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 Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT PROFESSIONAL STAFF CONGRESS/CUNY

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QUESTION PRESENTED

For nearly a century, American labor law, in both the public and private sectors, has been built on the principle of exclusive representation—the principle that, if a majority of employees in a bargaining unit democratically elects to be represented by a union, that union bargains on behalf of the entire unit with respect to terms and conditions of employment, and any agreement the union negotiates with the employer runs to the benefit of all employees in the unit. This Court held in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that exclusive representation in public employment does not violate the First Amendment.

The question presented by the petition is whether, despite *Knight*'s holding to the contrary, the First Amendment prohibits the use of exclusive-representation collective bargaining to set employment terms for public employees.

CORPORATE DISCLOSURE STATEMENT

Respondent Professional Staff Congress/CUNY has no parent corporation, and no corporation or other entity owns any stock in Respondent.

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INTRODUCTION

The petition asks the Court to consider holding unconstitutional what has been, for the past century, the fundamental principle of American labor relations in both the public and private sectors: the representation of a bargaining unit, for purposes of negotiating terms and conditions of employment and enforcing the agreed-upon terms, by a labor organization democratically selected by the majority of employees in that unit. Since 2016, this Court has denied certiorari in more than a dozen cases in which the lower courts have rejected First Amendment challenges to exclusive representation, and it should do so here as well.[1]

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[1] *See Peltz-Steele v. UMass Fac. Fed'n*, 60 F.4th 1, 4–8 (1st Cir.), *cert. denied*, 143 S. Ct. 2614 (2023); *Adams v. Teamsters Union Loc. 429*, 2022 WL 186045, at *2–3 (3d Cir.) (unpublished), *cert. denied*, 143 S. Ct. 88 (2022); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 968–70 (10th Cir.), *cert. denied*, 142 S. Ct. 423 (2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732–35 (7th Cir.), *cert. denied*, 142 S. Ct. 423 (2021); *Ocol v. Chicago Tchrs. Union*, 982 F.3d 529, 532–33 (7th Cir. 2020), *cert. denied*, 142 S. Ct. 423 (2021); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813–14 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2721 (2021); *Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020); *Branch v. Commonwealth Emp't Relations Bd.*, 120 N.E.3d 1163 (Mass. 2019), *cert. denied sub nom. Branch v. Mass. Dep't of Labor Relations*, 140 S. Ct. 858 (2020); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Uradnik v. Inter Fac. Org.*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018) (preliminary-injunction denial), *aff'd*, 2018 WL 11301550 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019); *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 583 U.S. 972 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 580

This Court recognized forty years ago, in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), that exclusive representation for public employees does not compel speech or association in violation of the First Amendment. *Id.* at 288 (recognition of a union representative for a unit of public employees "in no way restrain[s] [the employees'] 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").

Petitioners do not ask this Court to consider overruling *Knight*. They instead ask this Court to grant certiorari and upend the unbroken line of lower-court decisions holding that *Knight* forecloses First Amendment challenges to exclusive representation. But petitioners, like the plaintiff university professors in *Knight*, are not 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. This Court held in *Knight* that such facts do not state a First Amendment violation. That holding controls here.

University officials and reasonable outsiders understand that college faculty members do not necessarily agree with each other or with the positions of the majority-chosen union—as in every other democratic system of representation—so the union's

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U.S. 1159 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.), *cert. denied*, 579 U.S. 909 (2016); *see also Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 725–27 (8th Cir. 2021); *Akers v. Maryland State Educ. Ass'n*, 990 F.3d 375, 382 n.3 (4th Cir. 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80–81 (3d. Cir. 2020).

speech is not attributed personally to individual faculty members. Petitioners are also free to express their own views, whether individually or though groups of their choosing, and they are free to disassociate themselves from the union and their colleagues by resigning their union membership and speaking out against the union's positions—as they have done.

