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, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925

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QUESTION PRESENTED

State-subsidized childcare providers in the State of Washington democratically elected a union representative to negotiate with state officials over certain unit-wide contract terms that the State otherwise would set unilaterally. As a result, Washington law requires state officials to meet and negotiate with the union over those contract terms. The question presented is whether the State is compelling individual childcare providers to form an expressive association with the majority-chosen union, in violation of their First Amendment rights, even though individual providers need not join, subsidize, or do anything else to associate with the union, and even though reasonable observers understand that not every individual provider necessarily agrees with the union's speech.

CORPORATE DISCLOSURE STATEMENT

Respondent SEIU Local 925 is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

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INTRODUCTION

Like many other states, Washington includes state-subsidized childcare providers within the State's public employee collective bargaining system.[1] Washington's collective bargaining system follows the exclusive-representative model, so state officials negotiate contract terms with a single representative democratically chosen by the childcare providers. The Washington Legislature's choice to adopt an exclusive-representative system based on majority rule reflects the essentially universal judgment by Congress and state legislatures about how best 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.

Petitioner alleged that the State is violating the First Amendment by forcing childcare providers to associate with a union. But petitioner did not claim that the providers are required to join or financially support the union chosen to represent their unit or, indeed, to personally do or say *anything* to associate themselves with the union. Petitioner also did not dispute that state officials and reasonable outsiders understand that not all childcare providers 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 at-

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[1] *See* Pet. 22 n.5 (identifying 18 states that authorize, or previously authorized, collective bargaining by state-subsidized childcare providers).

tributed personally to individual providers. Nor did petitioner dispute that providers are free to express their own views, whether individually or though groups of their choosing. Petitioner herself frequently expressed her views directly to the head of the relevant state agency. Not surprisingly, the district court rejected petitioner's First Amendment compelled-association claim, and the Ninth Circuit affirmed.

The Ninth Circuit's ruling that exclusive-representative collective bargaining, by itself, does not violate the First Amendment rights of bargaining unit members agrees with the decisions of every other court to consider this issue and faithfully applies this Court's precedents. This Court already has denied four essentially identical petitions for certiorari filed by the same advocacy group, the most recent of which was denied in May 2019. *See infra* at 13. The current petition does not present a question worthy of this Court's review.

STATEMENT OF THE CASE

A. Background

1. Washington adopted its Public Employee Collective Bargaining Act (PECBA) in 1967. *See* Wash. Rev. Code §41.56.010 *et seq*. PECBA 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. *Id.* §§41.56.070, 41.56.080. The employees may also decide by majority vote to decertify the representative or change representatives. *Id*. §41.56.070; Wash. Admin. Code 391-25-070. If the unit does not have a

PECBA 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. D.Ct. ECF No. 71 at 6 (¶12). The National Labor Relations Act and Railway Labor Act also adopt exclusive-representative systems. 29 U.S.C. §159; 45 U.S.C. §152, Fourth. These systems reflect a longstanding legislative judgment based on experience 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. D.Ct. ECF No. 71 at 5-6 (¶¶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), *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.* Collective bargaining agreements with a democratically chosen exclusive representative also set employment terms for at least 100,000 state-subsidized childcare providers. D.Ct. ECF No. 70 at 6-7 (¶15).

2. The State of Washington operates programs that pay for family childcare providers to provide childcare for income-eligible working families. *See* D.Ct. ECF Nos. 37, 73. In 2006, the Washington Legislature adopted the Access to Quality Family Child Care Act (the Act) to "improv[e] access to and the stability of quality child care through providing collective bargaining … rights for family child care providers…." 2006 Wash. Sess. Laws, ch. 54. The Act extends PECBA to cover family childcare providers paid to carry out state programs. Wash. Rev. Code §41.56.028. For purposes of PECBA, the Governor is "the public employer of family child care providers," and providers are "public employees." *Id.* §41.56.028(1).

The Act authorizes the providers to democratically elect (or decertify) an "exclusive representative" to represent them in collective bargaining with state officials about: "(i) Economic compensation … (ii) health and welfare benefits; (iii) professional development and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters." *Id.* §41.56.028(2)(c). Prior to adoption of the Act, state officials would unilaterally

set the economic terms applicable to family childcare providers. Pet. App. 4a.

The Act preserves "parents' or legal guardians' right to choose and terminate the services of any family child care provider that provides care for their child" and provides that collective bargaining agreements must "expressly reserve" the State Legislature's authority "to make programmatic modifications to the delivery of state services through child care subsidy programs." Wash. Rev. Code §41.56.028(4)(a),(d). The Act also requires legislative approval of the funding necessary to implement the compensation and benefits provisions of any collective bargaining agreements. *Id.* §41.56.028(7).

