No. 24-71

IN THE
Supreme Court of the United States

AVRAHAM GOLDSTEIN, et al.,
Petitioners,
v.
PROFESSIONAL STAFF CONGRESS/CUNY, et al.,
Respondents.

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

BRIEF IN OPPOSITION FOR CITY UNIVERSITY OF NEW YORK AND OTHER STATE RESPONDENTS

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QUESTION PRESENTED

Whether a state law recognizing a union as the exclusive representative of public-sector employees in collective bargaining violates the First Amendment when the law does not require employees to join the union or to support the union in any other way.

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INTRODUCTION

Petitioners are six faculty members at the City University of New York (CUNY). As such, petitioners are part of CUNY's "instructional staff" bargaining unit, which comprises 30,000 similarly situated employees. Pursuant to New York's Taylor Law, the instructional staff has elected to be exclusively represented in collective bargaining by Professional Staff Congress/CUNY (PSC), a voluntary union. An employee who falls within the bargaining unit is not required to become a member of PSC or to support the union in any other way. But as the instructional staff's exclusive representative, PSC bargains collectively regarding the terms and conditions of employment for the entire bargaining unit.[1]

Petitioners object to being exclusively represented in collective bargaining by PSC because the union has made public statements—in the union's own name and entirely outside of collective bargaining—which petitioners consider to be anti-Israel and anti-Semitic. Petitioners brought this suit against PSC and various government entities and officers, arguing that the Taylor Law's exclusive representation system violates the First Amendment.

The Second Circuit unanimously rejected petitioners' claim as foreclosed by *Minnesota State Board for Community Colleges v. Knight*—in which this Court held, on facts indistinguishable from those in this case,

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[1] This brief is submitted on behalf of respondents CUNY, John Wirenius, Rosemary A. Townley, and Anthony Zumbolo (the Chair and two members of the New York Public Employee Relations Board), and New York State Comptroller Thomas P. DiNapoli. Respondents PSC and the City of New York are separately represented.

that exclusive representation does not infringe "any First Amendment right." 465 U.S. 271, 291 (1984).

The Second Circuit's decision does not warrant this Court's review. *Knight* unambiguously resolves the question presented, and this case presents the very opposite of a circuit split: in seventeen cases over the past decade, every judge to consider the question has concluded that *Knight* forecloses materially identical challenges to exclusive representation statutes.

Petitioners say that they are not asking this Court to revisit *Knight*, but merely to correct the lower courts' uniform determination that *Knight* applies in a situation like this. But contrary to petitioners' assertions, the judicial consensus understanding of *Knight*—which the Second Circuit applied in this case—comports fully with this Court's precedents, including *Janus v. State, County, and Municipal Employees*, 585 U.S. 878 (2018). Whereas *Janus* invalidated laws compelling nonunion employees to provide financial support for union speech, *Knight* and its progeny uphold exclusive-representation laws that do *not* require support for union speech. And *Janus* made clear that apart from eliminating compulsory financial support for union activities, the States remain free to "keep their labor-relations systems exactly as they are." *Id.* at 928 n.27.

Nor is there any conflict with this Court's compelled association cases. As those decisions recognize, freedom of association is not found in the text of the First Amendment. Rather, this Court has read an "instrumental" right of association into the First Amendment for the purpose of securing the freedoms that are specifically enumerated in the text. Compulsory association therefore does not trigger First Amendment scrutiny unless it burdens an underlying First Amendment right.

Here, exclusive representation for collective bargaining imposes no such burden on petitioners, who are free to speak their minds (or to stay silent) on any subject, to join or to resign from a union, and to form new associations to amplify their own expression.

In any event, the petition is a poor vehicle because petitioners' principal claim is unpreserved. Petitioners assert a First Amendment injury arising from their inability to engage in the supposedly "expressive" act of departing from their bargaining unit. But in addition to being implausible, this claim was never raised or decided below—so there is no ruling on this point for this Court to review.

STATEMENT

A. Legal Background

The New York State Legislature enacted the Public Employees' Fair Employment Act (commonly known as the Taylor Law) in 1967, in response to decades of recurrent public-sector labor unrest. *See* Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 3-19 (1990). Disputes were "too numerous to recall or record," and included "strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, . . . social workers, practical nurses, city-employed lifeguards, doctors and public health nurses, etc." *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967). Such strikes threatened catastrophic and irreparable harm to public safety and health.

