No. 18-

IN THE
Supreme Court of the United States

KATHERINE MILLER,

Petitioner,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON; CHERYL STRANGE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES; DAVID SCHUMACHER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF FINANCIAL MANAGEMENT; AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925, A LABOR ORGANIZATION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court recently held that a state "requir[ing] that a union serve as exclusive bargaining agent for its employees [is] itself a significant impingement on associational freedoms . . . that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). The State of Washington compels individuals who operate State subsidized home-based childcare businesses, and who are not government employees, to accept an exclusive representative that speaks for them in petitioning, lobbying, and contracting with the State over public policies that affect their profession.

The question presented is whether Washington's compelling nonmember providers to accept a private organization as their exclusive representative for dealing with the State over public policy is one of the "other contexts" in which the "significant impingement on associational freedoms" is not tolerated by the First Amendment.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, Plaintiff-Appellant in the courts below, is Katherine Miller. Cynthia Mentele was a Plaintiff in the District Court, but is not a Petitioner.

Respondents, Defendants-Appellees in the courts below, are Jay Inslee, in his official capacity as Governor of the State of Washington; Cheryl Strange, in her official capacity as Secretary of the Washington State Department of Social and Health Services (in the courts below Kevin W. Quigley was the Secretary); David Schumacher, in his official capacity as Director of the Office of Financial Management; and SEIU, Local 925, a labor organization.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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INTRODUCTION

The Court recently held that a state "requir[ing] that a union serve as exclusive bargaining agent for its employees . . . [is] itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). Here, Washington is forcing certain citizens to accept a government-appointed lobbyist and agent. This case presents that "other context." *Id*. It concerns whether Washington can compel individuals who operate State subsidized home-based childcare businesses but are not State employees to accept an exclusive bargaining agent they have not joined for speaking, petitioning, lobbying and contracting with the State over public policies that affect their profession.

The lower court held the State could designate an exclusive representative to speak for providers on the misconception that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) held exclusive representation does not impinge on speech and associational rights. The lower court alternatively held that even if it assumed that *Knight* did not govern, it would reach the same result: the State's designation of an exclusive representative for providers is constitutionally permissible because exclusivity serves the "compelling—and enduring—state interest of labor peace." Pet.App.16a.

This petition presents the Court with an opportunity to correct this growing and dangerous misapprehension among lower courts (now four circuits) that *Knight* gives the government untrammeled authority to dictate which organization represents citizens in dealing with the government. Regimes of exclusive

representation, like other mandatory expressive associations, are subject to a limiting constitutional principle: exacting First Amendment scrutiny. Whatever its merits in a public employment relationship, no compelling state interest justifies extending exclusive representation beyond that context to a citizen's relationship with government regulators.

This petition also gives the Court the opportunity to halt the lower court's application of labor peace to the provider context. Any state interest in workplace "labor peace" does not reach that far. *See Harris v. Quinn*, 573 U.S. 616, 649-50 (2014). The petition should be granted and the lower court reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 916 F.3d 783, is reproduced in the appendix (Pet.App.1a), as is the district court's order granting defendants summary judgment, unofficially reported at 2016 WL 3017713. (Pet.App.21a).

JURISDICTION

The Ninth Circuit entered judgment on February 26, 2019 (Pet.App.1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant portions of Washington's Access to Quality Family Child Care Act ("Access Act") and the Public Employees' Collective Bargaining Act ("Bargaining Act"), codified as amended at Wash. Rev. Code §§ 41.56.010 et seq., are reproduced at Pet.App.43a.

STATEMENT

1. As the lower court noted, Washington provides financial assistance to qualifying families for childcare costs. Under the terms of this program, families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State covers the remaining cost by providing the provider with a subsidy. Pet.App.4a; *see also* at 22a.

Before 2006, Washington unilaterally determined subsidy levels and other policies governing its childcare assistance programs, through legislation and regulations. But in 2006, Washington recategorized providers as "public employees" for purposes of collective bargaining legislation and authorized the providers to elect an exclusive collective bargaining representative to negotiate with the State on their behalf concerning childcare assistance policies. Wash. Rev. Code § 41.56.028 (Pet.App.43a-44a). Pet.App.4a; *see also id.* at 22a-23a.

Because the childcare providers are deemed "state employees" by the State only for purposes of collective bargaining and for no other purpose, Wash. Rev. Code § 41.56.028(3) (Pet.App.44a), Washington law limits the scope of their bargaining agent's representation. For example, families continue to be the providers' primary employers, *id.* § 41.56.028(4)(a) (Pet.App.44a); the providers are not allowed to strike, *id.* § 41.56.028(2)(e) (Pet.App44a); and the bargaining agent cannot negotiate about certain issues, *id.* § 41.56.028(2)(c) (Pet.App.43a-44a). Pet.App.4a-5a; *see also id.* at 15a-16a.

Notwithstanding that these childcare providers are not government employees—they merely receive state

subsidies for their services—and many are not members of the union, in recent years eighteen states have imposed exclusive union representatives upon them as if they were government employees.[1] *See infra* note 5.

Significantly, because of the limitations in the scope of collective bargaining in the context of providers and their non-employee status, among other reasons, the Court in *Harris* found the "labor peace" interest that ostensibly justifies exclusive representation of government employees inapplicable to similar providers. 573 U.S. at 649-50. "Federal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace" *Id.* at 650.

2. Petitioner is a licensed childcare provider who operates a childcare business in her home and has contracted with the Washington State Department of Early Learning to provide childcare services to children under one of several state assistance programs that provide her a subsidy for her childcare services. Wash. Admin. Code 170-290-0001 and 170-290-0240; *see also* Pet.App.23a.

Since November 2014, Miller has not been a member of SEIU and does not wish to associate with the union or be represented by it. Pet.App.32a, 33a; *see also id.* at 22a-23a. She continues to care for children and receives subsidies from the State. *Id.* at 4a, 23a. As a condition of receiving the subsidies, the State forces

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[1] Fifteen states have authorized mandatory representation for Medicaid providers and three states for individuals who operate foster homes for persons with disabilities. Washington also authorizes mandatory representation for language access providers. *See infra* notes 6-8.

Miller to accept SEIU as her authorized agent to represent her and speak for her in all bargaining matters with the State. Wash. Rev. Code § 41.56.028(2)(b)-(c) (Pet.App.43a-44a); *see also* Pet.App.4a, 22a-23a.

The Amended Complaint was filed on October 16, 2015. In Count One, Miller expresses opposition to the State choosing for her a private organization, of which she is not a member, to speak on her behalf in petitioning and contracting with the State, and forcing her to accept SEIU as her exclusive representative for such speech. Pet.App.30a-31a, 32a, 36a-37a, 37a-38a (Am. Compl. ¶¶ 1, 3, 16-18, 23-25).

She wants neither to be forced into an agency relationship with this advocacy group nor to be affiliated with SEIU's petitioning, contracts, and other expressive activities. *Id.* at 38a (¶25). She brought this suit to vindicate her First Amendment right to choose and associate with which organization, if any, speaks and contracts for her in her relationship with the State and not have others speak on her behalf. *Id.* at 39a-40a, 41a (¶¶ 29-33; Prayer for Relief ¶¶ A-B).

Miller does not seek to dictate with whom the State may associate or seek input from in deciding childcare policies affecting her. Neither does she seek the right to compel an audience with the State over its childcare policies or to be heard over others. All she seeks is to be left alone to make her own decisions regarding her associations and who speaks for her. Pet.App.6a, 11a-12a, 17a.

On May 26, 2016, the district court dismissed Count I. Pet.App.21a, 29a. The court rejected Miller's argument that *Harris*, not *Knight*, controls in the context of providers and held that Washington's certification of an exclusive representative did not impinge on her

First Amendment rights, and thus required no compelling justification. Pet.App.25a-28a. Petitioner Miller appealed. Pet.App.6a.

While the appeal was pending, the Court issued *Janus* and held it unconstitutional for states to compel employees to subsidize exclusive representatives. 138 S. Ct. at 2486. *Janus* twice recognized that exclusive representation "substantially restricts" individual rights, *id*. at 2460, 2469, and held it a "significant impingement on associational freedoms that would not be tolerated in other contexts," *id*. at 2478.

On February 26, 2019, the Ninth Circuit reached a different conclusion, holding exclusive representation does *not* impinge on associational freedoms. Pet.App.6a-14a. The lower court agreed with the First, Seventh and Eighth Circuits that *Knight* "is the most appropriate guide" for such claims and with the Eighth Circuit that "*Knight* is a closer fit than *Janus*." Pet.App.12a; *see also id*. 8a-9a, 10a, 12a (citing *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied.*, No. 18-776, 2019 WL 2078110 (May 13, 2019); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864-65 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *D'Agostino v. Baker*, 812 F.3d 240, 242-44 (1st Cir.) (Souter, J., by designation), *cert. denied*, 136 S. Ct. 2473 (2016)).[2] It did so after acknowledging the differences between *Knight's* holdings and Miller's contentions and recognizing *Knight's* decided issue "is arguably distinct from Miller's contention." Pet.App.11a (footnote omitted); *see id*. at 11a-12a.