Contrary to petitioners' contention, *Janus v. AFSCME Council 31*, 585 U.S. 878 (2018), did not question the constitutionality of exclusive-representation bargaining. *Janus* held only that public employees cannot be forced to provide financial support (known as agency fees) for the union that represents their bargaining unit. This Court emphasized that, aside from ending compelled agency fees, States could "keep their labor-relations systems exactly as they are" and that the Court was "not in any way questioning the foundations of modern labor law." *Id.* at 904 n.7, 928 n.27. No principle is more central to the foundations of modern labor law than exclusive representation.

The petition should be denied.

STATEMENT OF THE CASE

A. Background

1. In 1967, in response to years of disruptive labor strikes, New York State adopted its Public Employees' Fair Employment Act, N.Y. Civil Service Law §§ 200–215, commonly known as the Taylor Law, to "promote harmonious … relationships between government and its employees and to protect the public by assuring … the orderly and uninterrupted operations and

functions of government." N.Y. Civ. Serv. Law § 200; *see generally* Governor's Committee on Public Employee Relations, Final Report (Mar. 31, 1966) ("Taylor Committee Report").[2] The Taylor Law grants public employees the right to unionize and negotiate collectively with their public employers. N.Y. Civ. Serv. Law §§ 200–204, 210–211.

Before the Taylor Law, New York's 1947 Conlin-Waldon Act imposed draconian penalties for public employee strikes without creating a collective bargaining system. *See* Martin H. Malin, *The Motive Power in Public Sector Collective Bargaining*, 36 Hofstra Lab. & Emp. L.J. 123, 124–25 (2018). The Conlin-Waldon Act was a complete failure. *See id.* After major, disruptive, illegal strikes in 1965 and 1966, Governor Rockefeller appointed the Taylor Committee "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes." *Id.* at 123 n.5; Taylor Committee Report at 9. The Committee concluded that a collective bargaining system was necessary to promote labor peace, and the New York State Legislature responded by adopting the Taylor Law. *See* N.Y. Civ. Serv. Law § 200.

Under the Taylor Law, the majority of employees in an appropriate bargaining unit may democratically vote to be represented by an employee organization for purposes of collective bargaining. N.Y. Civ. Serv. Law § 204. If employees choose union representation, the union becomes "the exclusive representative, for the

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[2] Available at https://perb.ny.gov/system/files/documents/2024/05/1966-taylor-committee-report.pdf (last visited November 16, 2024).

purposes of [the Taylor Law], of all the employees in the appropriate negotiating unit," and the public employer is "required to negotiate collectively with such employee organization" about unit-wide employment terms. *Id.* § 204(2).

The Taylor Law guarantees public employees the right to choose whether to become members of a union that represents their bargaining unit. N.Y. Civ. Serv. Law § 202. The exclusive representative has a duty to fairly represent all bargaining unit employees, regardless of membership status, in negotiating and enforcing the collective bargaining agreement, but need not represent nonmembers in grievances about evaluations or discipline "where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate." *Id.* § 209-a(2)(c)(iii). After *Janus*, public employees who choose not to be members of the union that represents their bargaining unit are not required to provide any financial support to the union.

2. The Taylor Law's democratic system of exclusive-representative bargaining follows the model that Congress adopted nearly a century ago for private-sector labor relations. *See* 29 U.S.C. §§ 158(d), 159 (exclusive representation provisions of National Labor Relations Act); 45 U.S.C. § 152 Fourth (exclusive representation provisions of Railway Labor Act). Congress adopted exclusive representation as the best mechanism for stable labor relations, concluding that, because it is "practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of

majority rule." S. Rep. No. 74-573, reprinted in 2 Leg. Hist. of the NLRA 2313 (1935).

