No. 24-71

In the Supreme Court of the United States

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,
Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY; CITY UNIVERSITY OF NEW YORK; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employee Relations Board; ROSEMARY A. TOWNLEY, in her official capacity as Member of the New York Public Employee Relations Board; ANTHONY ZUMBOLO, in his official capacity as Member of the New York Public Employee Relations Board; CITY OF NEW YORK; THOMAS P. DINAPOLI, in his official capacity as New York State Comptroller,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Coalition for a Democratic Workplace (CDW) represents millions of businesses employing tens of millions of workers across the country in nearly every industry. CDW's members are joined by their mutual concern over regulatory overreach in the labor-relations field, including overreach by the National Labor Relations Board. CDW was formed in 2005 because of concerns about the Employee Free Choice Act, which would have eliminated secret-ballot elections and imposed union representation on employees who never had a chance to vote.

But now, local legislators are posing even greater threats to workplace democracy. Across the country, cities and states are adopting new regulatory schemes that impose representation on hundreds of thousands of unwilling workers. Under the banner of "co-regulation," these schemes designate representatives for workers without the workers ever having a say, much less a vote, in who represents them. And these new representatives have the power to adopt work standards covering not just single workplaces, but entire industries.

This kind of "representation" is possible only because lower courts have misinterpreted this Court's

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[1] In accordance with Supreme Court Rule 37.6, CDW states that no party or counsel in the pending appeal either authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of the accompanying brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief other than amicus or its members. CDW also states that CDW notified counsel for all parties of its intent to file this brief at least ten days before filing the brief in accordance with Supreme Court Rule 37.2.

opinion in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *Knight* stood for the straightforward principle that people could not force the government to listen to their views. But lower courts have extended it beyond that principle to allow essentially any form of government-imposed exclusive representation, including the form at issue in this petition. CDW files this brief to help the Court understand the broader effects of *Knight*'s misinterpretation. It also urges the Court to grant the petition to clarify the true, and limited, scope of *Knight*.

SUMMARY OF ARGUMENT

More than sixty years ago, this Court considered a challenge to "union shop agreements." These agreements, in the Court's words, were a form of "compulsory unionism": they required every employee in a bargaining unit to pay for the union's bargaining costs. Congress had authorized the agreements under the Railway Labor Act,[2] and this Court ultimately held that they were lawful. But not all members of the Court agreed. In dissent, Justice Hugo Black saw latent dangers in involuntary unionism. He wrote that if employees could be forced to contribute to the union's bargaining costs, they could be forced into other kinds of relationships as well. And that kind of compelled association would offend bedrock principles of constitutional law:

> I cannot agree to treat so lightly the value of a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions. It should not be

[2] *See* 64 Stat. 1248 (1951) (codified at 45 U.S.C. § 152(Eleventh)).

> forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against. The three workers who paid under protest here were forced under authority of a federal statute to pay all current dues or lose their jobs. They should get back all they paid with interest.
>
> Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group.

Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 796 (1961) (Black, J., dissenting). Justice Black's warning might once have seemed overstated—maybe even alarmist. But no longer. Across the country, workers are being collected into novel "representation" schemes. These schemes have come in several forms, including "labor standards boards" and "sectoral bargaining." *See, e.g.*, Seattle Mun. Code ch. 14.23 (domestic workers standards board); N.Y. Lab. L. § 674-a (farm labor standards board); Cal. Labor Code § 1475 (fast-food council); Initiative Petition 23-35: An Act Giving Transportation Network Drivers the Option to Form a Union (Mass. 2023) [hereinafter Mass. Rideshare Petition]. *See also generally* U.S. Chamber of Commerce, Standards Boards, Ballot Initiatives, and "Industrial Democracy": How Unions

Are Using Government to Circumvent the NLRA and End Labor-Market Competition (forthcoming 2024) [hereinafter U.S. Chamber Report] (describing the new schemes). But whatever their name, they share the theme of imposing representation on workers who never chose a representative. *See, e.g.*, Cal. Lab. Code § 1475 (providing for appointment rather than election of board members); Colo. Rev. Stat. § 8-7.5-103(2)(I) (same); Seattle Mun. Code § 14.23.030(B) (same); N.Y. Lab. L. § 674-a (same). And they also share a common origin—a distortion of this Court's decision in *Knight*.