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[2] The Second Circuit reached a similar conclusion in an unpublished, non-precedential order in *Jarvis v. Cuomo*, 660 F. App'x 72, 74-75 (2d Cir. 2016) (per curiam), *cert. denied* 137 S. Ct. 1204 (2017).

The lower court distinguished *Janus* on the grounds that it "never mentions *Knight*," and the constitutionality of exclusive representation "was not presented or argued and . . . was unnecessary to the Court's holding." Pet.App.12a, 13a. The court reasoned that it

> should "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions," and follow "direct[ly] applica[ble]" precedent, even if subsequent decisions call into question some of that precedent's rationale. . . . Consistent with that directive, we apply *Knight*'s more directly applicable precedent, rather than relying on the passage Miller cites from *Janus*.

Pet.App.13a (citations omitted).

The lower court proceeded to decide that even if it assumed *Knight* no longer governs, it would reach the same result: "SEIU's authorized position as the childcare providers' exclusive representative is constitutionally permissible" because exclusive representation "serves the compelling—and enduring—state interest of labor peace." Pet.App.14a, 16a.

REASONS FOR GRANTING THE PETITION

If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government. This form of compelled speech and association not only infringes on individual liberties, but distorts the political process the First Amendment protects.

The Court should grant the petition to end the widespread misconception that *Knight* held the government can designate exclusive representatives to speak for unconsenting individuals for any rational basis, without satisfying any First Amendment scrutiny. Pet.App.8a-9a (citing cases).

Knight merely held it constitutional for a college to exclude employees from its nonpublic meetings with union officials. 465 U.S. at 292. *Knight* did not challenge the fact that exclusive representation is a mandatory expressive association, much less rule that governments have carte blanche to compel any person into an exclusive-representative relationship. As the Court now recognizes: exclusive representation inflicts a "significant impingement on associational freedoms." *Janus*, 138 S. Ct. at 2478.

The Court should also grant the petition to resolve whether exclusive representation can "be tolerated in other contexts," *id*., namely outside of a government employment relationship. It cannot. Under *Harris*, a state's interest in "labor peace" does not extend that far, 573 U.S. at 649-50, a point the lower court ignored. Pet.App.16a-17a. Whatever its merits in the context of an employment relationship, no compelling state interest justifies forcing individuals who are not state employees to accept an exclusive representative for speaking with a state.

A. The Ninth Circuit's Opinion Conflicts with *Janus* and Other Court Precedents That Concern Mandatory Expressive Associations and Exclusive Representation.

1. *Janus* not only made clear that regimes of exclusive representation inflict a "significant impingement on associational freedoms," 138 S. Ct. at 2478, but also that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." *Id*. at 2469.

The Court often refers to an exclusive representative as an "exclusive bargaining *agent*." *Janus,* 138 S. Ct. at 2478 (emphasis added); *see*, *e.g., ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991) (analogizing the

agency relationship exclusive representation creates to that between trustees and beneficiaries and attorneys and clients). For good reason: this status vests a union with the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 138 S. Ct. at 2467, and the exclusive right to contract for them, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This includes individuals who oppose the union's advocacy and agreements. *Id.*

An exclusive representative's authority is "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Allis-Chalmers*, 388 U.S. at 180. Those "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can engage in advocacy that represented individuals oppose. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012). They also can, as individuals' proxies, enter into binding contracts that harm their interests, *see Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 349-40 (1953), like waiving unconsenting individuals' rights to bring discrimination claims in court, *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009). A repre-

sented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Given an exclusive representative's authority to speak and contract for unconsenting individuals, the Court has long recognized that this mandatory association restricts individual liberties. In *American Communications Ass'n v. Douds*, the Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"; "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." 339 U.S. 382, 401 (1950). More recently, in *14 Penn Plaza,* the Court held that exclusive representatives can waive individuals' legal rights because, among other reasons, "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands." 556 U.S. at 271.

2. Significant impingements on the "right to associate for expressive purposes" are subject to exacting scrutiny, under which a state must prove its conduct is justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984). The Court has required, in a variety of contexts, that mandatory associations must satisfy this scrutiny. *See Knox*, 567 U.S. at 310-11; *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658-59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577-78 (1995); *Rutan v. Republican Party,* 497 U.S. 62, 74 (1990); *Roberts*, 468 U.S. at 623 (citing seven earlier cases); *Elrod v. Burns,* 427 U.S. 347, 362-63 (1976)

(plurality opinion). This includes where the government coerces non-employee contractors to affiliate with a political organization. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

Taken together, *Janus* and these precedents compel the conclusion that exacting scrutiny applies when a state thrusts unwilling individuals into an exclusive representative relationship. In fact, if any mandatory association should have to pass constitutional muster, it is this one. Exclusive representative status literally gives unions legal authority to speak and contract for "all the public employees within the unit without regard to [union] membership," Wash. Rev. Code § 41.56.080 (Pet.App.45a) and thus of unconsenting individuals.

Indeed, as the Court recognized, that is the point of the exclusive-representative designation: to establish that the union speaks not just for its members, but has the "exclusive right to speak for all the employees in collective bargaining." *Janus*, 138 S. Ct. at 2467; *see Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). For those who do not want that union speaking on their behalf, like Miller, exclusive representation results in a "significant impingement on [their] associational freedoms," *Janus*, 138 S. Ct. at 2478.

Notwithstanding the Court's latest pronouncement on the "significant impingement" caused by exclusive representation "that would not be tolerated in other contexts," *id.*, the lower court held "exclusive bargaining representati[on] does not infringe Miller's First Amendment rights." Pet.App.14a. It did so believing "*Knight* is a closer fit than *Janus*." *Id.* at 12a. Most

compelling to the Ninth Circuit's belief was the Court's directive to lower courts that they "should 'leav[e] to [the Supreme] Court the prerogative of overruling its own decisions,' and follow 'direct[ly] applica[ble]' precedent, even if *subsequent decisions call into question* some of that precedent's rationale. *Agostini* [*v. Felton*], 521 U.S. [203,] 237 [(1997)]." Pet.App.13a (emphasis added).

B. The Circuit Courts Disagree Over Whether Exclusive Representation Impinges on Associational Rights.

In *Mulhall v. Unite Here Local 355*, the Eleventh Circuit held an employee had "a cognizable associational interest under the First Amendment" in whether he is subjected to a union's exclusive representation. 618 F.3d 1279, 1286-87 (11th Cir. 2010). That court found the union's "status as his exclusive representative plainly affects his associational rights" because the employee would be "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. *Id.* at 1287. Exclusive representation thus "amounts to 'compulsory association,'" though "that compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' . . . based on a legislative judgment that collective bargaining is crucial to labor peace." *Id.* (quoting *Acevedo-Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002)).

Washington's imposition of an exclusive representative on childcare providers amounts to compulsory association for the same reasons. However, unlike with government employees, "labor peace" does not justify this infringement on providers' First Amendment rights. *See Harris*, 573 U.S. at 649-50; *infra* pp. 17-19.

The Eleventh Circuit's recognition in *Mulhall* that exclusive representation impinges on First Amendment associational rights and must be justified by compelling state interests is consistent with *Janus*, 138 S. Ct. at 2478, but conflicts with the opposite conclusions reached by the lower court and the First, Seventh, and Eighth Circuits. Pet.App.8a-9a; *see* p. 6, *supra*. The Court should grant the petition to resolve this conflict.

C. The Court Should Clarify That *Knight* Does Not Exempt Exclusive Representation from First Amendment Scrutiny.

1. The lower court joined the First, Seventh, and Eighth Circuits in believing *Knight* was binding on them and required them to find exclusive representation is not subject to First Amendment scrutiny, notwithstanding, for the Eighth and Ninth Circuits, *Janus*' determination that exclusive representation is a "significant impingement on associational freedoms," 138 S. Ct. at 2478. Pet.App.7a-14a, 18a; *Bierman*, 900 F.3d at 574; *Hill*, 850 F.3d at 864; *D'Agostino*, 812 F.3d at 242-43. This interpretation of *Knight* is difficult to reconcile with *Janus* and other Supreme Court precedents that concern exclusive representation. Indeed, if that interpretation of *Knight* were correct, *Knight* would be an outlier in this Court's jurisprudence.

The lower courts' interpretation is not correct. *Knight* held only that *excluding* employees from nonpublic meetings with union officials did not infringe on employees' right to participate in those meetings. 465 U.S. at 273. The sole "question presented" in *Knight* was whether a "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees."

Id. The "appellees' principal claim [was] that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id*. at 282.

The Court disagreed, reasoning that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id*. at 283. Consequently, the Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy." *Id*. at 292.