The same exclusive-representation model is also used by the federal government, and in about 40 other states, the District of Columbia, and Puerto Rico for at least some public employees. *See* Br. for New York et al. as Amici Curiae Supporting Respondents, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), 2013 WL 6907713, at *8 n.3 & Appendix (filed Dec. 30, 2013) (collecting statutory authorizations of exclusive representation). Collective bargaining agreements with exclusive representatives presently cover about 7.8 million federal, state, and local public employees.[3]

3. Respondent Professional Staff Congress/CUNY ("PSC" or the "Union") is the collective bargaining representative for a bargaining unit of about 30,000 City University of New York ("CUNY") instructional staff. App. 67a. Petitioners are six bargaining unit employees. App. 65a–67a.

Petitioners are not members of the Union, and they are not required to provide any financial support to the Union. App. 17a, 44a–45a. Petitioners allege that they oppose representation by PSC because petitioners—five of whom are Jewish—believe that PSC "advocate[s] positions and take[s] actions that Plaintiffs believe to be anti-Semitic." App. 63a. In support of this allegation, petitioners point to the adoption of

[3] News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2023 (Jan. 23, 2024), Table 3 (union affiliation 2023), available at https://www.bls.gov/news.release/union2.htm (last visited November 16, 2024).

a June 2021 "Resolution in Support of the Palestinian People." App. 63a, 74a, 93a–95a (copy of resolution). Petitioners also "believe that PSC prioritizes the economic and employment interests of part-time adjunct professors and other groups in the bargaining unit over their interests as full-time faculty and/or staff of CUNY." App. 76a.

B. Proceedings Below

Petitioners filed this action on January 12, 2022, alleging claims under 42 U.S.C. § 1983 against PSC, CUNY, three New York Public Employee Relations Board members, the City of New York, and the New York State Comptroller. App. 62a–63a. Count One of their complaint alleges that PSC's status as exclusive collective bargaining representative violates petitioners' First Amendment rights by compelling them to associate with PSC and its speech. App. 82a–85a. Count Two alleges that petitioners' inclusion in the instructional staff bargaining unit violates their First Amendment rights by compelling them to associate with other employees in the bargaining unit. App. 85a–87a.[4]

In what the Second Circuit recognized as "a thorough and well-reasoned decision," App. 5a, the district court granted the defendants' motions to dismiss Counts One and Two. App. 12a–46a. The district court concluded that petitioners' First Amendment challenge to exclusive representation—whether "viewed

[4] In Count Three, petitioners alleged that three petitioners erroneously had union dues deducted after their resignations from membership. App. 87a–89a. The parties settled that claim. App. 5a n.2.

as challenging their compelled association with the PSC (Count One) or with the bargaining unit's other members (Count Two)"—is foreclosed by this Court's summary affirmance and plenary decision in the *Knight* litigation because "[t]he facts here are on all fours with those in *Knight*—indeed, strikingly so." App. 19a–28a, 32a (citing *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 460 U.S. 1048 (1983) (summary disposition) and *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) ("*Knight*")). The district court rejected petitioners' argument that this Court's "2018 decision in *Janus* repudiates, at least implicitly, the holding in *Knight*." App. 28a–32a.

The Second Circuit affirmed. App. 1a–11a. The Second Circuit concluded that petitioners' claims "are directly foreclosed by *Knight*," agreeing with "each of our sister circuits to have addressed this issue since … *Janus*." App. 6a & n.3, 10a. The Second Circuit explained that "[d]esignating PSC as [petitioners'] exclusive bargaining representative does not impermissibly burden [their] ability to speak with, associate with, or not associate with whom they please, including CUNY and PSC. [Petitioners] are free to resign their membership from the union or to engage in public dissent against PSC's views." App. 8a.[5]

[5] The Second Circuit also affirmed the district court's rejection of petitioners' challenge to a 2019 amendment to the Taylor Law. App. 10a–11a, 40a–44a. Petitioners do not pursue that challenge in their petition.

REASONS FOR DENYING THE PETITION

The petition is not worthy of this Court's review. Petitioners concede that the Second Circuit's decision is consistent with the decisions of every other court to consider the same issue, which unanimously hold that exclusive-representative bargaining systems for public employees do not, by themselves, compel speech or association in violation of the First Amendment. This Court has declined to review the question presented by this petition more than a dozen times since 2016. There is no reason for a different outcome in this case.

