No. 18-766

In The Supreme Court of the United States

TERESA BIERMAN, et al.,

Petitioners,

vs.

GOVERNOR TIM WALZ, in His Official Capacity as Governor of the State of Minnesota, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GOVERNOR TIM WALZ, COMMISSIONER TONY LOUREY, AND COMMISSIONER JANET JOHNSON

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QUESTION PRESENTED

Does a public sector union's status as the exclusive bargaining representative of all individuals in the unit violate the First Amendment rights of non-members who are not required to join or financially support the union and remain free to communicate with the government, to criticize the union, and to associate with whomever they please?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTORY AUTHORITIES

STATUTORY AUTHORITIES

TABLE OF AUTHORITIES – Continued

FEDERAL RULES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

1. "Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care." *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014). "In order to prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization." *Id.* (citing 42 U.S.C. § 1396n(c)(1)). "A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care." *Id.*

The State of Minnesota has several Medicaid and other programs for elderly individuals or persons with disabilities to allow them to stay in their homes, including the Personal Care Assistance Choice Program, Consumer Support Grant Program, and Consumer Directed Community Supports Program. (Pet. App. 54–55; Dist. Ct. Doc. 74 ¶ 15.) The personal care services provided include "grooming, dressing, bathing, transferring, mobility, positioning, eating, and toileting" as well as "meal planning and preparation; basic assistance with paying bills; shopping for food, clothing, and other essential items; . . . and traveling, including to medical appointments . . . " and "other similar, in-home, nonprofessional long-term services and supports . . . to meet [participants'] daily living needs and ensure that [they] may adequately function in [their] home and have safe access to the community." Minn.

Stat. §§ 256B.0711, subd. 1(c); 256B.0659, subd. 1(b), (i).

2. In 2013, the Minnesota Legislature enacted the Individual Providers of Direct Support Services Representation Act, 2013 Minn. Laws ch. 128, art. 2 (hereinafter "the Act"). It allows personal care providers as defined by the Act to seek possible union representation pursuant to the Public Employment Labor Relations Act ("PELRA"), Minn. Stat. Ch. 179A.[1] The Act is codified at Minn. Stat. §§ 179A.54 and 256B.0711. The Act applies to the personal care providers described above who render care to elderly individuals or persons with disabilities through programs funded in whole or in part by the State. Minn. Stat. §§ 179A.54, subd. 1(b), 256B.0711, subd. 1.

The Act was designed to provide participants with "better access, better quality and more stability." *Hearing on S.F. 778, 665 Before the S. Comm. on State & Local Gov't*, 88th Leg. (Mar. 4, 2013) (Statement of Sen. Sandra Pappas, Chair, S. Comm. on State & Local

[1] At least nine other states have similar laws. *See* Cal. Gov't Code § 110000 *et seq.*; Cal. Welf. & Inst. Code §§ 12301.6(c), 12302.25(a); Conn. Gen. Stat. §§ 17b-706, 17b-706a(e), 17b-706b; Ill. Comp. Stat., ch. 20, § 2405/3(f); Md. Code, Health-Gen. § 15-901 *et seq.*; Mass. Gen. Laws ch. 118E, § 73; Mo. Rev. Stat. § 208.862; Or. Const., art. XV, § 11(3)(f); Or. Rev. Stat. §§ 410.608-410.614; Vt. Stat. Ann. tit. 21, § 1634; Rev. Code Wash. § 74.39A.270. In at least five states, personal care providers have elected to unionize for more than seven years. Brief *amici curiae* of California, et al. at 6–13; *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681), 2013 WL 6979556.

Gov't).[2] It was also intended to benefit providers by "improv[ing] their wages," and "allowing access to better training and provide fairness." *Id.*

Pursuant to the Act, a union may seek to be certified as the exclusive representative of personal care providers by submitting a petition to the Minnesota Bureau of Mediation Services ("BMS") Commissioner that demonstrates at least 30 percent of personal care providers want to be represented by the union. Minn. Stat. §§ 179A.54, subd. 10, 179A.12, subd. 3. If an election is held and a majority of the votes cast by eligible providers support union representation, the BMS Commissioner shall certify the union as the exclusive representative. Minn. Stat. §§ 179A.12, subd. 10, 179A.54, subd. 10.[3] The union can then negotiate with the State regarding limited matters relating to the providers (principally compensation and educational opportunities), and any agreement is subject to legislative approval. Minn. Stat. §§ 179A.03, subd. 19, 179A.07, subd. 2, 179A.54, subds. 3–5, 256B.0711, subd. 4(c).