On its face, *Knight* was a modest decision. It merely approved a state law establishing a nonbinding consultation process between unions and public employers. *See* 465 U.S. at 274 (citing Minn. Stat. §§ 179.63, 179.65). The state created that process to solicit the union's feedback on certain policy questions outside the normal collective-bargaining process. *See id.* In the Court's view, that arrangement was unexceptional: the state could consult whomever it wanted. *Id.* at 282. It did not have to open the consultation to other parties. No one had a right to force the state to listen to his or her views. *See id.* (explaining that the state had simply "restricted the class of persons to whom it will listen in its making of policy").

But in the intervening decades, that simple holding has been distorted. Lower courts have read *Knight* to authorize not only limited forms of policy consultation, but expansive forms of exclusive bargaining. They have reasoned that, under *Knight*, the government can listen to whomever it likes. That means the government can bargain with whomever it likes. And that, in turn, means the government can

designate a bargaining representative for whomever it likes—even for people who would prefer no representative at all. *See, e.g.*, *Goldstein v. Pro. Staff Cong./CUNY*, 96 F.4th 345, 350 (2d Cir. 2024); *Mentele v. Inslee*, 916 F.3d 783, 785 (9th Cir. 2019) (reading *Knight* to approve exclusive representation for bargaining); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (same); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017) (same); *D'Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016) (same).

That distortion is now fueling even broader forms of compulsory representation. Workers are being collected under quasi-public "coregulation" schemes. These schemes force workers to accept the services of "representatives" with power over their wages, hours, and working conditions. These representatives are not elected, but appointed. And they are effectively unaccountable to anyone but their political patrons—who are almost always labor unions. *See, e.g.*, Cal. Lab. Code § 1475 (authorizing "representatives" to develop working conditions for fast-food industry); Mass. Rideshare Petition, *supra*, § 5 (authorizing single union to represent every rideshare driver in state after truncated organizing process). *See also* Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, New Labor Forum 3 (2022)[3] (criticizing sectoral-bargaining proposals for offering "limited democratic worker participation and voice in the conditions created through bargaining"); *California Fast Food Union: Launched!* Serv. Emp. Int'l Union

[3] Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4006698.

(Feb. 22, 2024)[4] (announcing creation of new "union" to represent fast-food workers on statewide board).

This development was not unexpected. More than sixty years ago, Justice Black foresaw the risk of allowing a supposedly voluntary union to arrogate power over unwilling workers. That risk has now come to pass—in part because of a misreading of this Court's own precedent. *See Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020) (rejecting challenge to exclusive representation because "lower courts must follow Supreme Court precedent") ("*Knight* controls here."). This Court should not allow that misreading to stand. It should accept the petition and clarify that *Knight* meant only what it said: the state can choose whom to listen to. It did not mean the state could force people to associate with "representatives" they did not want. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 916 (2018) ("Freedom of association . . . plainly presupposes a freedom not to associate." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

ARGUMENT

1. Lower courts have distorted *Knight* to justify nearly all forms of exclusive representation.

The question in *Knight* was narrow. In 1971, Minnesota adopted a law requiring public employers to "meet and confer" with unions about certain policy issues. 465 U.S. at 274 (citing Minn. Stat. §§ 179.63, 179.65 (repealed 1984)). The law required a public employer to listen to the union's views and proposals.

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[4] Available online: https://www.seiu.org/blog/2024/2/california-fast-food-workers-union-launched.