A simple legal prohibition on strikes by public-sector employees failed to resolve the many problems caused by such unrest. The Taylor Law addresses this failure by combining a prohibition on public-sector strikes with

provisions designed to guarantee the rights of public employees to unionize and to bargain collectively. N.Y. Civ. Serv. Law §§ 202-204, 207, 210. As of 2022, more than 68 percent of New York public-sector employees (some 882,000 workers) were covered by a collective-bargaining agreement.[2]

Under the Taylor Law, the New York Public Employee Relations Board (PERB) may define a "negotiating unit" or "bargaining unit" comprising a group of public employees who share a "community of interest." N.Y. Civ. Serv. Law § 207(1). The members of a bargaining unit may then vote to designate a union as the bargaining unit's exclusive representative in negotiations with the unit's employer. *See id.* §§ 204, 207(2)-(3). Where a union has been so designated, membership remains voluntary: An employee who is part of a bargaining unit that has elected to be exclusively represented by a union is under no personal obligation to join the union. *See id.* § 202. But a union that has been designated as a bargaining unit's exclusive representative has a legal duty to fairly represent all employees in the bargaining unit (including employees who are not members of the union) when the union engages in collective bargaining. For example, the union cannot negotiate a deal that either unfairly favors its members or unfairly disfavors nonmember employees. *See id.* § 209-a(2); *Janus*, 585 U.S. at 901; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944).

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[2] Barry Hirsch et al., *Union Membership, Coverage, Density and Employment by State: 2022* (2023). (For sources available on the internet, URLs appear in the Table of Authorities.)

Several remedies are available to members of a designated bargaining unit who disagree with an exclusive representative's speech or conduct. They may seek to join or to influence the union's leadership in order to change its direction. In the alternative, they may resign from or decline to join the union, in which case they bear no obligation to support the union, financially or otherwise. *See* N.Y. Civ. Serv. Law §§ 202, 208(1)(b), 215; *Janus*, 585 U.S. 787. Nonunion employees may seek to influence the union's activities through (for example) lobbying and public advocacy. And any member of the bargaining unit (whether or not a member of the union) may pursue a petition to revoke the union's certification as exclusive bargaining representative. *See* 4 N.Y.C.R.R. § 201.2. A decertification petition ultimately is resolved via majority vote of the bargaining unit's members. *See id.* §§ 201.2, 201.3(c)-(d), 201.5(b), 201.8.

The exclusive-representation model reflected in the Taylor Law has been a vital component of American labor law for nearly a century. *See* 45 U.S.C. § 152; *Burlington N. R.R. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). This model effectuates the principle of majority rule, which this Court has described as the "central premise" of American labor law. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009). This regime reflects a legislative determination that "secur[ing] to all members of the unit the benefits of their collective strength and bargaining power" justifies the "sacrifice of individual liberty that this system necessarily demands." *Id.* at 270-71. Exclusive representation also serves the public interest by allowing government employers—who might otherwise have to negotiate piecemeal agreements with many thousands of individual employees—to instead

bargain with a single counterparty that is legally empowered to organize and channel the concerns and priorities of an entire group. Recognizing these benefits, the federal government and at least 37 States, the District of Columbia, and Puerto Rico currently allow for exclusive representation of public-employee bargaining units.[3]

B. Factual and Procedural Background

1. Following an administrative proceeding, PERB designated CUNY's "instructional staff" as a Taylor Law bargaining unit in 1972. That bargaining unit currently comprises more than 30,000 CUNY faculty and staff members. The bargaining unit makes no public statements; its role is limited to the democratic selection of the instructional staff's exclusive representative for collective bargaining. The instructional staff carried out that role by selecting PSC to serve as exclusive bargain-

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[3] *See* Alaska Stat. § 23.40.110(b); Cal. Gov't Code § 3515.5; Conn. Gen. Stat. § 5-271(b); Del. Code tit. 19, § 1304(a); D.C. Code § 1-617.10(a); Fla. Stat. § 447.307(1)(a); Ga. Code Ann. § 25-5-5; Haw. Rev. Stat. § 89-8(a); Idaho Code §§ 33-1273, 44-1803; 5 Ill. Comp. Stat. § 315/3(f); Ind. Code §§ 20-29-5-2(a), 20-29-2-9; Iowa Code § 20.16; Kan. Stat. § 72-2220(a); Ky. Rev. Stat. §§ 67A.6902(2), 345.030(2); Me. Rev. Stat. tit. 26, §§ 967(1-A), 979-F(2)(B); Mass. Gen. Laws ch. 150E, § 4; Mich. Comp. Laws §§ 423.26, 423.211; Minn. Stat. § 179A.06(2); Mont. Code §§ 39-31-205, 39-31-206; Neb. Rev. Stat. § 48-838(4); Nev. Rev. Stat. § 288.160(2); N.H. Rev. Stat. Ann. §§ 273-A:3(I), 273-A:11; N.J. Stat. § 34:13A-5.3; N.M. Stat. § 10-7E-15(A); N.Y. Civ. Serv. Law § 204(2); N.D. Cent. Code §§ 15.1-16-11(1)(f), 15.1-16-18; Ohio Rev. Code § 4117.04(A); Okla. Stat. tit. 19, § 901.30-2(E); Or. Rev. Stat. § 243.666(1); 43 Pa. Stat. § 1101.606; P.R. Laws tit. 3, §§ 1451b, 1451f; R.I. Gen. Laws § 36-11-2(d); S.D. Codified Laws § 3-18-3; Texas Loc. Gov't Code §§ 174.101, 174.102; Utah Code § 34-20a-4; Vt. Stat. tit. 3, § 941(h), tit. 16 § 1991(a); Wash. Rev. Code §§ 41.56.080, 41.80.080(2)-(3); Wis. Stat. § 111.83(1); Wyo. Stat. § 27-10-103.

