing their First Amendment rights, simply because a PELRA representative is responsible for representing the entire bargaining unit in negotiations about proposed unit-wide contract terms. Pet. 9-10.

But this Court has never validated a claim of compelled expressive association where, as here, the complaining party is not personally required to do *anything* and there is no public perception of expressive association. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 65, 69 (2006) (no compelled expressive association where law schools had to "associate" with military recruiters but recruiters did not come onto campus to "become members of the school's expressive association," and "[n]othing about recruiting suggests that law schools

agree with any speech by recruiters"). Here, SEIU's representation of petitioners' bargaining unit does not send any messages about petitioners' *own* views or positions.

Petitioners insist that PELRA creates a mandatory expressive association because it "literally gives unions legal authority to speak and contract 'on behalf' of unconsenting individuals." Pet. 9 (quoting Minn. Stat. §179A.03, subd. 8). But petitioners' argument ignores the role that public perception plays in delimiting the scope of First Amendment compelled association claims, which might otherwise extend to the merest of metaphysical connections. If outsiders would not reasonably perceive one group's speech as reflecting the views or endorsement of another person, then that person has not been forced to associate with the group in a manner that implicates the First Amendment. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring) ("Voter perceptions matter, and 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."); *FAIR*, 547 U.S. at 65, 69 (requirement that law schools grant access to military recruiters did not "violate[] law schools' freedom of expressive association" where "[n]othing about recruiting suggests that law schools agree with any speech by recruiters").

Petitioners here did not dispute that state officials and reasonable outsiders understand that not every individual in the bargaining unit necessarily agrees with the speech of a majority-chosen bargaining representative. This is true of all democratic systems in which a representative chosen by the majority speaks

for a group—whether the representative is a congresswoman speaking for her constituents or a parent-teacher association speaking for parents. *See, e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.") (internal quotation marks omitted); *cf. Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (even high school students understand that school does not endorse speech of school-recognized student groups). Part of the reason why exclusive-representative systems are accepted throughout the United States is that they follow basic and well-understood democratic principles. *See In the Matter of Houde Engineering Corp.*, 1 NLRB (Old) 35, 43 (1934) ("The Board, therefore, stands upon the majority rule. And it does so the more willingly because the rule is in accord with American traditions of political democracy, which empower representatives elected by the majority of the voters to speak for all the people.").

Petitioners also complain that individual homecare workers are placed into an "agency relationship" with the bargaining representative. Pet. 9. As an initial matter, the characterization is misleading. The exclusive representative does not act as the personal agent of any individual worker but as bargaining representative of the unit as a whole. Minn. Stat. §179A.03, subd. 8 (PELRA representative "negotiate[s] with the employer on behalf of all employees in the appropriate unit"). It is partly for that reason that government officials and reasonable outsiders understand that the representative's view is not necessarily the view of any individual worker. *See*

Knight, 465 U.S. at 276 ("The State Board considers the views expressed … to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with the official faculty view ….").[6]

Equally to the point, petitioners get matters backward in referring to the burden of an "agency relationship." Minnesota's collective bargaining system places a legal duty only on the PELRA representative—not on the individual workers. What petitioners describe as an agency relationship is simply the PELRA representative's duty of fair representation, which requires the representative "to represent all members of a designated unit … without hostility or discrimination toward any," including toward those who choose not to become union members. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *see Eisen*, 352 N.W.2d at 735.

If there were no such duty, and the representative could, for example, "negotiate particularly high wage increases for its members in exchange for accepting no increases for others," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part), then petitioners would likely claim that they are pressured to join a union. Thus, the duty to represent the entire unit without discrimination protects individual homecare workers'

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[6] Under PELRA, an agreement negotiated through the formal "meet-and-negotiate" process for homecare workers becomes a proposal for legislative consideration. *See supra* at 6. The Legislature is entitled to decide with whom state officials are "to consult or not to consult" in formulating a proposal. *See Knight*, 465 U.S. at 285; *see also* Pet. App. 21a (district court was "mindful of its role as a federal court being asked to interfere with a state's policy decision of how to gather information in order to make Medicaid policy").

right *not to associate* with the majority-chosen unit representative. *Cf. Janus*, 138 S.Ct. at 2469 (observing that "serious 'constitutional questions [would] arise' if the union were *not* subject to the duty to represent all employees fairly") (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944)).

IV. Petitioners' Second Question Is Not Properly Before the Court

Petitioners' second question presented is whether, if Minnesota's exclusive-representative bargaining system infringes their First Amendment rights, the system satisfies heightened scrutiny. Petitioners concede that the Court should address the second question only if it addresses the first. Pet. 24. Because the first question does not warrant this Court's review, neither does the second. Moreover, even if the Court were to grant review of the first question, it still should not grant review of the second question.

This case was resolved on motions for judgment on the pleadings. The State and SEIU argued, and the district court and Eighth Circuit agreed, that *Knight* forecloses petitioners' claim that Minnesota's exclusive-representative system inherently compels First Amendment expressive association. Thus the State and SEIU never submitted evidence demonstrating that the State has compelling interests in using exclusive-representative collective bargaining to set contract terms for homecare workers and that there are no significantly less restrictive means of achieving those interests.[7] And the lower courts never addressed that issue. Because the second question was

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[7] At the preliminary injunction stage, SEIU did present expert testimony that the exclusive-representative model of collective bargaining is the only model of collective bargaining that has

never presented to or considered by the lower courts, and also would require a developed factual record, it is not suitable for this Court's review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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proven to be successful in the United States. D.Ct. ECF No. 61. But that evidence was not part of the record for a subsequent motion for judgment on the pleadings and was not a complete presentation.