Petitioners do not ask this Court to consider overruling *Knight*, which rejected a First Amendment challenge to a collective bargaining system that is indistinguishable from the system here. Regardless, there is no good reason to do so. *Knight* undergirds the labor relations systems for millions of public employees throughout the country, including federal, state, and local employees. No subsequent decisions have undermined *Knight*'s precedential force. Nor do petitioners' assertions that they strongly disagree with the Union's alleged positions change the constitutional analysis. Petitioners also urge the Court to grant review to hold that the principle of exclusive representation cannot be extended outside the public employment context, Pet. 18–20, but this case does not present a vehicle for addressing that issue.

I. As the lower courts unanimously have recognized, *Knight* forecloses petitioners' challenge to exclusive-representation bargaining.

The question presented in this petition is not new. This Court concluded forty years ago in *Knight* that an exclusive-representation system does not violate the First Amendment rights of public employees. Every lower court to consider this issue has recognized that *Knight* forecloses First Amendment challenges to exclusive-representative bargaining for public employees. *See supra* n.1; App. 6a n.3 (collecting cases).

Petitioners contend that review is warranted because, in petitioners' view, the lower courts are misinterpreting *Knight*. Pet. 10. This is a reprise of arguments made in numerous recent petitions for certiorari, all of which this Court has denied. *See supra* n.1.[6] Regardless, *Knight* forecloses petitioners' claims.

In *Knight*, this Court addressed a First Amendment challenge by college instructors (like petitioners here) to a Minnesota statute that (like the New York statute here) "establishe[d] a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit." 465 U.S. at 274. The Minnesota statute required public employers (1) to negotiate with such an exclusive representative over terms and conditions of employment (known as a

[6] *See, e.g.*, Pet. for Writ of Certiorari, *Peltz-Steele v. UMass Fac. Fed'n,* No. 22-1123, at 17 (May 15, 2023) (arguing that "*Knight* did not address whether exclusive representation constitutes a mandatory expressive association"), *cert. denied*, 143 S. Ct. 2614 (2023).

"meet and negotiate" requirement), and also (2) to confer with the exclusive representative about subjects outside the scope of mandatory negotiations (known as a "meet and confer" requirement). *Id.* Under the statute, "the employer [could] neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id.* at 275.

The statute did not prevent members of the bargaining unit from submitting advice to their employer or from speaking publicly on matters related to their employment. *Id.* Although the state university board "consider[ed] the [union's] views ... to be the faculty's official collective position," the board also recognized "that not every instructor agrees with the official faculty view on every policy question." *Id.* at 276.

This Court summarily affirmed the district court's dismissal of the instructors' constitutional challenge to the "meet and negotiate" requirement. *See Knight*, 465 U.S. at 279 (citing *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 460 U.S. 1048 (1983)). The Court then gave plenary consideration to the instructors' challenge to the "meet and confer" requirement, concluding that exclusive representation was constitutional in that context as well. *Id.* at 288.

In Part II.A of its opinion, the *Knight* Court first considered and rejected the instructors' claim that their right to free speech was impaired because, unlike the exclusive representative, they had no "government audience for their views." *Id.* at 280–88.

Contrary to petitioners' contention, Pet. 10–12, the *Knight* Court did not stop there. Rather, the Court

then turned, in Part II.B of the opinion, to the broader issues of speech and association, concluding that "[t]he State ha[d] *in no way* restrained [the instructors'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, *including the exclusive representative*." *Knight*, 465 U.S. at 288 (emphasis added); *see id.* at 290 n.12 (finding that nonmembers' "speech and associational freedom have been *wholly unimpaired*") (emphasis added); *id.* at 291 (stating that instructors were "[u]nable to demonstrate an infringement of *any First Amendment right*") (emphasis added).

The Court pointed out that the instructors were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 289. The Court reasoned that instructors' "associational freedom ha[d] not been impaired" because "the pressure [they may have felt to join the exclusive representative was] no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 289–90.