ing representative. PERB certified that election in 1972. (Pet. App. 67a, 69a, 79a.[4])

2. Petitioners are instructors at CUNY. By accepting that employment, petitioners brought themselves within the instructional staff bargaining unit. Each of the petitioners was also at one time a member of PSC. (Pet. App. 63a, 65a, 69a-73a.)

Petitioners strongly object to certain views that PSC has expressed outside the context of collective bargaining, which petitioners consider to be anti-Israel and anti-Semitic. (Pet. App. 63a, 74a.) Petitioners have exercised their right to resign from PSC (Pet. App. 63a, 65a, 69a-73a), have made numerous public statements objecting to the views of CUNY and PSC,[5] and have formed new associations to express and to amplify their

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[4] *See* Certification of Representation & Order to Negotiate, *In re Board of Higher Ed. of City of N.Y.*, Nos. C-0728, C-0808 (N.Y. PERB June 16, 1972).

[5] *See, e.g.*, Avraham Goldstein, *Josh Shapiro Rescued Me from Soviet Antisemitism*, Jerusalem Post (Aug. 14, 2024); Avraham Goldstein, *I'm Stuck with an Anti-Semitic Labor Union*, Wall St. J. (Jan. 20, 2022); Mario Caruso, *Letter to the Editor, What's Going on with CUNY's Woke Union?*, Wall St. J. (Feb. 8, 2022); KC Johnson, *How CUNY's Faculty Union Bet on Israel Hatred, and Lost, Tablet* (Aug. 12, 2021); David Brodsky, *At CUNY, My Union Condemns Israel for Human Rights Abuses, but Cheers on China*, Haaretz (July 22, 2021); David Israel, *Dozens Quit CUNY Faculty Union over Anti-Semitic, Anti-Israel Resolution*, JewishPress.com (July 22, 2021); Scott Jaschik, *Division in CUNY Faculty Union*, Inside Higher Ed (July 21, 2021); Leah Garrett, *I Resigned from the CUNY Union Because of Its Antisemitism*, Forward (July 14, 2021); Robert Cherry, *CUNY Must Confront Anti-Semitism in Its Midst*, N.Y. Daily News (July 11, 2021); A. Jay Adler, *Why I Resigned from the Professional Staff Congress (PSC)-CUNY*, Algemeiner J. (June 24, 2021); KC Johnson, *An Opening for Dissenters*, City J. (June 22, 2021).

own views on matters related to Israel and anti-Semitism.[6] Petitioners' complaint in this action does not allege that any person has ever ascribed any of PSC's stated views to individual nonmember instructors like petitioners, or that PSC's views could reasonably be so ascribed.

3. In January 2022, petitioners filed this action in the U.S. District Court for the Southern District of New York. (Pet. App. 62a-92a.) As relevant here, the complaint alleges that the Taylor Law violates petitioners' First Amendment rights of expressive association by purportedly compelling petitioners to associate (1) with PSC, a voluntary union from which all of them have resigned (Pet. App. 82a-85a), and (2) with the instructional staff, a bargaining unit that does not engage in expressive activity (Pet. App. 85a-87a).[7]

The district court granted respondents' motions to dismiss the complaint. (Pet. App. 12a-48a.) The court ruled that under this Court's decision in *Knight* (and the unbroken line of circuit-court authority applying that decision), a statute providing for "exclusive representation by public-sector labor unions does not violate the speech or associational rights of non-union members." (Pet. App. 27a (quotation marks omitted).) With respect to petitioners' complaint about purported association with PSC, the district court reasoned that petitioners were free to end their association with the union by

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[6] *See* *CUNY Alliance for Inclusion* (n.d.); CUNY Alliance for Inclusion, *CUNY Community Statement Encouraging Mutual Respect and Engagement Towards a Just Middle East Peace and a CUNY Free of Harassment* (n.d.).