Knight stands only for the proposition that government officials are constitutionally free to choose to whom they listen in nonpublic forums. That holding has no bearing here. Petitioner does not allege that Washington wrongfully excludes her from its meetings with SEIU. Nor does she assert a "constitutional right to force the government to listen to [her] views," *id*. at 283; *see* Pet.App.11a-12a.

Rather, Petitioner asserts her constitutional right not to be compelled to associate with SEIU and its speech and not have it speak for her. Pet.App.5a-6a, 11a-12a, 17a, 59a-60a. *Knight*'s holding that the government can choose to whom it *listens* says little about the government's ability to dictate who *speaks* to the government for individuals. The lower court agreed "that *Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct from Miller's contention that employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree." Pet.App.11a. But "[d]espite these differences," the lower court followed *Knight*. *Id*. at 12a.

2. The Ninth Circuit's reasons for a more expansive reading of *Knight,* which exempts exclusive representation from First Amendment scrutiny, are unfounded. The court points to an associational argument *Knight* addressed. Pet.App.7a, 10a-11a. But that argument was that "Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative" indirectly pressured employees to join the union. 465 U.S. at 288 (emphasis added). That is not the argument here.

The Ninth Circuit also points to the summary affirmance of other parts of the district court's opinion in *Knight*. Pet.App.7a. But, the Court summarily affirmed only the district court's rejection of contentions that the "PELRA unconstitutionally delegated legislative authority to private parties" and "restrict[ed] to the exclusive representative . . . participation in the 'meet and negotiate' process.'" *Id.* at 279. No such claims are made here.

The district court's opinion in *Knight* makes clear that the case involved no compelled speech and expressive-association claim. *Knight v. Minn. Cmty. Coll. Faculty Ass'n,* 571 F. Supp. 1, (D. Minn. 1982). There were three claims before that court: (1) exclusive representation violates the non-delegation doctrine, *id.* at 3-5; (2) agency fees compel employees to subsidize political activities, *id.* at 5-7; and (3) it is unconstitutional to bar employees from participating in union meet-and-negotiate and meet-and-confer sessions, *id.* at 7-12. Absent is any claim that exclusive representation associates unconsenting employees with a union and its speech on their behalf.

3. *Knight*'s rationales do not even make sense if applied to the compelled expressive-association claim raised in this case. The Ninth Circuit held that under

Knight Washington's Access and Bargaining Acts do not compel association because "[c]hildcare providers are not required to join SEIU" and "the non-union members were free to form advocacy groups." Pet.App.5a, 7a, 11a. Neither proposition is apposite, much less exculpatory.

The government is not free to force individuals to associate with an advocacy organization so long as that compelled association falls short of full-fledged membership. Further, the government is not free to compel individuals to associate with a particular organization or message so long as the individual is free to associate with other organizations.

As the Eleventh Circuit reasoned in *Mulhall*, "regardless of whether [an individual] can avoid contributing financial support to or becoming a member of the union, its status as his exclusive representative plainly affects his associational rights," because [h]is views . . . may be at variance with 'a wide variety of activities undertaken by the union in its role as exclusive representative.'" 618 F.3d at 1287 (citation omitted) (quoting *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 222 (1977), *overruled on other grounds by Janus*, 138 S. Ct. at 2486).

4. Finally, in a broader sense, it is simply inconceivable that this Court, when deciding in 1984 whether a college can exclude faculty members from union bargaining or "meet and confer" sessions, intended to rule that the First Amendment is no barrier whatsoever to states imposing an exclusive representative on individuals who are not government employees. State schemes to collectivize independent childcare providers did not even exist at that time. Yet, that is how broadly several lower courts, including the Ninth Circuit, now interpret *Knight*.

Knight cannot bear the incredible weight placed upon it. "Surely a First Amendment issue of this importance deserved better treatment." *Harris*, 573 U.S. at 636. The Court should grant certiorari to eliminate the lower courts' misapprehension of *Knight*, and establish that *Knight* does not exempt exclusive representation from First Amendment scrutiny in the "other context" of childcare providers.

D. No Compelling State Interest Justifies Extending Exclusive Representation Beyond the Context of an Employment Relationship.

1. The lower court alternatively held that even if it assumed that *Knight* did not govern, it would reach the same result: the State's designation of an exclusive representative for providers is constitutionally permissible because exclusivity serves the "compelling—and enduring—state interest of labor peace." Pet.App.16a. The Court should grant the petition to resolve whether Washington's extension of exclusive representation to individual providers who are not government employees survives exacting scrutiny. The Court should find that it does not because, under *Harris*, a state's "labor peace" interest does not extend that far to providers. 573 U.S. at 649-50. The court below ignored this part of *Harris* and the context of providers. Pet.App.14a-18a.

In *Abood*, the Court found that a public employer's interest in workplace labor peace justified exclusive representation of employees. 431 U.S. at 220-21, 224. According to *Abood*, that is an interest in avoiding workplace disruptions that could be caused by conflicting and competing demands from multiple unions. *Id*. *Abood* borrowed the interest from cases construing private-sector labor laws, *id*. at 220-21, and applied it

to the public sector without constitutional analysis, *id.* at 224. That lack of analysis was criticized at the time. *Id.* at 259-61 (Powell, J., concurring in judgment). The Court overruled *Abood* in *Janus*, but "assume[d]," without deciding, "that 'labor peace,' in this sense of the term, is a compelling state interest." 138 S. Ct. at 2465.

2. This case does not concern whether a compelling state interest justifies exclusive representation of public employees. Rather, it concerns whether any compelling interest justifies extending exclusive representation to individuals who receive state subsidizes for their childcare services to others. Whatever its merits in the context of an employment relationship, the labor peace interest, as the Court has recognized, has no application outside of that context.

Harris "confine[d] *Abood*'s reach to full-fledged state employees." 573 U.S. at 647. *Harris* similarly confined the reach of labor peace on the basis that: (1) "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes"; (2) "[f]ederal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace"; (3) "the specter of conflicting demands by personal assistants is lessened" given SEIU's limited authorities; and (4) "[s]tate officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Id.* at 649-50.

The last point especially is salient. Neither Washington nor any other state has a legitimate interest in lessening or preventing conflicting demands from diverse groups of citizens. Such demands are the essence of democratic pluralism. "'[C]onflict' in ideas

about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Abood*, 431 U.S. at 261 (Powell, J., concurring in judgment).

Under *Harris*, no constitutionally sufficient state interest justifies forcing individuals who are not government employees to accept an exclusive representative for dealing with the government. 573 U.S. 649-50. That is why the "significant impingement on associational freedoms" employees suffer as a result of exclusive representation "would not be tolerated in other contexts." *Janus,* 138 S. Ct. at 2478.

It is important that the Court grant the petition to establish this limiting principle for exclusive representation in the provider context and halt the lower court's holding that labor peace is a "compelling—and enduring—state interest" in this limiting context. Pet.App.16a. Otherwise, with the continued blessing of the lower courts, states and local governments can and will designate mandatory representatives to speak for an ever growing number of professions. *See infra* pp. 19-26. The Court should draw a line past which regimes of mandatory representation vis-à-vis government may not be extended.

E. If The Lower Courts Are Allowed to Misapply Exacting Scrutiny or Apply No Scrutiny at All, the Government Will Have Free Rein to Appoint Mandatory Advocates to Speak for Citizens.

1. The constitutional significance of this case is made evident simply by emphasizing what Washington has done. The State has granted an advocacy group (SEIU) statutory authority to speak and contract for everyone in a profession (childcare providers)

regarding certain state policies that affect them (aspects of the State's subsidy program). Bluntly stated, Washington is forcing certain citizens to accept a government-appointed lobbyist.

SEIU's function as an exclusive representative is quintessential "lobbying": meeting and speaking with public officials, as an agent of regulated parties, to influence government policies that affect those parties.[3] For example, if a professional association representing Medicaid providers, such as doctors, met and spoke with state officials to advocate for higher Medicaid rates, those actions certainly would constitute "lobbying." SEIU's function as an exclusive representative of childcare providers is indistinguishable, except SEIU is not a voluntary advocacy group, but a compulsory one Washington appointed on unwilling providers.

The public policies over which SEIU petitions the State, such as the childcare subsidy payment rates and other economic matters, Wash. Rev. Code § 41.56.028(2)(c) (Pet.App.43a-44a), are matters of political concern. *See Harris*, 573 U.S. at 653-54. This is constitutionally significant. "'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values,'" for it constitutes "'more than self-expression; it is the essence of self-government.'"

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[3] *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) ("lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); *cf.* 2 U.S.C. § 1602(8)(A) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citations omitted).

Washington turns our system of government on its head. Instead of citizens choosing their representatives in government, here the government is choosing representatives for its citizens. This violates basic constitutional guarantees. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Consequently, a citizen's right to choose which organization, if any, lobbies the government for him or her is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981).