Like every other court to consider the issue, the Second Circuit recognized that petitioners' "reading of *Knight* is far too narrow" and that the decision holds that the States may use exclusive-representation systems for public employee labor relations. App. 8a; *see also Adams v. Teamsters Union Loc. 429*, 2022 WL 186045, at *2 (3d Cir.), *cert. denied*, 143 S. Ct. 88 (2022) (rejecting narrow "reading of *Knight*" as "simply at odds with what it says. … [T]he Court also considered whether the law violated the teachers' First Amendment freedoms of speech or association. It held that it did not."); *Thompson*, 972 F.3d at 814 (rejecting argument that *Knight* "did not

involve a compelled-representation challenge," because "in *Knight*, the Court framed the question presented in broad terms," and plaintiff's proposed "cramped reading of *Knight* would functionally overrule the decision"); *Bierman*, 900 F.3d at 574 (rejecting argument that *Knight* considered only public employees' right to be heard because "a fair reading of *Knight* is not so narrow"); *Bennett*, 991 F.3d at 734 (rejecting argument that *Knight* "addressed only whether the plaintiffs could force the government to listen to their views"); *Hendrickson*, 992 F.3d at 969 (recognizing that *Knight* "found exclusive representation constitutionally permissible" and forecloses the "claim that exclusive representation imposes compulsion in violation of the First Amendment").

In the absence of any conflict regarding the proper interpretation of *Knight*, this Court should deny certiorari. Petitioners do not ask the Court to overrule *Knight*, much less demonstrate any "special justification" for abandoning *stare decisis*. *Cf. Janus*, 585 U.S. at 929.

It also bears emphasis that petitioners do not offer a realistic alternative to the American system of collective bargaining this Court upheld in *Knight*, which serves as the basis for contracts covering millions of federal, state and local employees. Petitioners proclaim that a decision in their favor "would not upend systems of collective bargaining" because "public employers could continue to meet and bargain with only one union if they so choose" and "PSC could continue to … bargain for the roughly 30,000 individuals in the bargaining unit, minus only the six Professors and others who oppose associating with PSC." Pet. 17–18. But experiments with members-only bargaining in

the United States have failed. Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 Cal. L. Rev. 1821, 1835 (2019).

Equally to the point, if a union could "negotiate particularly high wage increases for its members," *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part), then non-members would claim that they are pressured to join the union in violation of their First Amendment rights. *See Janus*, 585 U.S. at 899 ("[I]t is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers."). That is why this Court has recognized that the imposition of a duty of fair representation on the union when acting as the collective bargaining representative is a "necessary concomitant" of an exclusive-representative system and avoids "serious constitutional questions" that otherwise would arise. *Id.* at 901.

In *Janus*, this Court reasoned that a ban on compelled agency fees would not destroy state collective bargaining systems because "the Federal Government and 28 other States" already operated collective bargaining systems without agency fees. 585 U.S. at 895–96, 928 n.27. By contrast, there are no examples of successful collective bargaining systems in the United States that depart from the principle of exclusive representation upheld in *Knight*.

The Court has denied numerous previous petitions that asked the Court to revisit *Knight*. Nothing justifies a different outcome here.

II. *Knight* is consistent with this Court's broader First Amendment jurisprudence.

The lower courts' unanimity on the question presented is sufficient reason to deny the petition. But *Knight* is also entirely consistent with this Court's subsequent First Amendment decisions.

1. The premise of the Petition is that petitioners are "prohibit[ed] … from disassociating" from the Union. Pet. i (question presented). But petitioners have done so by resigning their union memberships. New York does not require petitioners to financially support PSC, or express or disseminate any unwanted message, or do anything else to align themselves with PSC or its positions. Petitioners also retain their full First Amendment rights to speak and petition about all issues, whether individually or through groups.[7] PSC's collective bargaining agreement expressly states that the recognition of PSC for purposes of the Taylor Law does not prevent CUNY officials "from meeting with any individual or organization to hear views on any matters." Dist. Ct. Dkt. 1-1 at 10 (Compl. Ex. A ¶1.2).