Id. But did not require the employer to respond to those proposals, much less bargain over them in good faith. *Id. See also Minneapolis Fed'n of Teachers, Loc. 59 v. Minneapolis Special Sch. Dist. No. 1*, 258 N.W.2d 802, 804 n.2 (Minn. 1977) (observing that the meet-and-confer procedure "does not impose any duty to bargain in good faith").

A group of community college professors objected to the consultation procedure. *Knight*, 465 U.S. at 278. They did not want the union to represent them; instead, they wanted to represent themselves. *Id.* So they sued to force the state to let them into the meet-and-confer sessions. *Id.*[5]

This Court rejected their claim. The Court reasoned that the professors were essentially demanding access to a closed consultation process. *Id. at 279–82.* That process had been set up by the state to solicit views it considered valuable. *Id. at 280.* And while the Constitution gave the professors a right to speak, it did not guarantee them access to what was essentially a closed process: "Appellees have no constitutional right to force the government to listen

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[5] In the lower court, the plaintiffs argued that the union was a quasi-political organization. They said that by forcing them to bargain through such an association, the state was effectively requiring them to associate with a political party. The district court rejected that argument, reasoning that the question was controlled by *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). *See Knight v. Minnesota Cmty. Coll. Fac. Ass'n*, 571 F. Supp. 1, 5 (D. Minn. 1982). But *Abood* has now been overruled, and this Court has never addressed the issue squarely. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 916 (2018) (overruling Abood and recognizing that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts").

to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id. at 282*.

That holding was straightforward. The right to speak had never meant the right to be heard. *See id.* (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444 (1915)). *See also Smith v. Ark. State Highway Emp., Loc. 1315*, 441 U.S. 463, 465 (1979) ("[T]he First Amendment does not impose any affirmative duty on the government to listen, to respond to, or in this context, to recognize the association and bargain with it."). And by affirming that principle, the Court merely declined to work a "constitutional revolution." *Knight*, 465 U.S. at 282.

Yet lower courts have read *Knight* to mean much more. In the forty years since it came down, the First,[6] Second,[7] Third,[8] Sixth,[9] Seventh,[10] Eighth,[11] Ninth,[12] and Tenth Circuits[13] have extended it to cover exclusive workplace bargaining. And while some of

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[6] *D'Agostino*, 812 F.3d at 243–44.

[7] *Goldstein*, 96 F.4th at 350; *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016).

[8] *Adams v. Teamsters Union Loc. 429*, No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022); *Oliver v. Serv. Emps. Int'l Union Loc. 668*, 830 F. App'x 76, 81 (3d Cir. 2020).

[9] *Thompson*, 972 F.3d at 814.

[10] *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724, 734 (7th Cir. 2021); *Hill*, 850 F.3d at 863–64.

[11] *Bierman*, 900 F.3d at 574.

[12] *Mentele*, 916 F.3d at 790.

[13] *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 969 (10th Cir. 2021).

these courts have limited that extension to the public sector, others have carried it into quasi-private industries. For example, in *Bierman v, Dayton*, the Eighth Circuit held that *Knight* authorized exclusive representation for workers who provided subsidized homecare services for disabled children. 900 F.3d at 574. In *Hill v. SEIU*, the Seventh Circuit reached the same conclusion in a case about subsidized healthcare providers. 850 F.3d at 863–64. And in *Mentele v. Inslee*, the Ninth Circuit applied that same logic to workers providing subsidized childcare. 916 F.3d at 790. *See also* Alexander T. MacDonald, *Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment*, 22 Georgetown J.L. & Pub. Pol'y 229, 248–49 (2024) (collecting and discussing lower-court decisions).