In 2006, the Washington childcare providers overwhelmingly elected SEIU Local 925 (SEIU) as their unit's bargaining representative in a democratic election administered by the Public Employment Relations Commission. D.Ct. ECF No. 40 at 2 (¶2). SEIU thereby became the PECBA representative of a statewide bargaining unit of approximately 7,000 providers. D.Ct. ECF No. 37 at 3-4 (¶12).

Under PECBA, individual childcare providers are not required to become union members, and SEIU must represent "all the public employees within the unit without regard to membership in said bargaining representative." Wash. Rev. Code §§41.56.040, .080; *see also Allen v. Seattle Police Officers' Guild*, 100 Wash.2d 361, 371-74 (1983) (union representative owes a duty of fair representation to all bargaining unit workers). PECBA also provides that "any public employee at any time may present his or her grievance to the public employer and have such

grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement … and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting ….” Wash. Rev. Code §41.56.080; *cf.* 29 U.S.C. §159(a) (similar provision of National Labor Relations Act).

Consistent with this Court’s decision in *Harris v. Quinn*, 573 U.S. 616 (2014), childcare providers who are not union members need not pay any money to SEIU. Pet. App. 37a (¶19); D.Ct. ECF No. 40 at 5 (¶¶18-20).

3. Since 2006, collective bargaining agreements for the Washington family childcare provider unit have provided for major improvements in the providers’ contract terms, including increased resources for training and professional development, health insurance coverage for providers who qualify, quality-care incentives, pay increases, bonuses, an infant pay differential and enhanced toddler rate, and a grievance procedure. D.Ct. ECF No. 40 at 2-4. By improving the contract terms for childcare providers, the State also makes it easier for families to obtain high-quality child care through public programs. D.Ct. ECF No. 70 at 9 (¶24); *id.* No. 73 at 4 (¶11).

B. Proceedings Below

1. Petitioner Kathleen Miller is a childcare provider in the bargaining unit represented by SEIU. Pet. App. 33a (¶6). She is a former SEIU member who previously served on the union’s bargaining committee. *Id.*; D.Ct. ECF No. 34-4 at 11-12. Petitioner filed suit against State officials and SEIU,

alleging that the State's recognition of SEIU as the PECBA representative of the childcare provider bargaining unit violates her First Amendment rights by forcing her to "associate" with the Union. Pet. App. 37a-40a (¶¶23-25, 29-33).

Petitioner did not claim that the State requires her to be a union member or to pay any money to SEIU or to do anything else to associate with SEIU. Nor did petitioner claim that the State restrains her from speaking or petitioning in opposition to the Union's positions, whether individually or through groups of her own choosing. Petitioner often communicates directly with State childcare officials, including the head of the Department of Early Learning. D.Ct. ECF No. 34-4 at 54-56.

2. The district court granted summary judgment to the State and SEIU on petitioner's claim. Pet. App. 21a-29a.[2] The district court reasoned that, under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), an exclusive-representative collective bargaining system, by itself, does not compel expressive association in violation of the First Amendment. Pet. App. 26a-28a. The district court also reasoned that Washington State "neither restrains childcare providers' right to speak nor requires them to join the democratically-elected representative group," and childcare providers have no First Amendment right to "an individual government audience" or "to be heard over another." *Id.* 28a. Accordingly, petitioner did not "demonstrate an infringement of any First Amendment right." *Id.* 26a-28a.

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[2] The district court's decision also addressed a different claim by a second plaintiff that is not at issue here.

3. Petitioner appealed to the Ninth Circuit. While her 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 Ninth Circuit unanimously affirmed the district court's judgment. Pet. App. 1a-18a. The court of appeals reasoned that *Knight* foreclosed petitioner's compelled-expressive-association claim because *Knight* held that a collective bargaining system in which the exclusive representative "expressed the faculty's 'official collective position … in no way restrained [dissenting faculty members'] freedom to associate *or not to associate with whom they please, including the exclusive representative*.'" Pet. App. 12a (emphasis in original) (quoting *Knight*, 465 U.S. at 288).

The Ninth Circuit rejected petitioner's argument that *Janus*, which "present[ed] [a] different question" and "never mentions *Knight*" and "expressly affirm[s] the propriety of mandatory union representation," "was nevertheless intended to overrule the Court's earlier decision in *Knight sub silentio*." Pet. App. 13a.