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[7] *See Lehnert*, 500 U.S. at 521 ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employee Rels. Comm'n*, 429 U.S. 167, 176 n.10 (1976) ("[N]o one would question the absolute right of the nonunion teachers to … communicate [their] views to the public …. [or] directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.").

Neither CUNY officials nor reasonable outsiders would assume that all CUNY faculty and staff members agree with PSC's positions—or with each other—about anything. This Court has never upheld a claim of compelled speech or expressive association where, as here, the complaining party is not personally required to do *anything* and there is no public perception of imputed speech or expressive association. *See D'Agostino*, 812 F.3d at 244–45 (reviewing cases); App. 37a–38a n.10 (same).

Petitioners ignore the role that public perception plays in delimiting claims of compelled speech and compelled expressive association. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), for example, there was no impingement on the law schools' First Amendment rights because the presence of military recruiters on campus would not lead reasonable people to believe that the "law schools agree[d] with any speech by recruiters." *Id.* at 65, 69. Likewise, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), Chief Justice Roberts explained that "forced association" would exist only if reasonable outsiders believe that the plaintiffs "endorse[]" or "agree[] with" another party's message. *Id.* at 459–60 (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.").

Reasonable outsiders understand that an "exclusive representative" in a public employee collective bargaining system does not act as any individual employee's "*personal* representative." *Reisman*, 939 F.3d at 411–13 (emphasis added). Rather, "a union, once it

becomes the exclusive bargaining agent for a bargaining unit, must represent the *unit* as an entity." *Id.* (emphasis in original); *see also Peltz-Steele*, 60 F.4th at 5 (same reasoning); N.Y. Civ. Serv. Law § 204(2) (exclusive representative serves as the representative "of all the employees in the appropriate negotiating unit").

While petitioners cite cases analogizing the relationship of the exclusive representative to bargaining unit workers to an agency, fiduciary, or trustee relationship (Pet. 9), "[n]o matter what adjective is used to characterize it, the relationship is one that is clearly imposed by law, not by any choice on a dissenter's part, and when 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." *D'Agostino*, 812 F.3d at 244; *see also 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 ….").[8]

[8] Different viewpoints exist within every democratic system, and reasonable people similarly understand that not every parent, constituent, or attorney shares the views of a parent-teacher association, elected representative, or bar association. *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.") (quotation 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).

Reasonable outsiders also would not perceive other bargaining unit members to be speaking for petitioners simply because they are in the same bargaining unit. In petitioners' words, the instructional staff bargaining unit is made of up "tens of thousands of other CUNY employees, regardless of … whether they have shared … political … interests." App. 86a (Compl. ¶100). A reasonable person would not perceive that 30,000 frequently opinionated and vocal college faculty members and instructional staff agree with each other about anything—and particularly not about controversial political issues. When reasonable outsiders would not perceive a group's speech as reflecting the views or endorsement of another person, then that person has not been forced into an association with the group in a manner that implicates the First Amendment.

2. None of the compelled speech cases petitioners cite offer any support for their theory here. In those cases, the plaintiff was required personally to communicate an unwanted message or prevented from communicating a desired message. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024) (prohibiting social-media platforms from "engag[ing] in content moderation—to filter, prioritize, and label ... messages" posted on their platforms); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–56 (2000) (forcing organization to accept a "gay rights activist" as a scoutmaster would "significantly affect [organization's] expression"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995) (parade organizers were required "to alter the[ir] message"); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (fundraisers were required to make specific disclosures to potential donors); *cf. Roberts v. United*

States Jaycees, 468 U.S. 609, 623 (1984) (compelling interest in eradicating gender discrimination justified law forcing organization to accept women as members).[9]

By contrast, petitioners "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." *D'Agostino*, 812 F.3d at 244.