These courts viewed the extension to bargaining not only as an outgrowth of *Knight* but, in fact, required by *Knight*'s rationale. *See, e.g.*, *Thompson*, 972 F.3d at 813 ("*Knight* controls here."); *Hill*, 850 F.3d at 864 (finding the outcome controlled by *Knight*); *Jarvis*, 660 F. App'x at 72 (finding challenge "foreclosed" by *Knight*). They assumed that if the government could choose to consult with only one union, it could also choose to bargain with only one union. *See Hill*, 850 F.3d at 864 (reasoning that exclusive bargaining involves merely the state's choice to "listen to one voice"). And even though many of this Court's free-association decisions pointed the other way, they found *Knight* to cut short any closer analysis. *See Mentele*, 916 F.3d at 789 (acknowledging tension with this Court's free-association precedents, including *Janus*, but finding *Knight* to be the "more appropriate guide").

But that logic read into *Knight* something that was never there. Again, *Knight* involved only a consultation process. And that process applied only to tangential "policy" matters. It did not apply to core employment conditions. Nor did it require the state to bargain. It merely gave the state a way to solicit feedback from a chosen source. It did not force any employee to bargain through a union, much less associate with the union's views. *See Knight*, 465 U.S. at 284.

Bargaining is different. In collective bargaining, the union acts as the workers' agent. It receives its authority directly from the workers and sits at the bargaining table in their place. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337–38 (1953); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964) (describing the "undoubted broad authority of the union as exclusive bargaining agent"). Every concession or demand it makes, it makes on the employees' collective behalf. *See Ford Motor*, 345 U.S. at 337–38.

In fact, the whole theory of collective bargaining is that workers have more leverage when they bargain together. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). They pool their bargaining authority and funnel it through one agent—the union. *Id.* So the union is effectively their alter ego. They cannot disassociate from the union's positions because, ultimately, the union is them. *See Building Power for Working People*, AFL-CIO[14] ("A union is you and your co-workers coming together as a team to make improvements at your workplace.").

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[14] Available online: https://aflcio.org/what-unions-do/empower-workers.

By glossing over these differences, lower courts have effectively cut workers out of the picture. They have viewed collective bargaining as simply an arrangement between the government and a union. *See Hill*, 850 F.3d at 864 (concluding that the state was free to choose its own bargaining partner); *Bierman*, 900 F.3d at 570 (same). But the arrangement makes no sense without the workers. The workers are the source of the union's power; without them, the union is merely an agent without a principal. *Ford Motor*, 345 U.S. at 337–38 ("Any authority to negotiate derives its principal strength from a delegation to the negotiators . . . ."). *See also Janus*, 585 U.S. at 898–99 (noting that the right to bargain on employees' behalf gives unions a "tremendous increase in power"). The workers may not always be seen, and too often, they are not heard. But they remain an essential element of the bargaining process.

2. The distorted view of *Knight* has given birth to novel forms of compulsory representation.

This distorted view of *Knight* poses real threats to free association. Taken to its logical end, it would effectively allow the government to impose a union on anyone. The government would need to use only a simple workaround. First, it could pass a law requiring two parties to bargain. Then, it could give itself a seat at the table. Because it would be involved in bargaining, it could choose its own bargaining "partners." So it could appoint the private parties' "representatives" for them—even over their objections.

That possibility is not hypothetical; it is already happening. Across the country, state and local

governments are enacting regulatory schemes that impose representatives on private parties. Sometimes dubbed "coregulation," these schemes meld private bargaining with public regulation. They convene private actors under a public umbrella to set wages, hours, and working conditions. They often describe this standard-setting process as advisory only: a tool for government to collect information about conditions in the workplace. But whatever their pretenses, they are essentially collective bargaining—just with fewer safeguards for minority rights.