[7] A third cause of action, alleging improper dues deductions (Pet. App. 87a-89a), has been resolved and is not at issue here.

resigning, and to cut off any misattribution of PSC's views to themselves by publicly expressing their contrary viewpoints. (Pet. App. 33a-34a.) With respect to petitioners' complaint about purported association with the instructional staff bargaining unit, the district court explained that such a state-mandated association has no expressive content (and thus does not impinge anyone's free-speech rights) given the size and composition of the bargaining unit. (Pet. App. 34a-38a.)

4. The Second Circuit unanimously affirmed in a published per curiam decision. (Pet. App. 1a-11a.) The court of appeals reasoned that, pursuant to *Knight*, the Taylor Law's exclusive representation regime "poses no First Amendment problem" because it "does not impermissibly burden Plaintiffs' ability to speak with, associate with, or not associate with whom they please"—including by resigning from PSC and engaging in public dissent against the union's views. (Pet. App. 8a.) Moreover, PSC's authority to negotiate with CUNY on behalf of the instructional staff bargaining unit "is restricted to the narrow scope of collective bargaining"—meaning that PSC cannot be understood to speak even on behalf of any of the union's individual members when it engages in advocacy outside of union contract negotiations. (Pet. App. 9a.)

The court of appeals denied petitioners' petition for rehearing en banc without dissent. (Pet. App. 49a-50a.)

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE LOWER COURTS REGARDING THE CORRECT INTERPRETATION OF *KNIGHT*.

First, certiorari is unwarranted because there is no split of authority requiring this Court's attention. Petitioners do not attempt to argue the contrary, acknowledging—as they must, and as the courts below observed (Pet. App. 6a-7a & n.3, 30a-32a)—that every one of the seventeen prior cases to consider the question has held that the exclusive-representation model of labor relations does not violate the First Amendment. Those decisions, rendered by nine different federal courts of appeals and the Supreme Judicial Court of Massachusetts, are in lockstep. Not one has generated a dissenting vote.[8] What is more, this Court has repeat-

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[8] *See* Pet. App. 7-10; *Peltz-Steele v. UMass Fac. Fed'n*, 60 F.4th 1, 4-8 (1st Cir. 2023); *Adams v. Teamsters Union Loc. 429*, No. 20-1824, 2022 WL 186045, at *2-3 (3d Cir. Jan. 20, 2022); *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 725-27 (8th Cir. 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 968-70 (10th Cir. 2021); *Bennett v. Council 31*, 991 F.3d 724, 727, 733-35 (7th Cir. 2021); *Akers v. Maryland State Educ. Ass'n*, 990 F.3d 375, 382 n.3 (4th Cir. 2021); *Ocol v. Chicago Tchrs. Union*, 982 F.3d 529, 532-33 (7th Cir. 2020); *Oliver v. Service Emps. Int'l Union Loc. 668*, 830 F. App'x 76, 80-81 (3d Cir. 2020); *Thompson v. Marietta Educ. Ass'n,* 972 F.3d 809, 813-14 (6th Cir. 2020); *Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 412-14 (1st Cir. 2019); *Branch v. Commonwealth Emp. Rels. Bd.*, 481 Mass. 810, 819-23 (2019); *Mentele v. Inslee*, 916 F.3d 783, 786-91 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill v. Service Emps. Int'l Union*, 850 F.3d 861, 863-66 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 F. App'x 72, 74-75 (2d Cir. 2016); *D'Agostino v. Baker*, 812 F.3d 240, 243-45 (1st Cir. 2016) (Souter, J., by designation).

edly denied certiorari on this very issue (also without dissent), including as recently as two Terms ago.[9]

As this Court's "certiorari jurisdiction exists to clarify the law," *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015), there is no basis to grant review here in respect of an issue that has generated neither confusion nor controversy in the lower courts. As explained in more detail below, *Knight* expressly and directly held (contrary to petitioners' assertions) that exclusive representation regimes comport with the First Amendment. The lower courts' uniformity on this question follows from the clarity with which this Court resolved it in *Knight*.

In *Knight*, a bargaining unit composed of community college faculty had designated a union as its exclusive representative under the applicable Minnesota law. 465 U.S. at 275-76. The college was required to negotiate with the union over the "terms and conditions of employment" for faculty within the bargaining unit, and also to confer with the union with respect to "policy questions relating to employment but outside the scope of mandatory bargaining." *Id.* at 273. Several faculty members who were not members of the union brought suit, alleging that this exclusive representation regime was unconstitutional. *Id.* at 278.