Petitioners urge that they "want to express their displeasure with PSC by disaffiliating themselves." Pet. 9. They claim a First Amendment right to "boycott entities to express a message." Pet. 8 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). But petitioners have already done so by resigning their memberships and denouncing PSC.

3. Petitioners point out that PSC can "enter into binding contracts for th[e] employees" in the bargaining unit. Pet. 3, 9. But that is not a First Amendment issue. Petitioners concede that public employees have no First Amendment right to force the government to

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[9] In *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66, 73 (1990), the Court held that public employees cannot be punished for refusing to support a political party or its candidates. Petitioners here do not allege that they face any employment consequences for resigning from PSC membership. The Taylor Law protects employees' "right to … refrain from forming, joining, or participating in, any employee organization" and makes it illegal for a public employer or employee organization "to interfere with, restrain or coerce public employees in the[ir] exercise of their rights." N.Y. Civ. Serv. Law §§ 202, 209-a(1)(a) & (2)(a).

negotiate contract terms with them individually or through their preferred representative. Pet. 11, 18; *see also Smith v. Ark. State Hwy. Emps., Loc. 1315*, 441 U.S. 463, 464–65 (1979) (public employer has no First Amendment obligation to deal with a union, rather than with individual employees). In the absence of a collective bargaining system, the government can—and generally does—set unit-wide contract terms for public employees and offer those terms on a take-it-or-leave-it basis. That the contract terms instead are set through negotiations with the bargaining unit's democratically chosen representative would not lead reasonable outsiders to believe that every bargaining unit worker supported every one of those contract terms.

The labor law cases petitioners cite about the impact of an exclusive representation system on "individual liberties" (Pet. 13) address economic liberties (like freedom of contract), not First Amendment speech and association. *See* Pet. 12–13 (citing *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202–23 (1944); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); and *14 Penn Plaza v. Pyett*, 556 U.S. 247, 271 (2009)). Those cases do not support petitioners' arguments here.[10]

[10] Petitioners' arguments also find no support in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) (Pet. 15), which did not involve a First Amendment claim. *Mulhall* held only that a private-sector employee who objected to union representation had an "associational interest" sufficient to support standing to allege the violation of a federal statute, not that exclusive-representative bargaining infringes First Amendment

4. *Janus* did not modify these First Amendment principles. *Janus* held only 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." 585 U.S. at 894. The Court emphasized that it was "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." *Id.* at 895–96, 916.

The *Janus* Court expressly stated that it was "not in any way questioning the foundations of modern labor law," but was 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." 585 U.S. at 904 n.7, 916. The Court explained that its decision would not require an "extensive legislative response," and that the States could "keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 928 n.27; *see also id.* at 896, 928 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).

Petitioners point to a passage in *Janus* describing exclusive-representative bargaining as "a significant impingement on associational freedoms that would not be tolerated in *other* contexts." 585 U.S. at 916 (emphasis added); Pet. 14. That passage from *Janus*,

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rights. *Id.* at 1286–88; *see Hill*, 850 F.3d at 865 n.3 (distinguishing *Mulhall*); *D'Agostino*, 812 F.3d at 244–45 (same).

however, is taken from a paragraph in which the Court reasoned that exclusive representation in public employment (unlike compulsory financial support) *is* constitutional under the line of cases pertaining to the government's greater authority under the First Amendment when it acts as employer. *See* 585 U.S. at 916 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564–68 (1968)). The reference to "other contexts" serves only to make clear that exclusive representation is *permitted* in the context of public employee collective bargaining. Thus, "every Court of Appeals to have addressed the issue post-*Janus*" has concluded that exclusive-representative bargaining is consistent with the First Amendment. *Peltz-Steele*, 60 F.4th at 7–8.

In sum, none of the cases that petitioners rely upon cast any doubt on the constitutionality of exclusive-representative bargaining for public employees.

III. Petitioners' strongly held views do not change the constitutional analysis.

Petitioners' accusation that PSC is "anti-Semitic" (Pet. 1)—which PSC vehemently denies—does not provide a reason for granting review.