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[2] Video of the Minnesota Senate committee hearing is available at https://www.senate.mn/media/media_list.php?ls=88&category=committee&type=video&archive_year=2013 (last visited March 17, 2019), at 0:09:45.

[3] The Act and PELRA clearly state that the providers decide whether they will be represented by a union. Minn. Stat §§ 17A.54, subd. 10, 179A.12, subds. 3, 7, 10. Petitioners' assertion that the union is "a government-appointed lobbyist" is unsupported by the text of the pertinent statutes. (*See* Pet. 18.)

3. In 2014, Respondent SEIU Healthcare Minnesota ("SEIU") submitted a petition to BMS requesting an election to certify it as the exclusive representative for personal care providers pursuant to Minn. Stat. § 179A.54, subd. 10. (Pet. App. 57–58; Dist. Ct. Doc. 74 ¶ 25.) From August 1–25, 2014, a mail-ballot election was held among the eligible providers. (*Id.*) On August 26, 2014, the ballots were tabulated by BMS. (*Id.*) A majority of the votes cast were in favor of unionization, and therefore BMS certified SEIU in accordance with section 179A.12. (*Id.*)

The State and SEIU subsequently entered into contract negotiations. On January 9, 2015, the parties reached a tentative agreement, which was ratified by the Minnesota Legislature in May 2015. (Dist. Ct. Doc. 96, Ex. B); 2015 Minn. Laws ch. 71, art. 7, § 52. The first contract was effective from July 1, 2015 to June 30, 2017, and provided for, among other things, a higher wage floor, paid time off, and additional training opportunities for personal care providers. (Dist. Ct. Doc. 96 at 12, 20–21, 23.) The Minnesota Legislature ratified a second agreement covering July 1, 2017, to June 30, 2019, which, among other things, increased the minimum wage floor, increased the accrual rate for paid time off, provided holiday pay, and provided training stipends. (Eighth Cir. Doc. filed Nov. 16, 2017 at 18, 22, 27); 2017 Minn. Laws 1st Spec. Sess. ch. 6, art. 18, § 2, subds. 7(f), 15(b).

4. A group of providers filed this lawsuit claiming that: (1) the election of an exclusive representative under the Act violates their First Amendment right to

freedom of association because it compels them to associate with a union (Count I); and (2) the election itself, regardless of the outcome, violated the First Amendment by submitting their right to freedom of association to a majority vote (Count II). (Pet. App. 59–60.) The State Respondents and SEIU moved for judgment on the pleadings, arguing that Petitioners' claims are foreclosed by *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), in which this Court rejected a First Amendment challenge to PELRA by non-member faculty at Minnesota colleges. This Court explained that exclusive representation does not infringe upon speech or associational rights because "[t]he state has in no way restrained [the dissenters'] 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." *Id.* at 288.

The district court granted Respondents' motions, holding that Petitioners' First Amendment rights are not violated by the certification of SEIU as the exclusive representative for personal care providers. (Pet. App. 19–21 (citing *Knight*, 465 U.S. at 276, 282–83, 288–89).) With respect to Count II, the district court found "no support for [Petitioners'] assertion that their constitutional rights are violated by the mere fact that a vote is occurring, which may or may not result in an action that [Petitioners] claim would violate their constitutional rights." (*Id.* at 25.)

The Eighth Circuit affirmed, concluding that Petitioners' claims are "foreclosed by *Knight*." (*Id.* at 5–6.)