Perhaps the most popular "coregulation" scheme involves labor standards boards. These boards are structured as "tripartite" bodies. They include members representing, ostensibly, government, industry, and workers. *See, e.g.*, Colo. Rev. Stat. § 8-13.5-205 (tripartite agricultural work standards board); Nev. Rev. Stat. § 608.610 (tripartite home-care standards board); Cal. Lab. Code § 1475 (tripartite fast-food workers board). These members convene and draft employment standards, including wages, hours, and other working conditions. *See, e.g.*, N.Y. Lab. L. § 674-a (directing board to develop overtime standards for farmworkers); Cal. Lab. Code § 1475(b) (directing board to develop standards for wages, hours, and other working conditions for fast-food workers). After developing standards, they usually send the standards to a public official. *See, e.g.*, Cal. Lab. Code § 1475(d)(1)(C)(ii) (submission to state labor commissioner); Seattle Mun. Code § 14.23.020(I) (submission to city council). This official reviews the standards, approves them, and promulgates them as regulations. *See* Cal. Lab. Code § 1475(d)(1)(C)(iii); N.Y. Labor L. § 674-a(7); Nev. Rev. Stat. § 608.670. These regulations then bind all

workers in the covered industry, whether or not the affected workers participated in the process. *See* Cal. Lab. Code § 1475(d)(2)(D) (stating that the minimum wage established by the board "shall constitute the state minimum wage for fast food restaurant employees for all purposes under [the California Labor Code]"). *See also* U.S. Chamber Report, *supra* (surveying and describing boards' functions); Cynthia Estlund, *The Case for Sectoral Co-Regulation*, 98 Chi.-Kent L. Rev. 539, 543–45 (2024) (describing emerging "co-regulation" schemes); Aurelia Glass & David Madland, *Momentum for Worker Syandards Boards Continues to Grow*, Ctr. for Am. Progress (Sept. 7, 2023)[15] (examining nine state and local worker-standards boards created since 2018).

As a form of representation, these boards are vanishingly thin. Workers cannot elect their representatives. Instead, the representatives are appointed by the government. *See, e.g.*, Cal. Lab. Code § 1475(a)(3)–(4); Colo. Rev. Stat. § 8-7.5-103(2)(I); Seattle Mun. Code § 14.23.030(B); N.Y. Lab. L. § 674-a. And once appointed, the representatives have few if any duties to the people they represent. They owe no duty of fair representation, cannot be recalled, and need not consider the wishes of workers. Instead, they are simply appointed to their seats and stay there until their terms expire. *See, e.g.*, Cal. Lab. Code § 1475(a)(4) (term of four years); Seattle Mun. Code § 14.23.030(C) (terms of two to three years). *But see* Nev. Rev. Stat. § 608.610 (no explicit limit on terms).

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[15] Available online: https://www.americanprogress.org/article/momentum-for-worker-standards-boards-continues-to-grow/.

Yet despite their lack of accountability, these representatives wield significant power. Merely by virtue of their board seats, they have the right to negotiate with employer representatives over industry-wide working conditions. *See, e.g.*, Cal. Lab. Code § 1475(c)(1)(B) (providing that after meetings to discuss employment standards, council promulgates standards by majority vote); N.Y. Lab. L. § 674-a(5) (same). And while some boards ostensibly only "recommend" new conditions, these recommendations are almost always rubber-stamped. *See* Order of Commissioner of Labor Roberta Reardon on the Report and Recommendations of the 2022 Farm Laborers Wage Board (Sept. 22, 2022)[16] (approving board's "recommendations" without change). Any official review is, in practice, nominal at best. *See id.* The boards were designed to set labor conditions, and they do just that. *See* U.S. Chamber Report, *supra* (describing labor-standards boards as a workaround to avoid perceived limitations of the National Labor Relations Act).

And some boards do more than just "recommend" standards: they regulate. For example, the California Fast Food Council can raise wages across the entire fast-food industry. Cal. Lab. Code § 1475(d)(2)(D). It can also adopt other "minimum working conditions." *Id.* § 1475(j)(1). And while these conditions nominally pass through the state labor commissioner, the commissioner's review is meager. She can only review the standards to make sure they are "consistent with" the Council's statutory powers. *Id.* § 1475(d)(1)(C)(iii). If they are, she promulgates them without change.

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[16] Available online: https://dol.ny.gov/system/files/documents/2022/09/fwwb_signed_order_093022.pdf.