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[9] *See Peltz-Steele v. UMass Fac. Fed'n*, 143 S. Ct. 2614 (2023); *Ocol v. Chicago Tchrs. Union*, 142 S. Ct. 423 (2021); *Thompson v. Marietta Educ. Ass'n,* 141 S. Ct. 2721 (2021); *Reisman v. Associated Facs. of Univ. of Me.*, 141 S. Ct. 445 (2020); *Branch v. Massachusetts Dep't of Lab. Relations*, 140 S. Ct. 858 (2020); *Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Uradnik v. Inter Fac. Org.*, 139 S. Ct. 1618 (2019); *Hill v. Service Emps. Int'l Union*, 583 U.S. 972 (2017); *Jarvis v. Cuomo*, 580 U.S. 1159 (2017); *D'Agostino v. Baker*, 579 U.S. 909 (2016).

This Court held that exclusive representation did not violate the plaintiffs' First Amendment rights. The Court noted that "[n]ot every instructor in the bargaining unit is a member" of the union, and that "not every instructor agrees with the official faculty view on every policy question." *Id.* at 276. The Court reasoned that, by adopting an exclusive representation scheme, the "state has in no way restrained [the plaintiffs'] 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 plaintiffs were not required to become union members, and they remained "free to form whatever advocacy groups they like." *Id.* at 289. Moreover, a "person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288. The plaintiffs were thus "[u]nable to demonstrate an infringement of any First Amendment right." *Id.* at 291.

Knight resolves the question presented in this case. As the district court observed, the facts are "on all fours"—both *Knight* and this case involve First Amendment challenges to public-sector collective-bargaining regimes with voluntary-membership unions acting as exclusive bargaining representatives of instructors' bargaining units. (Pet. App. 27a.) There was no First Amendment violation in *Knight*, and there is no First Amendment violation here. (*See* Pet. App. 7a-10a.)

Petitioners attempt to distinguish their claim from those resolved in *Knight*—asserting that *Knight* addressed only the question whether the government may "prevent nonunion employees from participating in its nonpublic meetings with union officials," whereas petitioners' claim is that "compelling them to accept a union as their exclusive representative compels them to associate with that union and its speech." Pet. 10.

But petitioners' assertion runs headlong into *Knight*'s express recognition that an exclusive-representation regime "*in no way* restrain[s]" employees' "freedom to associate *or not to associate* with whom they please, including the exclusive representative." 465 U.S. at 288 (emphasis added).

That statement was not merely an aside, nor was it dicta. It was central to the Court's reasoning and to its conclusion that the plaintiffs were "[u]nable to demonstrate an infringement of any First Amendment right." *Id.* at 291. And contrary to petitioners' intimations (Pet. 10-11 & n.3), *Knight* plainly considered the compelled speech and association arguments that petitioners advance here: Justice Brennan advanced such arguments in his solo dissent, *see Knight*, 465 U.S. at 295-99 (Brennan, J., dissenting), and the majority opinion rejected the dissent's view of the law in an opinion that spent several pages discussing the speech and associational rights of nonunion employees, *see id.* at 288-90 (majority op.).

Petitioners also suggest that their claim is different from the one in *Knight* because they are challenging "the government's ability to dictate who *speaks* to the government *for individuals*." Pet. 11 (second emphasis added). The argument again flies in the face of *Knight*, which recognized that, although the State may construe the positions advanced by a union like PSC to represent "the faculty's official collective position," a reasonable person understands that "not every instructor agrees with the official faculty view on every policy question." *See* 465 U.S. at 276. The union's "unique status" as advocate for the whole faculty certainly "amplifies its voice," but that does not mean that the union speaks for any individual employee—or that it could reasonably be understood to do so. *Id.* at 288. Rather, as Justice Souter

explained for the First Circuit in *D'Agostino*, a union's relationship to nonunion employees "is clearly imposed by law, not by any choice on a dissenter's part," making it "readily understood" that the union does not speak for any individual—particularly because individual employees "may choose to be heard distinctly as dissenters," thereby eliminating any "unacceptable risk [that] the union speech will be attributed to them contrary to their own views." 812 F.3d at 244.