The court rejected Petitioners' attempt to distinguish their claims from *Knight*, explaining that "[t]here is no meaningful distinction between this case and *Knight*," which has "direct application." (*Id.* at 6–7.) The Eighth Circuit further held that this Court's decisions in *Harris* and *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) "do not supersede *Knight*" because "the constitutionality of exclusive representation standing alone was not at issue." (*Id.*)

REASONS FOR DENYING THE PETITION

Petitioners have not identified any compelling reasons to grant certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). Indeed, the Eighth Circuit's decision does not conflict with any decision of this Court or any other circuit court. *Cf.* Sup. Ct. R. 10(a), (c) (Court grants certiorari when there is a circuit split or the lower court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). On the contrary, the legal issue was settled by this Court long ago in *Knight*, which every lower court to consider this question has recognized. *Cf.* Sup. Ct. R. 10(c) (Court grants certiorari when the case involves an important question of federal law that "has *not* been, but should be, settled by this Court") (emphasis added).

I. The Eighth Circuit's Decision Does Not Conflict with a Decision of Any Other Circuit.

The First, Second, Seventh, Eighth, and Ninth Circuits have all recently concluded, consistent with *Knight*, that exclusive representation does not violate the First Amendment rights of non-members. *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019) (publicly subsidized childcare providers); *Uradnik v. Inter Faculty Org.*, No. 18-3086, slip op. at 2 (8th Cir. Dec. 3, 2018) (public university faculty), *petition for cert. filed*, No. 18-719 (Dec. 4, 2018); Pet. App. 5–6 (homecare providers); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir.) (homecare and childcare providers), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (childcare providers), *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.) (childcare providers), *cert. denied*, 136 S. Ct. 2473 (2016). This Court has already considered and denied petitions for certiorari in *Hill*, *Jarvis*, and *D'Agostino*, which were similar to this petition. Petition for Writ of Certiorari, *Hill v. Serv. Emps. Int'l Union*, 138 S. Ct. 446 (2017), 2017 WL 2591420; Petition for Writ of Certiorari, *Jarvis v. Cuomo*, 137 S. Ct. 1204 (2017), 2016 WL 7190381; Petition for Writ of Certiorari, *D'Agostino v. Baker*, 136 S. Ct. 2473 (2016), 2016 WL 2605061.

Furthermore, while Petitioners suggest that this Court's decision in *Janus* changed the law in this area, two circuits addressed this issue in three post-*Janus* decisions, and they uniformly held that exclusive representation in the public sector remains constitutional.

Mentele, 916 F.3d at 789; *Uradnik*, slip op. at 2; (Pet. App. 5–6). Indeed, the Eighth Circuit held in this case that *Janus* and *Harris* "do not supersede *Knight*" because "the constitutionality of exclusive representation standing alone was not at issue" in those cases. (Pet. App. 7); *see also Uradnik*, slip op. at 2 (citing *Janus*, 138 S. Ct. at 2478; *Harris*, 134 S. Ct. at 2640).

The Ninth Circuit also rejected the argument that *Janus* supersedes *Knight*. *Mentele*, 916 F.3d at 789. The Ninth Circuit explained that the cases "presented different questions . . . and *Janus* never mentions *Knight*." *Id.* The court further concluded that *Janus* "expressly affirm[s] the propriety of mandatory union representation" by making it "clear that the degree of First Amendment infringement inherent in mandatory union representation is tolerated in the context of public sector labor schemes." *Id. Janus* therefore does not "revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation." *Id.*

Petitioners' assertion that *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) conflicts with these cases is incorrect. (Pet. 12–13.) As the district court explained, *Mulhall* "only addressed standing, not the merits of the employee's claim, and only addressed a Labor Management Relations Act claim, not a First Amendment claim," Pet. App. 21, which is why it does not even cite, let alone discuss *Knight*. *Accord Hill*, 850 F.3d at 865 n.3 (distinguishing *Mulhall*); *D'Agostino*, 812 F.3d at 244–45 (finding plaintiffs' reliance on *Mulhall* "odd").

Indeed, *Mulhall* involved materially different facts and legal issues. In *Mulhall*, the union had "agreed to spend money in support of [the employer's] public campaign to obtain a gaming license, in exchange for [the employer's] assistance in making [the union] the exclusive bargaining agent for [the employer's] currently non-unionized workforce." 618 F.3d at 1283. The union also agreed "not to 'picket, boycott, strike, or take other economic action against' " the employer. *Id*. at 1289. The employee sued both his employer and the union under section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. *Id*. at 1283. The Eleventh Circuit concluded that the employee had standing to challenge the legality of the agreement between his employer and the union because he was at "imminent risk" of harm due to the *employer's* "considerable and varied organizing assistance" which "substantially increase[d] the likelihood" of unionization. *Id*. at 1288. The constitutionality of exclusive representation was not at issue.