See id. It is the Council, not the labor commissioner, that regulates the fast-food workplace. *See id.* § 1475(j)(1) (stating that standards developed by council are the legal minimum standards for fast-food workers).[17]

Broad as these schemes are, even more adventurous ones are afoot. In New York, a proposed cosmetology board would have authority not only over wages and working conditions, but also over minimum prices. *See* SB S1800 Reg. Sess. (N.Y. 2023-24). And in Massachusetts, a proposed ballot initiative would give a single union the right to represent every rideshare driver in the state. *See* Mass. Rideshare Petition, *supra*. The petition would erect the nation's first "sectoral bargaining" scheme, a system borrowed from Europe and Latin America. *See* U.S. Chamber of Commerce, Bait and Switch: The False Promise of New "Representation" Models (2022)[18] (describing function and origins of proposed sectoral-bargaining models). This scheme would allow the union to be designated with only minimal support from the drivers themselves—perhaps as few as 2.5%.[19] And once designated, the union would

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[17] The statute appears to require closer review for antidiscrimination and workplace-safety standards. If the Council wants to regulate on those subjects, it must petition the responsible agencies. *See* Cal. Lab. Code §§ 1475(e), (f). It is not clear, however, how responsive those agencies will be to the Council's petitions or how closely they will review the Council's proposals. The Council first met in March 2024, and it has not yet petitioned either agency.

[18] Available online: https://www.uschamber.com/employment-law/unions/bait-and-switch-the-false-promise-of-new-representation-models.

[19] This low percentage results from two features of the proposal: its definition of "active driver" and its election procedures. Active

represent all drivers in statewide negotiations with rideshare platforms. Mass. Rideshare Petition, *supra*, § 6(A). The resulting agreement would be sent to the state secretary of labor, who, like the California labor commissioner, would review it only for statutory compliance. *Id.* § 6(F). And if the agreement complied with vague, high-level standards, it would be approved. *Id. See also* U.S. Chamber Report, *supra* (describing effect on nonconsenting workers); Dubal, *supra*, at 3 (criticizing sectoral-bargaining proposals for imposing industry-wide standards without meaningful democratic input from affected workers).

These schemes flow directly from the distorted view of *Knight*. As extended by lower courts, *Knight* could be read to block any challenge to exclusive representation when the government is involved. *See, e.g.*, *Goldstein*, 96 F.4th at 349 (rejecting challenge to exclusive representation under broad reading of *Knight*); *Thompson*, 972 F.3d at 813–14 (same); *Bierman*, 900 F.3d at 573–74 (same). If the government participates in bargaining, even nominally, it can force workers to bargain through a union. *See, e.g.*, *Hill*, 850 F.3d at 863–64 (extending broad version of *Knight* to otherwise private workers who receive state subsidies through Medicaid

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drivers are defined as drivers who have completed more than the median number of ride requests in the last X months. The union can trigger an election with signatures from 5% of active drivers—i.e., 2.5% of all drivers. The union can then gain exclusive status if more than half of the drivers who cast ballots vote for the union. So if turnout is low and the same drivers vote for the union, 2.5% could select a union for the other 97.5%. *See* Mass. Rideshare Petition, *supra*, §§ 2(A) (defining active drivers), 5(D) (setting out election procedures). The union can also gain exclusive status without an election by collecting signatures from a quarter of drivers. *Id.* § 5(D)(3).

program); *Mentele*, 916 F.3d at 785 (same). No worker can object because, according to lower courts, no worker has a right to bargain with the government. *See Hill*, 850 F.3d at 863 (rejecting challenge because the state could choose to "listen to only one voice"). *Cf. Goldstein*, 96 F.4th at 349 (rejecting challenge because "the First Amendment does not guarantee public employees the right to engage in collective bargaining with their employer").