The Ninth Circuit also held that, even if exclusive-representative bargaining, by itself, were treated as an infringement on First Amendment rights that triggers exacting scrutiny, "we would

reach the same result." Pet. App. 14a. The Ninth Circuit reasoned that the State has a compelling interest in "negotiating with only one entity" to set unit-wide contact terms to "avoid[] the chaos and inefficiency of having multiple bargaining representatives," "the potential confusion that would result from multiple agreements, and possible dissention among providers." *Id.* 16a-17a. The Ninth Circuit further reasoned that any purported impingement on nonmembers' rights is limited because the bargaining subjects are "circumscribed," and that petitioner "has not suggested," and "it is difficult to imagine," an alternative collective bargaining system that would serve the State's interests while significantly reducing what petitioner claimed was an infringement of First Amendment rights. *Id.* 15a, 17a.

REASONS FOR DENYING THE PETITION

The petition is not worthy of this Court's review. The lower courts are unanimous in rejecting petitioner's 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.* The petition does not ask this Court to overrule *Knight,* much less offer any special justifications for abandoning stare decisis. Petitioner relies on the Court's recent decision in *Janus*, but that decision addressed union fees, not exclusive representation, and the Court made clear it was "not in any way questioning the foundations of modern labor law." 138 S.Ct. at 2471 n.7.

Additionally, petitioner's arguments find no support in this Court's precedents about compelled expressive association outside the collective bargaining context. Petitioner does not contend that the State requires her to do or say anything, or that it restricts her speech in any way. Nor does she contend that the First Amendment prevents State officials from negotiating with the union about contract terms that apply to all providers in the bargaining unit. Petitioner's sole complaint is that the union's role as representative of her bargaining unit purportedly "associates" her 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 childcare provider necessarily agrees with the union's speech.

Finally, the petition should also be denied because the Ninth Circuit's decision rests on alternative grounds. The court of appeals concluded that, even if the exclusive-representative system infringed on First Amendment associational rights, the system would satisfy exacting scrutiny. That conclusion is supported by the record below, which includes expert testimony about the benefits to the State of using an exclusive-representative model and the failure of alternative models. Petitioner presented no evidence to oppose the State's and Union's summary judgment motions, so a different ruling by this Court on the infringement issue would not change the judgment below.

I. The lower courts have unanimously rejected petitioner's argument

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 Ninth 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-18a; *Bierman v. Dayton*, 900 F.3d 570, 572 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S.Ct. 2043 (2019); *Hill v. Service Emps. Int'l Union*, 850 F.3d 861 (7th Cir.), *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.), *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 nonunion 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.

Thus, five district court judges, 13 circuit court judges, and one retired U.S. Supreme Court justice have all considered and unanimously rejected petitioner's argument that exclusive-representative collective bargaining, by itself, compels expressive association in derogation of First Amendment associational rights.

Similar advocacy groups also have filed similar suits to challenge exclusive-representative bargaining. All those challenges also have been rejected.

See, *e.g.*, *Uradnik v. Inter Faculty Organization*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied,* 139 S. Ct. 1618 (2019); *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.); *Branch v. Commonwealth Emp't Relations Bd.*, 481 Mass. 810 (2019).

2. Petitioner tries 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. 12-13. *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 Hill*, 850 F.3d at 865 n.3 (distinguishing *Mulhall*); *D'Agostino*, 812 F.3d at 245 (same).[3] That being so, there is no conflict in the lower courts warranting this Court's review. Indeed, since 2016, this Court has rejected four petitions for certiorari raising the same question presented here and asserting the same nonexistent circuit conflict. *Bierman,* 139 S.Ct. 2043 (2019); *Hill,* 138 S.Ct. 446 (2017); *Jarvis*, 137 S.Ct. 1204 (2017); *D'Agostino*, 136 S.Ct. 2473 (2016).

3. Cases raising First Amendment challenges to exclusive-representative bargaining are also still percolating through the lower courts. On February

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[3] *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).

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

II. The Ninth Circuit's decision follows this Court's precedents

Petitioner contends that review is warranted because, in petitioner's view, the lower courts are misinterpreting *Knight*. Pet. 13-17. Not only is petitioner's disagreement with the unanimous decisions of the lower courts an insufficient basis for this Court's review, but petitioner is incorrect. *Knight does* foreclose the only argument petitioner raised below—that Washington's exclusive-representative system inherently "associates" her with a union in violation of the First Amendment. Petitioner does not ask the Court to overrule *Knight,* much less demonstrate any "special justification" for abandoning stare decisis. *Cf. Janus*, 138 S.Ct. at 2486.

Petitioner is also wrong in asserting that the Ninth Circuit's decision conflicts with *Janus*. Pet. 8-

12. The only issue *Janus* addressed was whether public employees could be required to pay fees to support a union representative. This Court expressly stated in *Janus* that it was *not* revisiting longstanding precedent that permits the government to use exclusive-representative collective bargaining to set contract terms.