2. In addition to the lower court, the First, Seventh, and Eighth Circuits have given government free rein to violate this fundamental liberty by holding that the government can, on any rational basis, appoint exclusive representatives to speak and contract for individuals in their relations with the government. Pet.App.8a-9a; *Bierman*, 900 F.3d at 574; *Hill*, 850 F.3d at 864; *D'Agostino*, 812 F.3d at 243-44. The implications of these decisions are staggering.

Washington's conduct represents not the top of a slippery slope, but the bottom. The State has imposed an exclusive representative on individuals who operate home-based daycare businesses that provide services to public-aid recipients. Pet.App.4a. *See also Parrish v. Dayton*, 761 F.3d 873, 874-75 (8th Cir. 2014) (Minnesota's attempt at imposing exclusivity over childcare providers); *infra* note 5.

This development is not anomalous, but part of a troubling trend that began in the early 2000s in which

states began extending exclusive representation beyond employment relationships to individuals who merely receive government monies for their services.[4] Since then, eighteen states have authorized mandatory representation for home-based daycare businesses and childcare providers,[5] fifteen states for Medicaid providers,[6] three states for individuals who

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[4] *See* Maxford Nelsen, *Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity* (Freedom Found. 2018) (https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf) (last visited May 25, 2019).

[5] Conn. Gen. Stat. § 17b-705 (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp. Stat. 315/3(n); Mass. Gen. Laws ch. 15D, § 17 (West, Westlaw through Ch. 9 of 2017 1st Annual Sess.); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed 2011); Md. Code Ann., Educ. § 9.5-705 (West, Westlaw through 2018 Reg. Sess.); Minn. Stat. § 179A.52 (expired); N.M. Stat. Ann. § 50-4-33 (West, Westlaw through 2d Reg. Sess. 53rd Legislature); N.Y. Lab. Law § 695-a et seq. (West, Westlaw through L.2018, ch. 356); Or. Rev. Stat. § 329A.430 (West, Westlaw through 2018 Reg. Sess.); R.I. Gen. Laws § 40-6.6-1 et seq. (West, Westlaw through Ch. 353 of Jan. 2018 Sess.); Wash. Rev. Code § 41.56.028 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, §§ 741.01-.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed); Iowa Exec. Order No. 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order No. 07-21 (July 18, 2007) (rescinded); N.J. Exec. Order No. 23 (Aug. 2, 2006); Pa. Exec. Order No. 2007-06 (June 14, 2007) (rescinded); Interlocal Agreement Between Mich. Dep't of Human Servs. & Mott Cmty. Coll. (July 27, 2006) (rescinded).

[6] *See* Nelsen, note 4, *supra* (describing each state scheme in depth); Cal. Welf. & Inst. Code § 12301.6(c)(1) (West, Westlaw through Ch. 106 of 2018 Reg. Sess.); Conn. Gen. Stat. § 17b-706b (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp. Stat. 315/3(n) (2016) (West, Westlaw through 2018 Reg. Sess.); Md. Code Ann., Health-Gen. § 15-901 (West, Westlaw through May 13, 2019 of 2019 Reg. Sess.); Mass. Gen. Laws ch. 118E, § 73

operate foster homes for persons with disabilities,[7] and Washington for language access providers.[8]

Local governments are also getting in on the act. In January 2016, the City of Seattle enacted an ordinance calling for the certification of an exclusive representative to represent independent-contractor drivers in their relations with both the city and ride-sharing technology companies (such as Uber and Lyft). Seattle, Wash., Code § 6.310.735 (2016); *see Clark v. City of Seattle*, 899 F.3d 802 (9th Cir. 2018).

These schemes affect or have affected hundreds of thousands of individuals. But they will be the narrow end of the wedge if government officials are allowed to

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(West, Westlaw through Ch. 315 of 2018 2d); Minn. Stat. § 179A.54 (West, Westlaw through May 4, 2019 of 2019 Reg. Sess.); Mo. Rev. Stat. § 208.862(3) (West, Westlaw through 2018 2d Reg. Sess.); Or. Rev. Stat. § 410.612 (West, Westlaw through 2018 Reg. Sess.); Vt. Stat. Ann. tit. 21, § 1640(c) (West, Westlaw through Law 2017-18 Sess.); Wash. Rev. Code § 74.39A.270 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, §§ 741.01-06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2241 (repealed 2011); Iowa Exec. Order No. 43 (Jul. 4, 2005) (rescinded); Pa. Exec. Order No. 2015-05 (Feb. 27, 2015); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

[7] Or. Rev. Stat. § 443.733 (West, Westlaw through 2018 Reg. Sess.); Wash. Rev. Code § 41.56.029 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); N.J. Exec. Order No. 97 (Mar 5, 2008).

[8] Wash. Rev. Code § 41.56.510 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.) (language access providers who provide spoken language interpreter services for department of social and health services appointments, department of children, youth, and families appointments, or Medicaid enrollee appointments; for injured workers or crime victims receiving benefits from the department of labor and industries; and for any state agency through the department of enterprise services);

appoint exclusive representatives to speak for individuals for any rational basis. Under that low level of scrutiny, government officials could politically collectivize any profession or industry under the aegis of a state-favored interest group. For example, Washington or any other state could mandate that other healthcare professionals (such as doctors or dentists) or businesses (such as hospitals or insurers) accept state-designated organizations as their mandatory representatives for petitioning the State over its regulation of their profession or industry.

The Court recognized this slippery slope when it discussed the need to establish "clear boundaries" that prevented the extension of *Abood* to "partial-public employees, quasi-public employees, or simply private employees." *Harris*, 573 U.S. at 646. Otherwise, "individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group to which they do not belong" would be subjected to government compulsion. *Id*. The Court listed childcare providers as an example of the "host of workers who receive payments from a governmental entity for some sort of service," for which the line must be drawn. *Id.*

3. These ramifications are intolerable. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976). "The First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). Consequently, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for

that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Id*. at 791.

An unbounded government authority to appoint exclusive representatives to speak for citizens threatens not only individual liberties, but also the political process the First Amendment protects. These mandatory organizations are government imposed "factions": similarly-situated individuals forced together into an association to pursue self-interested policy objectives (here, seeking higher subsidizes). The problems caused by *voluntary* factions have been recognized since the nation's founding. *See The Federalist No. 10* (J. Madison). Far worse will be the problems caused by *mandatory* factions.

An advocacy group into which citizens are conscripted, and that has special privileges in dealing with the government that no others enjoy, will have political influence far exceeding citizens' actual support for that group's agenda. Allowing the government to create such artificially powerful factions will skew the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

It is for good reason that the Court has refused to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or to "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" *Harris*, 573 U.S. at 630 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id*. at 884.

The Ninth Circuit's decision gives government *carte blanche* to regiment citizens into mandatory advocacy groups. The opinion below cannot be allowed to stand. The Court should grant the writ and hold that exclusive representation only is constitutional when it satisfies First Amendment scrutiny.

CONCLUSION

The First Amendment reserves the choice of who should speak to the government to each individual. The Court should take this case to clarify its opinion in *Knight*, and hold that no compelling interest justifies extending exclusive representation to individuals who are not government employees because as the Court found in *Harris* labor peace is not a compelling interest in this context.

The writ of certiorari should be granted on the question presented.

Respectfully submitted,

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May 24, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35939
D.C. No. 3:15-cv-05134-RBL

CYNTHIA MENTELE,

Plaintiff,

and

KATHERINE MILLER,

Plaintiff-Appellant,

v.

JAY INSLEE, in His Official Capacity as Governor of the State of Washington; KEVIN W. QUIGLEY, in His Official Capacity as Director of the Washington State Office of Financial Management; DAVID SCHUMACHER, in His Official Capacity as Director of the Washington State Office of Financial Management; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925, a labor organization,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington Ronald B. Leighton, District Judge, Presiding

Argued and Submitted December 3, 2018
Seattle, Washington

Filed February 26, 2019

Before: Susan P. Graber, M. Margaret McKeown, and Morgan Christen, Circuit Judges.

Opinion by Judge Christen;
Concurrence by Judge Graber

SUMMARY*

Civil Rights

The panel affirmed the district court's summary judgment for the State of Washington in an action brought pursuant to 42 U.S.C. § 1983 alleging that Washington's authorization for the Service Employees International Union Local 925 (SEIU) to act as the exclusive collective bargaining representative for Washington's publicly subsidized childcare providers violated plaintiff's First Amendment rights.

Plaintiff, a Washington State childcare provider, alleged that Washington's arrangement with SEIU violated her rights of free speech and association. Applying *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the panel held that Washington's authorization of an exclusive bargaining representative did not infringe plaintiff's First Amendment rights. The panel further held that even assuming that *Knight* no longer governed the question presented in light of the Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the panel would still conclude that Washington's exclusive bargaining arrangement with SEIU was constitutionally permissible. The panel noted that the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

childcare providers were partial state employees for whom SEIU's scope of representation was relatively circumscribed and that the State's exclusive bargaining arrangement with SEIU served the compelling—and enduring—state interest of labor peace.