But again, that logic gets the constitutional analysis backwards. As this Court has often explained, the First Amendment protects not only the right to associate, but also the right not to associate. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 623 (1995); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). People cannot be forced to associate with a group advocating messages they reject. *Janus*, 585 U.S. at 892–93; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000). And that is no less true when the message's audience is the government. In fact, it is even more true when the government is the audience: when a message is aimed at the government, it is much more likely to involve policy and politics, the central concerns of the First Amendment. *See Janus*, 585 U.S. at 912–13 (observing that public-union bargaining raises issues of governmental policy not implicated by purely private bargaining); *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (stating that "political expression" is "at the core of our electoral process and of the First Amendment freedoms." (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

Yet these new schemes treat the government's involvement as a free pass. They presume that as long as the government is involved, they can override all

associational rights, including the rights of the "represented" workers. And the workers themselves are treated as silent props: they are simply lined up behind a mock negotiation conducted in their name. *See Janus*, 585 U.S. at 901 ("[D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights."). *See also* U.S. Chamber Report, *supra* ("Rather than organize workers and represent them at the bargaining table, [unions] have decided to capture policymakers and advance their agendas at city hall.").

That kind of faux representation has been rejected before, and for good reason. Though this Court has approved exclusive representation under the NLRA, it has done so only with significant caveats. For example, it has held that an employer cannot recognize a union as the exclusive representative unless the union is supported by a majority of the employees. *See Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961). Similarly, this Court has held that a union's exclusive power comes with corresponding fiduciary duties. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944). The union must represent all workers fairly. *Steele*, 323 U.S. at 198. It cannot discriminate against workers who choose not to join. *Id.* It cannot trade nonmembers' interests to benefit its supporters. *Id.* It must represent all workers equally—or not at all. *See Vaca*, 386 U.S. at 177. *See also Janus*, 585 U.S. at 901 ("Protection of [worker's] interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected.").

But none of these guardrails applies to these new "coregulation" schemes. Unlike a union, a labor-standards-board representative owes no duty to the people she represents. She is not elected and need not concern herself with the preferences of her constituents. *See* Estlund, *supra*, at 551 (observing that labor-standards boards "do *not* rely on workers' collective bargaining leverage; rather, they deploy political and regulatory power to raise labor standards"). So she can freely trade the interests of some workers for those of others. *See* Cal. Lab. Code § 1475(j)(1) (allowing board to set standards for all fast-food employees "or a relevant subgroup of fast food employees"). Her power to discriminate is limited only by the limitations on the state's own power—limitations that, in recent years, have proven to be shockingly weak. *See Olson v. California*, 104 F.4th 66, 80 (9th Cir. 2024) (holding that state did not violate Equal Protection Clause by allegedly singling out specific businesses while exempting similarly situated businesses). *Cf. Janus*, 585 U.S. at 901 (observing that exclusive bargaining without a duty of fair representation would raise "constitutional questions").

This is the danger Justice Black foresaw. *See Street*, 367 U.S. at 796. What might once have seemed a distant threat has now arrived. Workers are no longer choosing their representatives; their representatives are choosing them. And they are doing it with the blessing of courts—courts who have distorted the straightforward, limited holding of *Knight*.

CONCLUSION

These harms were not inevitable. Properly understood, *Knight* held only that people cannot force the government to listen to them. *See* 465 U.S. at 282. That is very different from holding that the government can shuffle people into thin "representation" schemes, where they must stand behind the views and policies of a representative they may vehemently oppose. *See Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting) (warning that a broad view of compelled representation would "give carte blanche to any legislature to put at least professional people into goose-stepping brigades"). Yet still, *Knight* has been read to justify that further step. It has been taken to mean that the government can impose a bargaining representative on anyone as long as the government itself participates in bargaining.

That view of *Knight* is wrong, and it should be corrected. But it can be corrected only by this Court. That alone is reason to grant certiorari here. *Cf. Harris v. Quinn*, 573 U.S. 616 (2014) (refusing to extend *Abood* when extension would have applied questionable precedent to new categories of employees) ("If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged employees.").

Respectfully submitted,

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