1. In *Knight*, community college instructors who had opted not to join the majority-elected union challenged a Minnesota law that provided for their public employer to "meet and negotiate" with an exclusive representative over employment terms. They also challenged an additional 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 Minnesota was violating 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 as-

sociate 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 petitioner's 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. Petitioner relies heavily on the Court's recent 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 providers 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* 573 U.S. at 649.

Petitioner points 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. 1. 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). Washington's public sector collective bargaining law includes that "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 2471 n.7, 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 childcare providers 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 Ninth Circuit's decision faithfully applies this Court's precedents to reach the same conclusion as every other court to consider post-*Janus* challenges to exclusive-representative collective bargaining.

III. Petitioner's argument lacks support in precedents about compelled expressive association

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

Petitioner concedes that she has no First Amendment right to negotiate contract terms individually, to prevent state officials from negotiating

exclusively with SEIU about childcare provider contract terms, or to be governed by any regime other than unit-wide contract terms. Pet. 5. Petitioner also did not present any evidence that Washington's public employee collective bargaining law imposes any burden on *her*. Petitioner need not join the union, subsidize the union, or do anything else to associate with the union. Nor does Washington law restrain petitioner from presenting her own grievances, criticizing the union, joining other groups, or expressing her views about childcare contract terms to the public or directly to state officials.

Petitioner's sole argument below was the essentially semantic contention that she is forced into a "mandatory association" with SEIU, infringing her First Amendment rights, simply because PECBA states that an exclusive representative is responsible for representing "all" bargaining unit members in negotiations about unit-wide contract terms. Wash. Rev. Code §41.56.080.

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 an expressive association. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65, 69 (2006) (*FAIR*) (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 petitioner's bargaining unit does not send any messages about petitioner's *own* views or positions.

Petitioner insists that the collective bargaining law creates a mandatory expressive association because it "literally gives unions legal authority to speak and contract for 'all the public employees within the unit without regard to [union] membership.'" Pet. 11 (quoting Wash. Rev. Code §41.56.080). But petitioner's 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").

Petitioner 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. Bd. 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.").

Petitioner also complains that individual child-care providers 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. Wash. Rev. Code §41.56.080 (PECBA representative negotiates contract terms for "all the public employees within the 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 ….").

Equally to the point, petitioner gets matters backward in referring to the burden of an "agency relationship." Washington's collective bargaining system places a legal duty only on the PECBA representative—not on the individual providers. What petitioner describes as an agency relationship is simply the PECBA 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 Allen,* 100 Wash.2d at 371-74.

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 petitioner would likely claim that childcare providers are pressured to join a union. Thus, the duty to represent the entire unit without discrimination protects individual providers' 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") (emphasis in original) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944)).

IV. The Ninth Circuit's decision rests on alternative grounds

Finally, the petition should be denied because a ruling by this Court that exclusive-representative bargaining, by itself, infringes First Amendment rights would not change the judgment below. The Ninth Circuit stated that, even if such an infringement existed, "we would reach the same result," because the system would satisfy "exacting scrutiny." Pet. App. 14a.

Petitioner urges that *Harris v. Quinn* holds that the States lack any compelling interest in using exclusive-representative bargaining to negotiate contract terms for workers who are not "full-fledged" public employees. Pet. 17-19. To the contrary, *Harris* addressed only a requirement that homecare personal assistants pay mandatory union fees, and the Court emphasized that the *Harris* petitioners did not "challenge the authority of the [union] to serve as the exclusive representative of all the personal assistants in bargaining with the State." *Harris*, 573 U.S. at 649. This Court held that the State had no compelling interest in the *mandatory fees* because they are not necessary for a successful exclusive-representative system. *Id.* at 649-51. This Court subsequently reached the same conclusion in *Janus*, with respect to all public employees, pointing out that the federal government and 28 states authorize exclusive-representative collective bargaining while prohibiting agency fee requirements. 138 S.Ct. at 2466.

By contrast, the record below includes expert testimony that there are no examples of successful collective bargaining systems in the United States

that do *not* use the democratic, exclusive representative model, and that experiments with members-only or multiple representative systems were abandoned as failures. *See* D.Ct. ECF No. 71 at 3-8 ((¶¶4, 6-17). The record below also includes evidence about the benefits to the State of setting childcare provider contract terms through bargaining (which petitioner does not dispute the State may constitutionally choose to do) rather than by unilateral dictate. *See* D.Ct. ECF No. 70 at 9 (¶24), No. 71 at 4(¶5) & 8-9 (¶¶18-21), No. 73 at 3-4 (¶¶9-11). Petitioner introduced no evidence at all on these issues, so there would be no basis for challenging the Ninth Circuit's alternative holding if review were granted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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