As an initial matter, federal, state, and local law make it illegal for labor organizations to discriminate on the basis of religion or creed, and any such discrimination would be actionable under those laws. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c); New York State Human Rights Law, N.Y. Exec. Law § 290 et seq.; New York City Human Rights Law, 8 N.Y.C. Admin. Code § 8-101 et. seq.; *State Comm'n for Hum. Rts. v. Farrell*, 24 A.D.2d 128,

132 (N.Y. App. Div. 1965) ("A party has the right not to be excluded from the union because of race, creed, color, or religious persuasion."). PSC also has a legal duty of fair representation when it acts as exclusive representative, and that duty precludes discrimination. *See Civ. Serv. Bar Ass'n, Loc. 237, Int'l Bhd. of Teamsters v. City of New York*, 64 N.Y.2d 188, 196 (N.Y. Ct. App. 1984) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)) (duty of fair representation prohibits "conduct toward a member of the collective bargaining unit [that] is ... discriminatory").

Petitioners complain that PSC (meaning PSC's Delegate Assembly) approved a resolution calling for "discussions at the chapter level" to "consider" support for the Boycott-Divest-Sanction movement. App. 94a. Although the resolution "condemns racism in all forms, including anti-Semitism," App. 93a, petitioners "believe that this Resolution is openly anti-Semitic." App. 74a. Petitioners are entitled to their beliefs, but those beliefs do not create a First Amendment violation that does not otherwise exist.

In *Rumsfeld*, for example, law schools argued that they were forced to associate with a military recruitment policy that they believed to be homophobic, in contravention of their deeply held beliefs, but the Court recognized that there was no compelled expressive association—"regardless of how repugnant the law school considers the recruiter's message"—because the presence of recruiters on campus would not lead reasonable people to believe that the law schools agreed with the recruiters' message. 547 U.S. at 70.

The same is true here. PSC never represented that the Delegate Assembly resolution expressed the views

of all faculty. Indeed, the four principal PSC officers voted *against* the resolution, and the Union published letters from faculty members who criticized the resolution.[11] Petitioners are free to express their own messages about PSC, about Israel, and about all other issues—and they have. *See, e.g.*, App. 37a–38a n.10 (citing *Wall Street Journal* article by one of the petitioners entitled "I'm Stuck with an Anti-Semitic Labor Union."). Neither CUNY officials nor reasonable outsiders would assume that all CUNY instructional staff agree with a resolution passed by the PSC's Delegate Assembly about a controversial issue.

Moreover, the people who petitioners allege hold odious views about Israel are petitioners' own coworkers. Yet petitioners have no First Amendment right to require CUNY to establish separate campuses or academic departments so petitioners will never interact with colleagues who have different views. Like the plaintiffs in *Rumsfeld*, petitioners "attempt[] to stretch … First Amendment doctrines well beyond the sort of activities these doctrines protect." 547 U.S. at 70.

IV. This case is not a vehicle to consider exclusive representation outside the public employment context.

Finally, petitioners urge the Court to grant review to hold that the principle of exclusive representation should not be extended outside the public employment

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[11] *See* "Debating the Delegate Assembly Resolution," *Clarion* (August 2021), available at https://psc-cuny.org/clarion/2021/august/responses-israel-and-palestine/ (last visited November 16, 2024).

context. Pet. 18–20. This case would not be a vehicle for considering that issue, because this case concerns exclusive representation *within* the public employment context, as in *Knight* and *Janus*.

The Court stated in *Janus* that, while exclusive-representative systems might "not be tolerated in *other* contexts," the government's authority as employer permits exclusive-representative bargaining in the context of public employment. 585 U.S. at 916 (emphasis added); *cf. id.* at 895 ("We assume that 'labor peace,'" meaning "avoidance of conflict and disruption that … would occur if the employees in a unit were represented by more than one union," "is a compelling state interest."). This case does not present the hypotheticals outside the public employment context that petitioners raise.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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