Concurring, Judge Graber wrote separately to state her view that, with respect to plaintiff's associational rights, she would follow the Eighth Circuit's analysis in *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), and hold that there was no "meaningful distinction" between this case and the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984).

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OPINION

CHRISTEN, Circuit Judge:

The State of Washington authorized the Service Employees International Union Local 925 (SEIU) to act as the exclusive collective bargaining representative for Washington's publicly subsidized childcare providers. Katherine Miller, a Washington childcare provider, challenges that arrangement as an infringement of her First Amendment rights of free speech and association. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's order granting summary judgment to SEIU and Washington State.

I.

Washington provides financial assistance to qualifying families for childcare costs. Under the terms of this program, families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State covers the remaining cost.

Before 2006, Washington unilaterally determined subsidy levels and other policies governing its childcare assistance programs, through legislation and regulations. But in 2006, Washington re-categorized the providers as "public employees" for purposes of the State's collective bargaining legislation and authorized the providers to elect an exclusive collective bargaining representative to negotiate with the State on their behalf. Wash. Rev. Code § 41.56.028. Because the childcare providers are state employees only for purposes of collective bargaining, they are considered "partial" state employees, rather than full-fledged state employees, and Washington law limits the scope of their collective bargaining agent's representation. For example, families continue to be the providers'

primary employers, *id*. § 41.56.028(4)(a); the providers are not allowed to strike, *id*. § 41.56.028(2)(e); and the bargaining agent cannot negotiate about certain issues, *id*. § 41.56.028(2)(c) ("[r]etirement benefits shall not be subject to collective bargaining").

The childcare providers elected SEIU as their exclusive bargaining representative, and SEIU negotiated a number of terms and conditions for them as part of a state-wide collective bargaining agreement. Childcare providers are not required to join SEIU, but SEIU is nonetheless "required to represent[] all the public employees within the unit without regard to membership." *Id*. § 41.56.080. SEIU members pay union dues to support SEIU. Non-union members previously paid "agency fees" to support SEIU's collective bargaining efforts, but SEIU and the State eliminated the agency fees provision from their collective bargaining agreement after the Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (holding that states may not compel partial state employees to pay agency fees for union representation).[1]

Katherine Miller and Cynthia Mentele, two Washington state childcare providers, filed suit in March of 2015 against State officials and SEIU. Miller is a former SEIU member; the record is unclear about whether Mentele was a member. Both plaintiffs alleged that their First Amendment right to expressive association was violated when Washington recognized SEIU as the exclusive bargaining representative for all childcare providers because SEIU necessarily spoke

[1] Agency fees are reduced union dues paid by non-union member employees to support the union's collective bargaining efforts. *See*, *e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460–61 (2018).

and negotiated on their behalf. Miller and Mentele sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The complaint did not clearly define the nature of the relief Miller and Mentele sought, but the briefing filed with our court clarified that they sought neither the opportunity to negotiate with the union themselves nor the complete elimination of a collective bargaining representative.

The parties filed cross-motions for summary judgment. The district court granted the motion filed by the State and SEIU, while denying the motion filed by Miller and Mentele. The parties stipulated to the dismissal of Mentele's additional claim that sought reimbursement of past union dues.

Miller alone appeals the district court's judgment. We review de novo the district court's order granting summary judgment. *Stanford Univ. Hosp. v. Fed. Ins. Co.*, 174 F.3d 1077, 1082 (9th Cir. 1999).

II.

A.

Our analysis relies largely on two Supreme Court cases that discuss the propriety of exclusive bargaining representation for public employees: the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); and its recent decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Two other cases provide important context for our decision: *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Harris*, 134 S. Ct. 2618. SEIU and the State argue that *Knight* controls the outcome of this appeal; Miller argues that we are bound by *Janus*.

Knight involved a challenge by community college professors to two statutory provisions under Minnesota law: (1) a "meet and negotiate" provision, which required the State to meet and negotiate with the faculty's exclusive bargaining representative (e.g., the faculty's union) concerning the terms and conditions of employment; and (2) a "meet and confer" provision, which required the State to meet and confer with the exclusive representative regarding "policy questions relating to employment but outside the scope of mandatory bargaining." *Knight*, 465 U.S. at 273–75, 279. The Court summarily affirmed the "meet and negotiate" requirement, *id*. at 279, and separately concluded that the exclusion of non-union members from the State's "meet and confer" provision did not infringe the non-union members' First Amendment rights:

> Appellees' speech and associational rights, however, have not been infringed by Minnesota's restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The state has in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative.

Id. at 288. The Court explained that the non-union members had not been denied access to a public forum, *id.* at 280–83, that state employees had no right to be heard by, or negotiate individually with, a public body, *id*. at 283–85, and that the non-union members were free to form advocacy groups or otherwise make their views known to the State and associate with whomever they wished to associate, *id.* at 288–90. The Court concluded that the non-union members' rights to free

speech and association were not abridged by the meet and confer provision.

Significant for the present appeal, *Knight* was decided a few years after the Court's decision in *Abood v. Detroit Board of Education*. In *Abood*, the Court concluded that, although compulsory agency fees impinge employees' First Amendment rights to some extent, the mandatory fees were nevertheless justified by the State's compelling interest in "labor peace"; i.e., the logistical and managerial benefits that accrue when an employer negotiates only with one exclusive representative. 431 U.S. at 232–37. Though it followed *Abood* by a few years, *Knight* never mentioned labor peace and instead upheld Minnesota's meet and confer provision by concluding that it did not infringe the non-union members' First Amendment associational rights at all. In this way, *Knight* expressly cabined *Abood*, explaining that the First Amendment infringement in *Abood* was the result of the "compulsory *collection of dues*" from non-union members, and observing that *Abood* did not address whether exclusive representation infringed the non-union members' associational rights. *See Knight*, 465 U.S. at 291 n.13 (emphasis added).

Following *Knight*, every circuit court to address the constitutionality of exclusive bargaining arrangements (as distinct from the constitutionality of compelling financial support for such bargaining arrangements) has concluded that these provisions do not violate the First Amendment. *D'Agostino v. Baker*, 812 F.3d 240, 242–44 (1st Cir. 2016) (Souter, J., by designation); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864–65 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *petition for cert. filed*, ___U.S.L.W. ___ (U.S.

Dec. 13, 2018) (No. 18-766); *Jarvis v. Cuomo*, 660 F. App'x 72, 74–75 (2d Cir. 2016) (order) (unpublished).

In 2014, thirty years after it decided *Knight*, the Court addressed the constitutionality of compelling agency fees from non-union members who are partial state employees like the childcare providers here. *Harris*, 134 S. Ct. 2618. *Harris* acknowledged *Abood*'s "labor peace" justification for compelling agency fees to support exclusive bargaining representation, but it did not extend *Abood*'s rationale to union representation of partial state employees. *Id*. at 2640. In fact, contrary to *Abood*'s rationale, in *Harris* the Court decided that compelled fees are not necessary to ensure labor peace because public sector unions can effectively operate with the support of the dues paid by union members alone. *Id*. at 2640–41. In any event, *Harris* reasoned, there are minimal labor peace benefits to be gained when partial employees are represented because the scope of their unions' representation is limited. *Id*. at 2640.

The Court decided *Janus* in 2018. *Janus* alluded to the propriety of exclusive representation arrangements, but it primarily considered the constitutionality of compelling full-fledged, non-union member state employees to pay agency fees. 138 S. Ct. at 2459–60. *Janus* reaffirmed that labor peace is a compelling state interest, but it overruled *Abood*'s holding that labor peace justifies requiring non-union members to pay agency fees. *Id*. at 2465–66. *Janus* then went on to observe:

> It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other

> contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.

Id. at 2478. In this passage, *Janus* suggested that exclusive bargaining representation does significantly impinge on associational freedoms, but in the same breath the Court stated that this degree of impingement is justified or "tolerated" in the context of collective bargaining agents. *Id*. *Janus* explained that "States can keep their labor-relation *systems* exactly as they are"; they just "cannot force nonmembers to subsidize public-sector unions," *id*. at 2485 n.27 (emphasis added). Also in *Janus*, the Supreme Court expressly distinguished between compelling nonunion members to pay agency fees (constitutionally impermissible) and mandating that any union representation be exclusive, which the Court suggested is a tolerated impingement of nonunion members' First Amendment rights.

Miller contends that we are bound by *Janus*'s observation that exclusive union representation of nonunion members impinges First Amendment rights. Appellees contend that *Knight* controls because *Janus*'s reference to exclusive representation is dictum unnecessary to *Janus*'s primary holding.

B.

We conclude that the Supreme Court's holding in *Knight* is the most appropriate guide. The salient rationale from *Knight* merits repeating:

> [T]he First Amendment guarantees the right both to speak and to associate. Appellees' speech and associational rights, however, have not been infringed by Minnesota's restriction

> of participation in "meet and confer" sessions to the faculty's exclusive representative. The state has in no way restrained appellees' 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.
>
> . . . .
>
> [A]ppellees' associational freedom has not been impaired. Appellees are free to form whatever advocacy groups they like. They are not required to become members of [the union], and they do not challenge the monetary contribution they are required to make to support [the union's] representation activities.