In any event, this Court already considered three certiorari petitions that argued *Mulhall* created a circuit split on the constitutionality of exclusive representation, and it denied certiorari in each case. Petition for Writ of Certiorari, *Hill v. Serv. Employees Int'l Union*, 138 S. Ct. 446 (2017), 2017 WL 2591420 at *24; Petition for Writ of Certiorari, *Jarvis v. Cuomo*, 137 S. Ct. 1204 (2017), 2016 WL 7190381 at *23–25; Petition for Writ of Certiorari, *D'Agostino v. Baker*, 136 S. Ct. 2473 (2016), 2016 WL 2605061 at *16–18.

Because the Circuits have uniformly upheld the constitutionality of exclusive representation, there is no conflict for this Court to resolve.[4]

II. This Court Has Already Settled the Question Presented.

The Circuits have acted uniformly because this Court already conclusively determined that exclusive representation does not violate the First Amendment rights of non-members. In *Knight*, a group of Minnesota community college faculty instructors, who were not members of the union elected to represent the faculty bargaining unit, challenged the constitutionality of exclusive representation as authorized by PELRA. 465 U.S. at 278. Like Petitioners in this case, the instructors argued that exclusive representation violated their First Amendment speech and associational rights. *Id.* at 288–90. This Court summarily affirmed the constitutionality of exclusive representation in collective bargaining. *Id.* at 279. It also rejected the instructors' argument with respect to the "meet and confer" process, holding that they were "[u]nable to demonstrate an infringement of any First Amendment right." *Id.* at 291.

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[4] District courts in Maine and Ohio have also recently rejected these arguments. *Reisman v. Assoc. Faculties of Univ. of Maine*, 356 F. Supp. 3d 173 (D. Me.), *appeal docketed*, No. 18-2201 (1st Cir. Dec. 7, 2018); *Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-628 (S.D. Ohio Jan. 14, 2019). The State Respondents are not aware of any court that has agreed with Petitioners' arguments.

The Court explained that exclusive representation did not infringe upon the instructors' speech and associational rights because "[t]he state has in no way restrained [the dissenters'] 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." *Id.* at 288. The Court emphasized that the objecting non-members were "free to form whatever advocacy groups they like," and they "are not required to become members of [the union]." *Id.* at 289.

The same analysis applies here. As in *Knight*, Petitioners' freedom *not* to associate is unimpeded. They are not required to join a union. Minn. Stat. §§ 179A.06, subd. 2, 179A.13, subd. 2. Nor do they have to be a member of any certified union to participate in the State programs. Minn. Stat. § 179A.13, subd. 2. They are free to associate with any group or represent themselves in advocating any provider-related position, including opposition to any proposed agreement between the State and the union. Minn. Stat. § 179A.06, subd. 1; *Knight*, 465 U.S. at 289 ("Appellees are free to form whatever advocacy groups they like.").

Petitioners remain free to speak to relevant decision-makers on any subject. Minn. Stat. § 179A.06, subd. 1; *Knight*, 465 U.S. at 289 (concluding that PELRA does not restrain instructors' freedom to speak on any education-related issue). They may petition the Governor of Minnesota, state legislators, and the Minnesota Department of Human Services if they desire with respect to any issue or aspect of personal care

programs. *Id.* They are also free to criticize SEIU and make clear that they disagree with its positions. *Id.*

Furthermore, as in *Knight*, it is readily understood that SEIU's positions represent the collective viewpoint of providers, not the individual position of each Petitioner. *Knight*, 465 U.S. at 276 (noting that the State considered the views presented by the union to be the official collective position and recognized that not every instructor agrees with the official faculty view on every policy question); *accord D'Agostino*, 812 F.3d at 244 ("[W]hen an exclusive bargaining agent is selected by majority choice, 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. And the freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views. . . .").