Petitioners find no support for a different interpretation of *Knight* in their citations (Pet. 11-12) to dicta in decisions of the Sixth and Ninth Circuits. To the contrary, those cases recognize that petitioners' "cramped reading" of *Knight* is so unreasonably narrow that adopting it would "functionally overrule the decision." *Thompson*, 972 F.3d at 814; *see Mentele*, 916 F.3d at 789. Due respect for *Knight* forecloses petitioners' self-negating interpretation of the decision—which is but one reason why there has arisen no conflict of authority concerning *Knight*'s holding.[10]

[10] Petitioners do not ask the Court to overrule *Knight*, and this Court has repeatedly denied certiorari petitions that have expressly asked this Court to revisit its decision in *Knight*. *See* Pet. for Writ of Cert. 2, *Ocol*, 142 S. Ct. 423 (No. 20-1574), 2021 WL 1944939; Pet. for Writ of Cert. 22, *Thompson,* 141 S. Ct. 2721 (No. 20-1019), 2021 WL 307478.

II. *KNIGHT* COMPORTS FULLY WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

Petitioners are incorrect in contending that the Second Circuit's straightforward application of *Knight* somehow brings *Knight* into conflict with this Court's other First Amendment precedents. *See* Pet. 12-16.

1. First, there is no conflict with *Janus*. *Contra* Pet. 13-14. *Janus* held that "compelled subsidization of privat e speech seriously impinges on First Amendment rights," 585 U.S. at 894, and that a statute requiring nonunion public employees to pay "agency fees" to subsidize a union's speech did not survive the applicable "exacting scrutiny." *See id.* at 894-901. But the Court expressly distinguished the agency-fee question from the concept of exclusive representation, explaining that 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." *Id.* at 895-96; *see Harris v. Quinn*, 573 U.S. 616, 649 (2014). And the Court made clear that its decision was "not in any way questioning the foundations of modern labor law," *Janus*, 585 U.S. at 904 n.7—one component of which undoubtedly is the system of exclusive representation that undergirds public-sector collective bargaining around the country. See *supra* at 5-6 & n.3.

Far from calling into question the constitutionality of exclusive representation, *Janus* expressly and repeatedly relied on the continued viability of this system as part of the justification for the Court's ultimate holding: The Court reasoned that mandatory agency fees were not necessary to achieve the government's interest in labor peace *because* exclusive representation adequately serves that purpose, 585 U.S. at 896, and that such fees also were unnecessary to prevent "free riding" *because*

unions can fairly provide exclusive representation to a bargaining unit without collecting such fees, *see id.* at 896-901. The Court thus left no doubt that the government may "require that a union serve as exclusive bargaining agent for its employees," *id.* at 916, and that apart from statutory adjustments relating to the excision of agency-fee requirements, the States "can keep their labor-relations systems exactly as they are," *id.* at 929 n.27.

In arguing the contrary, petitioners misread (Pet. 14) *Janus*'s references to the "rights of individual employees" and "associational freedoms." 585 U.S. at 887, 901. In the context of a decision that struck down agency-fee requirements on First Amendment grounds while expressly leaving exclusive-representation programs intact, the *Janus* Court's references to "rights" and "freedoms" do not point to *First Amendment* rights of free expression, but to employees' ordinary economic rights to make individualized employment contracts and to form (or to exit) associations in order to advance their economic interests. But such economic rights are permissible subjects of state regulation, and are not subject to any relevant First Amendment protection. *See, e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-02 (1949); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-93 (1937).

2. There also is no conflict between *Knight*'s First Amendment holding and the earlier labor-law cases on which petitioners rely (Pet. 12-13). None of the cited decisions suggested that an exclusive-representation scheme burdens a nonunion employee's *First Amendment* rights, which are the only ones at issue in this case. Rather, to address the potential for an exclusive bargaining representative to impinge upon *other* rights (e.g., nonunion employees' equal protection rights), this

Court interpreted federal labor law to require an exclusive representative to provide *fair* representation to all affected employees. *See, e.g.*, *Steele*, 323 U.S. at 200-03.[11]

The Taylor Law expressly enacts that same safeguard. N.Y. Civ. Serv. Law § 209-a(2). It does so to prevent unfair discrimination, and to provide a counterweight to the sacrifice of individual economic power and contractual liberty "that this system [of exclusive representation] necessarily demands." *14 Penn Plaza*, 556 U.S. at 271. The fair representation requirement does not attempt to remedy a *First Amendment* injury, because there is no such injury to remedy. This Court has never identified such an injury from exclusive representation standing alone, and petitioners—having misapprehended the import of the decisions on which they rely—offer no basis for the Court to recognize a novel First Amendment injury in this case.

3. Nor does *Knight*'s endorsement of exclusive representation conflict with this Court's decisions concerning "compelled expressive association." *Contra* Pet. 14-16.

There is no conflict because the expressive association cases recognize an implied First Amendment "right to associate" only "for the purpose of engaging in" activities that are expressly "protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," *Roberts v.*

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[11] Subsequent decisions restated *Steele*'s reasoning in discussing the fundamentals of labor law. *See American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401-02 (1950); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *14 Penn Plaza*, 556 U.S. at 271.