Knight, 465 U.S. at 288–89. The Court further summarized in a footnote that the appellees' "speech and associational freedom have been *wholly unimpaired*" by the meet and confer provision. *Id.* at 290 n.12 (emphasis added). Given the importance of that analysis to the Court's opinion, we do not view those statements as dictum.

Miller insists that *Knight* is not precisely on point. We acknowledge that *Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees[2] is arguably distinct from Miller's contention that employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree. For Miller, the fact that she is free to communicate her opinions or associate with whomever she chooses does

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[2] *See* 465 U.S. at 283–84 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)).

not alleviate her concern that a union she dislikes is speaking for her. Miller is not complaining about an inability to speak herself; she just wants to be "left alone to make her own decisions regarding associations and her speech."

Despite these differences, *Knight* is a closer fit than *Janus*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining "the Court of Appeals should follow" the precedent that has "direct application"). *Knight* addressed the First Amendment rights of non-union members who were excluded from union meetings with the State, and Miller claims that her First Amendment rights are infringed when SEIU purports to speak on her behalf even though she abhors the union. *Knight* acknowledged that exclusive bargaining required the State to treat the union representatives as expressing "the faculty's official collective position" *even though* "not every instructor agrees with the official faculty view on every policy question." 465 U.S. at 276. In this way, *Knight* addresses Miller's objection because Minnesota's exclusion of non-union faculty members from meet and confer sessions necessarily meant that union representatives expressed the faculty's "official collective position" on behalf of even dissenting non-union members. *Knight* expressly concluded that such a system "in no way restrained appellees' . . . freedom to associate *or not to associate with whom they please, including the exclusive representative*," *id*. at 288 (emphasis added), and it approved the requirement that bound non-union dissenters to exclusive union representation.

Miller argues that *Janus* overruled *Knight* and that *Janus* controls the outcome of this case, but we are not persuaded. The cases presented different questions, as we have explained, and *Janus* never mentions *Knight*.

To accept Miller's argument, we would have to conclude that the brief passage Miller relies upon (two sentences at most), which addresses a question that was not presented or argued and which was unnecessary to the Court's holding, was nevertheless intended to overrule the Court's earlier decision in *Knight sub-silentio*. *See Bierman*, 900 F.3d at 574 (concluding that *Janus* did not overrule *Knight*). We are unwilling to make that leap. The same passage Miller identifies as evidence that *Knight* did not survive *Janus* goes on to expressly affirm the propriety of mandatory union representation, which is consistent with *Knight*. *Janus* is also clear that the degree of First Amendment infringement inherent in mandatory union representation is tolerated in the context of public sector labor schemes. 138 S. Ct. at 2478 ("We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views."). *Janus*'s reference to infringement caused by exclusive union representation, even in the context of its broader discussion of *Abood* and the Court's long history of relying on labor peace to justify certain provisions in collective bargaining agreements, is not an indication that the Court intended to revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation. The Supreme Court has directed that we should "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions," and follow "direct[ly] applica[ble]" precedent, even if subsequent decisions call into question some of that precedent's rationale. *Agostini*, 521 U.S. at 237; *see Bierman*, 900 F.3d at 574. Consistent with that directive, we apply *Knight*'s more directly applicable precedent, rather than relying on the passage Miller cites from *Janus*,

and hold that Washington's authorization of an exclusive bargaining representative does not infringe Miller's First Amendment rights.

The Eighth Circuit reached the same conclusion, for essentially the same reasons, in *Bierman*, the only circuit-court decision to have addressed this issue after the Supreme Court decided *Janus*. *Bierman* concerned Minnesota's law authorizing in-home care providers to elect an exclusive representative to negotiate employment terms with the State. 900 F.3d at 572. A group of providers challenged the law, arguing that it "unconstitutionally compels them to associate with the exclusive negotiating representative." *Id.* The Eighth Circuit concluded that *Janus* did not affect this analysis, followed the reasoning in *Knight*, and rejected the providers' argument. *Id.* at 574; *accord Reisman v. Associated Faculties of Univ. of Me.*, No. 1:18-cv-00307-JDL, 2018 WL 6312996, at *2–5 (D. Me. Dec. 3, 2018) (order); *Uradnik v. Inter Faculty Org.*, Civ. No. 18-1895 (PAM/LIB), 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018) (unpublished).

C.

Even if we assume that *Knight* no longer governs the question presented by Miller's appeal, we would reach the same result: SEIU's authorized position as the childcare providers' exclusive representative is constitutionally permissible.

At least in the context of organized labor, the impingement of First Amendment rights must, at a minimum, satisfy "exacting scrutiny"; i.e., it must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. (quoting

Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012)).[3] "Exacting scrutiny encompasses a balancing test. In order for a government action to survive exacting scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015) (internal quotation marks omitted). We therefore begin by assessing the seriousness of the burden on Miller's associational rights.

The childcare providers here are partial state employees for whom SEIU's scope of representation is relatively circumscribed. *See* Wash. Rev. Code § 41.56.028 (describing limitations of representative's bargaining power). The providers are not allowed to strike, SEIU cannot negotiate their retirement benefits, families retain the right to choose and terminate any provider, and the legislature retains the unilateral right to adopt personnel requirements and to make programmatic modifications. *See id*. § 41.56.028(2)(c), (2)(e) & (4)(a); *see also Harris*, 134 S. Ct. at 2634–37

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[3] The Court in *Janus* applied "exacting scrutiny" to the question whether compelling agency fees from non-union members is permissible, as it had done in *Harris* and in *Knox*. 138 S. Ct. at 2465. But the Court noted that strict scrutiny may be more appropriate due to the First Amendment rights at stake. *Id*. The Court did not need to resolve that question in *Janus* because the statute at issue failed even exacting scrutiny, *id*., but we note that the Court previously applied exacting scrutiny to challenges of free association rights. *See*, *e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). If we concluded that Miller's First Amendment rights were infringed by SEIU's representation, we would be obliged to apply "exacting scrutiny" to decide whether the infringement is constitutionally permissible, because this was the test the Court applied in *Roberts*, *Knox*, *Harris*, and *Janus*. *See Agostini*, 521 U.S. at 237.

(describing similarly limited scope of the union's bargaining authority). Because of SEIU's limited role in representing partial employees, any impingement of the employees' speech and associational freedoms is correspondingly reduced.

Against that backdrop, we conclude that the State's exclusive bargaining arrangement with SEIU serves the compelling—and enduring—state interest of labor peace. *Janus* did not revisit the longstanding conclusion that labor peace is "a compelling state interest," 138 S. Ct. at 2465, and the Court has long recognized that exclusive representation is necessary to facilitate labor peace; without it, employers might face "inter-union rivalries" fostering "dissension within the work force," "conflicting demands from different unions," and confusion from multiple agreements or employment conditions, *id*. (quoting *Abood*, 431 U.S. at 220–21). For the following reasons, Washington's continued compelling interest in labor peace justifies the minimal infringement associated with SEIU's exclusive representation. *Accord Uradnik*, 2018 WL 4654751, at *3.

First, Washington has an interest in negotiating with only one entity, at least for the sake of efficiency and managerial logistics, and that interest persists even if, per *Harris*, Washington's interest in the payment of fees to support the union dwindles with the reduced union representation. Washington's scheme calls for the negotiation of comparatively few conditions, but it does not *eliminate* the State's interest in avoiding the competing demands of rival representatives, the potential confusion that would result from multiple agreements, and possible dissension among the providers. *See Janus*, 138 S. Ct. at 2465–66.

Second, *Janus* specifically acknowledged that exclusive representation is constitutionally permissible. *Id.* at 2478. The Court reaffirmed that "[s]tates can keep their labor-relation systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id*. at 2485 n.27. This statement is consistent with *Harris*, which concluded that compulsory agency fees are not justified for public sector unions representing partial employees, in part because of the union's limited scope of representation, *see* 134 S. Ct. at 2640; and it follows from *Janus*'s own statement that exclusive bargaining systems are acceptable for public employees, even though compulsory agency fees are not, 138 S. Ct. at 2478. These cases establish a bright line distinction between allowing exclusive representation and mandating the payment of agency fees.

Finally, applying an exacting standard, we know of no alternative that is "significantly less restrictive of associational freedoms." *Id*. at 2465. Because SEIU's limited representation already reduces the level of any infringement, it is difficult to imagine an alternative that is "*significantly* less restrictive" than the one Washington employs. *Id*. (emphasis added). Miller has not suggested an alternative way for the State to solicit meaningful input from childcare providers while simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual providers. *See* Wash. Rev. Code § 41.56.010 (declaration of purpose). Miller wants to be left alone, but it is unclear what sort of system Washington would or could implement to satisfy this demand, apart from unilaterally deciding the terms of employment for partial employees.