Although Petitioners attempt to distinguish their claims from *Knight*, Pet. 13–17, every court to consider these arguments has found them unconvincing. Pet. App. 6 ("There is no meaningful distinction between this case and *Knight*."); *Mentele*, 916 F.3d at 788–89 (rejecting challenger's attempt to distinguish *Knight*); *Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018) (same); *Reisman*, 356 F. Supp. 3d at 176–77 (same); *Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-628, slip op. at 8–9 (S.D. Ohio Jan. 14, 2019) (same); *see also D'Agostino*, 812 F.3d at 243 (rejecting same argument Petitioners

make here based on *Knight*); *Jarvis*, 660 F. App'x at 74 (same); *Hill*, 850 F.3d at 864 (same). As the Eighth Circuit put it, "a *fair* reading of *Knight* is not so narrow." (Pet. App. 6 (emphasis added).)

Indeed, although Petitioners characterize the *Knight* opinion as not discussing compelled speech or association, Pet. 14–15, this Court spent an entire section in *Knight* discussing the First Amendment speech and associational rights of non-members. 465 U.S. at 288–90; *see also id.* at 295–96 (Brennan, J., dissenting) (stating that it is "crucial" to recognize that the faculty's "First Amendment right to be free from compelled associations with positions or views that they do not espouse" is "at stake here"); *Mentele*, 916 F.3d at 788 ("Given the importance of that analysis to the Court's opinion, we do not view those statements as dictum.").

Petitioners' slippery slope argument misses the mark. (Pet. 19–24.) The State is not "choosing representatives for its citizens," "appoint[ing] exclusive representatives," or "politically collectiviz[ing] any profession or industry under the aegis of a state-favored interest group." (Pet. 19, 22–23.) To the contrary, it was personal care providers themselves who decided in an election to designate SEIU as their exclusive representative. (*See supra* at 4.) Providers are free to elect a different representative or to be unrepresented if they so desire. Minn. Stat. § 179A.12, subd. 3. In fact, the Minnesota Legislature enacted a similar law with respect to childcare providers, who decided not to unionize. 2013 Minn. Laws ch. 128, art. 1

(expired); Certification of Results of Tabulation, Minn. Bureau of Mediation Servs., No. 16PCE0649 (Mar. 1, 2016), *available at* https://mn.gov/bms/assets/16PCE0649-Cert_tcm1075-237424.pdf.

In sum, certiorari is unwarranted because this Court already settled whether exclusive representation violates the First Amendment rights of non-members, and Petitioners' contrary arguments lack merit.[5]

III. The Eighth Circuit's Decision Does Not Conflict with Any Decisions of This Court.

Contrary to Petitioners' assertion, the lower courts' decisions do not conflict with *Janus* or any other decision of this Court. *Janus* dealt solely with whether a state may compel non-members to pay a fair-share fee to a union. *Accord* Pet. App. 7 ("[T]he constitutionality of exclusive representation standing alone was not at issue" in *Janus*); *Mentele*, 916 F.3d at 789 (constitutionality of exclusive representation "was not presented or argued" in *Janus*). The opinion does not even cite, much less overrule, *Knight*.

Janus also does not support Petitioners' argument that exclusive representation in and of itself is unconstitutional. Indeed, *Janus* distinguished exclusive representation from the issue of fair-share fees. *Janus*,

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[5] To reverse the lower courts, this Court would need to overrule *Knight*. The Petition, however, does not ask the Court to do so.

138 S. Ct. at 2465 (it is "simply not true" that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked"); *accord Harris*, 134 S. Ct. at 2640. With respect to exclusive representation, this Court stated that "[i]t is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" and "States can keep their labor-relations systems exactly as they are" with the exception of fair-share fees. *Janus*, 138 S. Ct. at 2478, 2485 n.27; *see also id.* at 2471 n.7 ("[W]e are not in any way questioning the foundations of modern labor law.").