United States Jaycees, 468 U.S. 609, 618 (1984).[12] This right is merely "instrumental," *id.*, and therefore a compelled-association claim requires showing that the challenged association "would alter or disrupt" the plaintiff's own expressive activity, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2400 (2024). *See id.* at 2401-02; *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 60-62, 68-70 (2006); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987). Thus, to whatever extent the Taylor Law "necessarily associates" nonunion employees with the union that represents their interests in collective bargaining (Pet. 14-15), such an association is without First Amendment significance unless it burdens the employees' underlying speech rights.

For this purpose, "perceptions matter": if members of the public "do not actually believe" that the plaintiff endorses an objectionable group's message, then there is no burden on the plaintiffs' First Amendment rights. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 459-60 (2008) (Roberts, C.J., concurring); *cf. Shurtleff v. City of Boston*, 596 U.S. 243, 251-58 (2022) (no government speech where private messages on flags raised at city hall could not be attributed to city government). Where there is "little likelihood that the views of those engaging in the expressive activities would be identified with" those who wish not to be associated with that expression, no First Amendment violation arises—particularly if members of the latter group "remain[] free to disassociate [themselves]

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[12] The Constitution also provides a distinct form of protection to the right to maintain "intimate" associations such as familial relationships, *see Roberts*, 468 U.S. at 617-20—but petitioners do not invoke any such protection in this employment-law case.

from those views and . . . [are] 'not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.'" *FAIR*, 547 U.S. at 65 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980)).

Here, petitioners and other similarly situated nonunion employees are not compelled to affirm or to mouth support for the exclusive representative's views. Nor are those views attributed to individual nonunion employees. To the contrary, petitioners are free under the Taylor Law to speak (or not to speak) on any topic (including the instructional staff's employment conditions and the subject of Israel); to express any viewpoint they wish to express (including viewpoints contrary to those that PSC expresses); to associate (or not to associate) with whomever they please (including PSC); and to form whatever alternative advocacy groups they wish to form. See *supra* at 7-8, 12-14 & nn.5-6. Petitioners are not being "regimented" into "goose-stepping brigades" (Pet. 19 (quotation marks omitted))—they have loudly and lawfully exercised their rights to dissent and to disassociate themselves from PSC.

Petitioners assert repeatedly that an exclusive representative's speech must be attributed to individual employees because they supposedly are thrust into a "mandatory agency relationship" (Pet. 4) under which the exclusive representative purportedly "has legal authority both to speak for [petitioners] and to enter into binding contracts on their behalf" (Pet. 5). *See* Pet. 6, 9, 11, 14-15, 18-20. But petitioners misunderstand the nature of the relationship between a union (a distinct legal entity) and the employees whose interests the union represents. An exclusive bargaining representative does *not* act as any individual employee's agent, because the fundamental requisites of an agency relationship are not satisfied—no employee has direct

control over a union's speech or conduct. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013); *Restatement (Third) of Agency* § 1.01 (2006) (Westlaw).[13]

In particular, an exclusive bargaining representative does not serve as the agent of (or otherwise claim to speak for) any individual employee in collective bargaining. Instead, it acts on behalf of "*all* the employees" in the bargaining unit, as a collective whole. *Janus*, 585 U.S. at 898 (emphasis added); *accord Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). And PSC certainly does not purport to speak for any individual member of the instructional staff when it takes positions on matters outside of the collective-bargaining process. When the union conducts such public advocacy, it does so in the name of the union as a distinct legal entity, not on behalf of the bargaining unit or any individual CUNY employee.

Moreover, the "mandatory" nature of the association at issue (Pet. 4) in fact provides a bulwark against petitioner's claimed First Amendment injury. *Because* exclusive representation "is clearly imposed by law, not by

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[13] The relationship between employee and union is better analogized to that between a trust beneficiary and the trustee. *See Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 567 (1990) (plurality op.); *id.* at 585-86 (Kennedy, J., dissenting). But contrary to petitioners' suggestion (Pet. 9), a trust beneficiary's objection to the State's appointment of a trustee to manage a trust's assets would not raise a First Amendment issue. That is because (again) such an appointment would neither burden the beneficiary's expression nor compel the beneficiary to speak. Giving the trustee control over a person's property without the owner's consent might theoretically generate due process concerns (it might deprive the property owner of property rights without sufficient protection), but the hypothetical appointment of a trustee would not violate the owner's First Amendment rights.

any choice on a dissenter's part," it is "readily understood that employees in the minority, union or not, will probably disagree with some positions taken by" the union—such that there is no "unacceptable risk [that] the union speech will be attributed to [nonmembers] contrary to their own views." *D'Agostino*, 812 F.3d at 244. Exclusive representation accordingly imposes no burden on petitioners' First Amendment rights. *See FAIR*, 547 U.S. at 65, 69-70; *Knight*, 465 U.S. at 288-90.