Even assuming that *Knight* no longer governs the question presented, we would still conclude that Washington's exclusive bargaining arrangement with SEIU is constitutionally permissible.

AFFIRMED.

GRABER, Circuit Judge, concurring:

I concur in full in the opinion. I write separately only to state my view that the conclusion we reach in Part II-B is less tenuous than the opinion makes it sound. I agree entirely with the Eighth Circuit's reasoning in *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), a case similar to ours. I would follow the Eighth Circuit's analysis and hold that, with respect to Plaintiffs' associational rights, there is no "meaningful distinction" between this case and the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *Bierman*, 900 F.3d at 574. Accordingly, we are bound by *Knight*. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed 10/13/16]

Case No. C15-05134-RBL

CYNTHIA MENTELE and KATHERINE MILLER,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, KEVIN W. QUIGLEY, DAVID SCHUMACHER, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,

Defendants.

FINAL JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED THAT FINAL JUDGMENT IS HEREBY ENTERED in accordance with the May 25, 2016, Order Granting Defendants' Summary Judgment Motions and Denying Plaintiffs' Cross Motion, Dkt. #62, and the October 11, 2016, Joint Stipulation of Dismissal of Plaintiff Mentele, Dkt. #80. IT IS FURTHER ORDERED that the Joint Motion for Entry of Final Judgment, Dkt. #81, be, and the same hereby is, GRANTED.

FINAL JUDGMENT is therefore entered in favor of the Washington State Defendants and against Plaintiffs on all Counts of the Amended Complaint; and in favor of Defendant Service Employees International Union Local 925 (SEIU) and against Plaintiff Mentele

on Count I of the Amended Complaint; AND with the voluntary dismissal of Count II against SEIU, the Amended Complaint is DISMISSED IN ITS ENTIRETY.

Dated this 13th day of October, 2016.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed 5/26/16]

Case No. C15-5134-RBL
Dkt. #s 65, 66, 68

CYNTHIA MENTELE and KATHERINE MILLER,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, KEVIN W. QUIGLEY, DAVID SCHUMACHER, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925.

Defendants.

ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTIONS AND DENYING PLAINTIFFS' CROSS MOTION

THIS MATTER is before the Court on the Washington State Defendants' Motion for Summary Judgment and Dismissal [Dkt. #65], the Defendant Service Employees International Union's Partial Motion for Summary Judgment [Dkt. #66], and the Plaintiffs Mentele and Miller's Partial Cross-Motion for Summary Judgment [Dkt. #68]. This case considers the constitutionality of a Washington law authorizing a union (as exclusive representative) to bargai[n] with the state about union and non-union state-subsidized child care providers' terms and conditions of employment. Non-union plaintiffs argue the Access to Quality Family Child Care Act

compels them to associate with SEIU, violating their First Amendment associational and speech rights. Defendants seek summary judgment, arguing the Access Act is constitutional under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058 (1984), because although it amplifies SEIU's voice at the bargaining table, it neither restrains Plaintiffs' right to speak nor requires them to join SEIU.

DISCUSSION

A. Background.

Washington State subsidizes the cost of child care for approximately 7,000 eligible low-wage working families. *See* RCW 43.215.135. It unilaterally determined the subsidy amount, until it passed the Access Act. *See* RCW 74.04.050 (2004); *see also* RCW 41.56.028(1) (2016). The Act deems subsidized child care providers public employees solely for collective bargaining. *See* RCW 41.56.028(1). It authorizes them to elect an exclusive bargaining representative to negotiate with the state about their health and welfare benefits, professional development and training, grievance procedures, and the manner and rate of subsidy and reimbursements. *See* RCCW 41.56.028(2).

A majority elected SEIU, a union, as their exclusive representative. SEIU and the state entered into a collective bargaining agreement that required non-union members to pay a dues-equivalent fee supporting SEIU's administrative costs, such as the costs of bargaining. In 2014, the Supreme Court decided *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618 (2014), which held that unions cannot collect dues-equivalent fees from non-union partial-state employees, and

the State and SEIU immediately rescinded that requirement.

Miller and Mentele are licensed child care providers. Miller alleges she was a union member until November 2014, and SEIU claims it stopped collecting dues from her at that time. Miller continues to care for children and to receive subsidies from the state; she is a "partial"-state employee.

Mentele denies she was ever a union member, although SEIU alleges she was a member until October 2014, and that it stopped collecting dues from her at that time. Mentele is no longer a state-subsidized child care provider.

Miller and Mentele claim the Defendants violated their First Amendment rights by authorizing SEIU to bargain on their behalf, even though they are not SEIU-members. They argue this exclusive authority forces non-union state-subsidized child care providers to unwillingly associate with the union's speech. Miller and Mentele ask the Court to declare the Access Act and SEIU's collective bargaining agreements unconstitutional and to enjoin the State and SEIU from bargaining. Mentele also claims *Harris* requires SEIU to refund any fees she paid from March 2012 to October 2014.

The State Defendants seek summary judgment on both claims. They argue Mentele lacks standing to challenge the constitutionality of the Access Act, because she is no longer a state-subsidized child care provider. They argue the Access Act is constitutional under *Minnesota v. Knight*—which upheld a statute requiring public employers to exchange views with only their employees' exclusive representative—because it neither obligates child care providers to join or

financially support SEIU, nor restricts their speech or ability to join any group. The State Defendants also argue that if Mentele seeks restitution for any fees collected pre-*Harris* from the State, the Eleventh Amendment bars such a claim. SEIU joins the State Defendants' arguments, but only moves for summary judgment on Miller and Mentele's first claim.

Mentele concedes she lacks standing to pursue a constitutional claim against the State Defendants and SEIU. *See Dkt*. #68 at 22. Miller and Mentele both concede their request for injunctive relief should be dismissed. *See id*. Those claims are DISMISSED with prejudice.[1] Miller continues to allege that by authorizing SEIU exclusively to bargain with the state, the Access Act unconstitutionally associates her with SEIU, in which she declined membership.

She argues *Harris v. Quinn*, not *Minnesota v. Knight*, controls and indicates exclusive bargaining is only constitutional if the employees are "full-fledged"-state employees. She argues that because the government's interest in labor peace does not extend to partial-public employees, no compelling interest justifies SEIU's infringement—its authority to speak and contract on her behalf—on her First Amendment associational and speech rights.

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[1] To the extent Mentele argues the State owes her restitution, this claim too is DISMISSED with prejudice because the Eleventh Amendment prohibits actions for damages against the State. *See Romano v. Bible* 69 F.3d 1182, 1185 (9th Cir. 1999) (*citing Stivers v. Pierce*, 71 F.3d 732, 749 (9th Cir. 1995)); *see also Doe v. Lawrence Livermore Nat'l Laboratory*, 131 F.3d 836, 839 (9th Cir. 1977).

B. Standard of Review.

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); *see also Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *See Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251–52. The moving party bears the initial burden of showing no evidence exists that supports an element essential to the nonmovant's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323–24.

C. Constitutionality of Exclusive Representation.

Miller acknowledges exclusive representation is constitutional "in the full employment context," but argues it is unconstitutional for partial-public employees, such as state-subsidized child care providers. Her legal argument depends on three Supreme Court cases

involving the intersection between labor laws and the First Amendment: *Abood*, *Knight*, and *Harris*.

In *Abood v. Detroit Board of Education*, the Supreme Court considered the constitutionality of a Michigan statute authorizing a union and a local government employer to agree to an "agency shop" arrangement requiring every employee, whether a union member or not, to pay the union a service fee. *See* 431 U.S. 209, 97 S. Ct. 1782 (1977). The Supreme Court distinguished between collecting mandatory fees from non-union members for a union's administrative, grievance, and bargaining expenditures and for its political or ideological expenditures, holding the former constitutional and the latter not. *See id*. at 232, 237.

In *Minnesota v. Knight*, the Court considered whether a Minnesota statute requiring public employers to "exchange views" only with their employees' exclusive representative impinged the employees' First Amendment associational rights. *See* 465 U.S. 271. It reasoned that although the restriction amplified the exclusive representative's voice above the employees', amplification is inherent in the government's freedom to choose its advisors and to ignore others. *See* 465 U.S. at 288. The Court also reasoned that the restriction did not infringe employees' associational freedoms because they did not have to join the representative group. *See id*. It therefore concluded Minnesota's restriction "in no way restrained appellees' 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; *see also Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048, 103

S. Ct. 1493 (1983) (summarily upholding a similar provision).

In *Harris v. Quinn*, the Supreme Court refused to extend *Abood's* holding to partial-state employees. *See* 134 S. Ct. 2618. It held that the First Amendment prohibits collecting a union-activities fee from "those deemed public employees solely for the purpose of unionization who do not want to join or to support the union." *See id*. at 2644. It reasoned that *Abood's* justification for an agency fee—the fact that the State compelled the union not to discriminate between its members and non-members in negotiating and administering a collective-bargaining agreement, settling disputes, and processing grievances—did not apply to partial-state employees, whose rates were set by law and whose grievances the union did not represent. *See id*. at 2636–37.