Petitioners' repeated reliance on the "impingement" language in *Janus* is misplaced. (Pet. 1, 6–8, 12, 26.) As detailed above, the full text of the opinion makes clear that exclusive representation remains constitutional, which is consistent with *Knight*. *See also Mentele*, 916 F.3d at 789 (*Janus* "expressly affirm[ed] the propriety of mandatory union representation"); *Janus*, 138 S. Ct. at 2478 (stating that impingement caused by exclusive representation "would not be tolerated in *other* contexts" (emphasis added)).[6] States simply cannot "go further still and require"

[6] Petitioners erroneously assert that this case presents that "other context." (Pet. 1.) As discussed above, there is no meaningful distinction between Petitioners and the challengers in *Knight*. In both instances, the First Amendment rights of non-members have not been violated because they are not required to join or financially support the union and remain free to communicate with the government, to criticize the union, and to associate with whomever they please. (*See supra* at 11–12.)

non-members to pay fair-share fees. *Janus*, 138 S. Ct. at 2478. Such fees cross the line drawn by this Court, whereas exclusive representation does not. *Id.*

Harris also does not support Petitioners' position. Unlike Petitioners, the Illinois personal care providers in *Harris* did not "challenge the authority of the [union] to serve as the exclusive representative of all the personal assistants in bargaining with the State." 134 S. Ct. at 2640. They only challenged the portion of Illinois law that forced them to pay a "fair-share" fee to the union. 134 S. Ct. at 2626–27. This Court concluded that the personal care providers could not be required to pay a fair-share fee. *Id.* at 2638. In so doing, this Court made clear that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id*. at 2640; *accord* Pet. App. 7 (*Harris* "do[es] not supersede *Knight*."); *D'Agostino*, 812 F.3d at 243 ("We do not, however, read *Harris* as limiting *Knight* in a way that affects this case."); *Hill*, 850 F.3d at 864 ("*Harris* did not speak to the constitutionality of the exclusive-bargaining-representative provisions."); *Jarvis*, 660 F. App'x at 74–75 ("*Harris* addressed only the narrow question of whether individuals who were neither full-fledged state employees nor union members could be required to pay fair share fees . . . ; it did not consider the constitutionality of a union serving as the exclusive representative. . . . Thus, *Harris* does not relieve us from the duty to follow *Knight*. . . .") (internal citations, brackets, and quotation marks omitted).

This Court's distinction in *Harris* between "full-fledged state employees" and personal care providers is not relevant here. 573 U.S. at 2638. As discussed above, *Knight*'s First Amendment analysis of exclusive representation with respect to college faculty applies equally to Petitioners. (*See supra* at 11–12.) Neither group's First Amendment rights are violated because in both cases they are not required to join or financially support the union and remain free to communicate with the government, to criticize the union, and to associate with whomever they please.

Petitioners' reliance on *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012) is similarly misplaced. *Knox* only "concerns the procedures that must be followed when a public-sector union announces a special assessment or mid-year dues increase." 567 U.S. at 322 n.9.

Because the Eighth Circuit's decision in this case is consistent with this Court's precedent, including *Janus* and *Harris*, there is no conflict for this Court to resolve.

IV. The Second Question Presented Is Also Not Worthy of Certiorari.

This Court should deny review of the second question presented by Petitioners for several reasons. First, Petitioners concede that their second question does not merit review on its own. Pet. 24 (stating that "*[i]f* the Court takes the first question . . . it should *also* take the second question" (emphasis added)). As discussed

above, there are no compelling reasons to review the first question. Therefore, the second question should be denied as well.

In addition, this case is not the proper vehicle to address Petitioners' second question. The district court dismissed Petitioners' claims on the pleadings without a factual record based on *Knight*, and the Eighth Circuit affirmed. (Pet. App. 6–7, 20–21, 25.) Neither court addressed Petitioners' second question because *Knight* is binding precedent that forecloses Petitioners' claims as a matter of law.

This Court ordinarily "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[T]his is a court of final review and not first view." (quotation omitted)). "In particular, when [this Court] reverse[s] on a threshold question, [this Court] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Because the lower courts did not address Petitioners' second question and the record is not suitable to resolve it, this Court should deny review. Even if the Court were to grant certiorari on Petitioners' first question and overrule *Knight*, the appropriate procedure would be to remand to the lower courts to consider in the first instance with a full record the State

interests served by the law and whether such interests can be achieved through less restrictive means.

CONCLUSION

For all of these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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