Contrary to the contention of amicus Jewish Coalition for Religious Liberty (at 16-19), the statements of PSC and various media outlets (outside the four corners of petitioners' complaint) to the effect that the union "represents 30,000 CUNY instructional staff" do not support an inference that the public imputes PSC's views to individual members of the bargaining unit. The statements in question accurately reflect (if in shorthand) that PSC represents all members of the bargaining unit *in collective bargaining*. None of them suggests that every member of the union (let alone every nonunion member of the instructional staff) endorses everything that the union may say—particularly outside the context of collective bargaining.

Any hypothetical misattribution risk is particularly attenuated on the facts of this case: As amici Advancing American Freedom et al. point out, the speech to which petitioners principally object "has nothing whatsoever to do with professors' working conditions or compensation" (Br. 9; *see id.* at 8-10)—which are the only subject matters with respect to which PSC represents the bargaining unit's collective interests. *See* N.Y. Civ. Serv. Law § 204(2).

III. THIS CASE IS A POOR VEHICLE TO EVALUATE PETITIONERS' UNPRESERVED EXPRESSIVE CONDUCT CLAIM.

The petition should also be denied for the additional reason that petitioners failed to raise in the courts below the legal theory on which they now principally rely.

Specifically, petitioners' lead argument for certiorari asserts a First Amendment right to engage in "affirmative expressive activity" through the "act of dissociating" from PSC and the instructional staff bargaining unit. Pet. 8. Petitioners then contend that the Taylor Law "suppresses [their] expressive activity by compelling them to remain exclusively represented by PSC and to remain part of its bargaining unit." Pet. 9. But neither the district court nor the court of appeals passed upon these theories, so there is no ruling on these points for this Court to review. *See* Pet. App. 7-10, 19-40. The petition conspicuously omits any citation to any relevant ruling in either of the decisions below.

The courts below did not decide these issues because petitioners did not timely raise them. The complaint asserts causes of action sounding in compelled association with PSC and with the bargaining unit, not claims about purported suppression of petitioners' own affirmative expressive activity. (*See* Pet. App. 82a-87a.) Petitioners also did not assert any such claim in response to defendants' motions to dismiss in the district court. (*See* Pls. Mem. of Law (May 24, 2022), SDNY ECF No. 64; Hr'g Tr. (Oct. 26, 2022), SDNY ECF No. 82.) Nor did petitioners assert such a claim in their principal brief on appeal to the Second Circuit. (*See* Br. for Appellants (June 12, 2023), CA2 ECF No. 50.) The first time that any claim of this nature appeared in the case was petitioners' reply brief in the court of appeals (Reply Br.

at 14-15 (Aug. 25, 2023), CA2 ECF No. 91), but by then it was far too late for them to assert a new theory or cause of action. *See, e.g.*, *Windward Bora LLC v. Sotomayor*, 113 F.4th 236, 245 & n.6 (2d Cir. 2024); *Green v. Department of Educ.*, 16 F.4th 1070, 1078 (2d Cir. 2021).

As a "court of final review and not first view," this Court ought not grant certiorari to consider a novel First Amendment claim that was neither presented to nor decided by the courts below. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (quotation marks omitted); *id.* at 108-09; *see also OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37-38 (2015).

Had petitioners raised an expressive conduct claim in the lower courts, it would have failed. Conduct is protected under the First Amendment only if it is "inherently expressive." *FAIR*, 547 U.S. at 66. Petitioners have already resigned from PSC, so the only form of disassociative conduct theoretically available to them would be removing themselves from the instructional staff bargaining unit. But there would be nothing inherently expressive about taking that step; a person might wish to leave a bargaining unit for purely economic reasons, or for no reason at all. Giving expressive content to their proposed resignation from the bargaining unit would thus require petitioners to explain their desired message. "The fact that such explanatory speech is necessary is strong evidence that the conduct . . . is not so inherently expressive that it warrants protection" under the First Amendment. *Id.* And even if petitioners' proposed resignation from the bargaining unit could be viewed as expressive, the Taylor Law permissibly establishes a content-neutral regulation of conduct that at most incidentally burdens any such expression. *See id.* at 67 (discussing *United States v. O'Brien*, 391 U.S. 367 (1968)).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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