Miller seizes upon *Harris*, asking the Court to conclude "*Harris*, not *Knight*, is dispositive." She argues *Harris's* distinction between "full-fledged-" and "partial-"state employees limits *Knight* as it did *Abood*. Her analogy is misplaced.

Harris addressed only whether a state could compel partial-public employees to contribute to a union. It did not consider an exclusive bargaining agent's effect on employees' First Amendment rights. It explained, "A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee." *See Harris*, 134 S. Ct. at 2640. *Harris*, which is merely tangential to the constitutionality of exclusive representation, does not supplant *Knight*.

Nor does it constrain *Knight's* applicability by creating a constitutional right for partial-state employees to compel an individual government audience. When deciding *Knight*, the Supreme Court mined for such a right. *See* 465 U.S. 271 at 1066. It announced that members of the general public do not have it. *See id*. Neither do public employees. *See id*. Neither do public employees working in academic institutions. *See id*. at 1065. So too, neither do state-subsidized child care providers. *See D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (holding the Massachusetts law authorizing partial-state employee child care providers to elect an exclusive bargaining agent did not violate non-union members' associational or expressive rights because the *Harris* distinction did not limit *Knight*); *see also Jarvis v. Cuomo*, No. 5:14-CV-1459 LEK/TWD, 2015 WL 1968224, *7 (N.D. N.Y. Apr. 30, 2015); *Hill v. SEIU*, No. 15-cv-10175, 2016 U.S. Dist. LEXIS 62734, at *6 (N.D. Ill. May 12, 2016).

The Access Act neither restrains child care providers' right to speak nor requires them to join the democratically-elected representative group. *See Knight*, 465 U.S. at 288. It also does not impinge their right to be heard over another, because the Constitution affords no such right. *See Knight*, 465 U.S. 271 at 1065–66; *see also D'Agostino*, 812 F.3d at 244. Miller cannot demonstrate an infringement of any First Amendment right.

CONCLUSION

As Justice Holmes suggested in *Bi-Mettalic Investment Co. v. State Board of Equalization*, persons should register their disagreement with public policy or disapproval of representatives' effectiveness principally at the polls. *See* 239 U.S. 441, 445, 36 S. Ct. 141 (1915). If Miller wants to silence SEIU's voice at the

bargaining table, she can vote for a new representative.

The Washington State Defendants' Motion for Summary Judgment and Dismissal [Dkt. #65] is GRANTED. SEIU's Partial Motion for Summary Judgment [Dkt. #66] is GRANTED. The Plaintiffs' Cross-Motion for Summary Judgment [Dkt. #68] is DENIED. Only Mentele's claim for restitution against SEIU remains, as neither moved for summary judgment.

IT IS SO ORDERED.

Dated this 26th day of May, 2016.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

[Filed 10/16/15]

No. 3:15-cv-5134-RBL

CYNTHIA MENTELE and KATHERINE MILLER,
Washington family childcare providers,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, in His Official Capacity as Governor of the State of Washington; KEVIN W. QUIGLEY in His Official Capacity as Director of the Washington State Department of Social and Health Services; DAVID SCHUMACHER in His Official Capacity as Director of the Washington State Office of Financial Management; and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925, a labor organization,

Defendants.

AMENDED COMPLAINT

INTRODUCTION

1. This case seeks to enforce and expand the United States Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), to Washington family child care providers who are not members of the union. *Harris* held the First Amendment does not permit a State to compel personal care providers to subsidize speech on

matters of public concern by a union they do not wish to join or support. The State forced Plaintiff Mentele and is continuing to force Plaintiff Miller to accept, and until October 2, 2014, forced Plaintiff Mentele to financially support, a mandatory representative to speak to or petition the State over its child care policies. Plaintiffs allege that this violates their rights under the First Amendment to the United States Constitution, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. 1983, to choose individually with whom they associate or support to petition or to speak to the government. This case concerns whether it is constitutional for a State to compel citizens to accept a mandatory representative to lobby government over policies that affect their private businesses in providing family child care services and seeks the return of the Union fees automatically seized by the State from the childcare payments made to Plaintiff Mentele.

2. This is a civil rights class action pursuant to 42 U.S.C. § 1983, seeking for Plaintiffs declaratory and for Plaintiff Miller injunctive relief, as well as nominal and compensatory damages and/or restitution of union fees illegally collected from Plaintiff Mentele. Defendants are state actors acting under the color of state law—specifically, the Public Employees' Collective Bargaining Chapter, RCW 41.56.010 et seq., and collective bargaining agreements between the State and SEIU Local 925. Defendants have been depriving Plaintiffs, and continue to deprive Plaintiff Miller, of their rights, privileges, and immunities against compelled speech and compelled association under the First and Fourteenth Amendments of the United States Constitution.

3. Plaintiffs are family child care providers who operate child care businesses in their homes and received, and Plainitiff Miller continues to receive, child care subsidies from the State. Plaintiffs are not members of the exclusive bargaining representative of the State-wide family child care provider bargaining unit ("nonmembers"). Plaintiffs bring this suit to enjoin and declare unconstitutional RCW 41.56.028 and RCW 41.56.080 to the extent that those statutes mandate an exclusive bargaining representative on behalf of nonmember providers, and those portions of RCW 41.56.113(1)(b)(i) and RCW 41.56.122 applicable to nonmember providers, along with Articles 1, 4.1 and 5 (before it was superseded by a new Memorandum of Understanding (MOU) on September 18, 2014) of the 2013-2015 Collective Bargaining Agreement ("CBA") between the State of Washington and SEIU Local 925, and similar language in any future CBAs which implement those statutory provisions. RCW 41.56.028, RCW 41.56.080, and 41.56.113(1)(b), along with Articles 1 and 4.1 of the CBA, forces nonmember providers receiving State subsidies to accept a mandatory, exclusive representative to lobby the government over policies that affect their private businesses. RCW41.56.113(1)(b)(i), along with Article 5, prior to it being superseded by a September 18, 2014, MOU, of the CBA, which required the State acting as payor, but not as employer, to deduct from the payments to nonmember providers a fee equal to SEIU's membership dues and remit that fee to the union, forced nonmember providers to accept and financially support a mandatory representative to speak to and petition the State over its child care policies.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the First and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. § 1343, because Plaintiffs seek relief under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983. This Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief for Plaintiffs, including preliminary and permanent injunctive relief for Plaintiff Miller, pursuant to Rule 65 of the Federal Rules of Civil Procedure, based thereon.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arise in this judicial district, Plaintiffs reside and do business in this judicial district, and Defendants do business and operate in this judicial district. Because the claims arose in Thurston County, intradistrict assignment to the Tacoma Division is proper. Local Civil Rule 3(d).

PARTIES

6. Plaintiffs Cynthia Mentele and Kathy Miller are licensed child care providers who operate child care businesses in their homes and Plaintiff Mentele received, and Plaintiff Miller continues to receive, child care subsidies from the State. They are family child care providers pursuant to RCW 41.56.030(7). Mentele resides and operates her business in King County, Washington. Miller resides and operates her business in Klickitat County, Washington. Plaintiff Mentele was and Plaintiff Miller is a member of a state-wide bargaining unit represented by Local 925, but Plaintiff Mentele was never a member of Local 925 and Plaintiff Miller has not been a member of that union since November 5, 2014.

7. Defendant Jay Inslee is the Governor of the State of Washington, Washington's chief executive officer, and the public employer of family child care providers pursuant to RCW 41.56.028, and is being sued in both of these official capacities.

8. Defendant Kevin Quigley is the Director of the Washington Department of Social and Health Services ("DSHS"). As such, on information and belief, he is charged with the responsibility of issuing child care subsidy payments to family child care providers, including Plaintiffs, and processing all deductions therefrom, including union dues and nonmember dues equivalent fees according to a "union security" provision pursuant to RCW 41.56.113(b). He is sued only in his official capacity.

9. Defendant David Schumacher is the Director of the Washington State Office of Financial Management. As such, and on information and belief, he is charged with the responsibility of negotiating and enforcing the collective bargaining agreement on behalf of the governor with SEIU 925 pursuant to RCW 41.56.028(1). These responsibilities are handled by the Labor Relations Division of OFM, over which Schumacher exerts direct authority. He is sued only in his official capacity.

10. Defendant Service Employees International Union Local 925 ("SEIU 925") is a labor union conducting business and operations throughout the State of Washington with its headquarters located in this judicial district at 1914 N 34th Street, Suite 100, Seattle, WA 98103. SEIU 925 is the exclusive bargaining representative of family child care providers receiving child care subsidies pursuant to RCW 41.56.028 and RCW 41.56.080.

FACTUAL ALLEGATIONS

I. Family Child Care Providers and the State of Washington.

11. Washington's family child care providers care for a child or children in the home of the provider or in the home of the child or children throughout all hours of the day, and in certain circumstances overnight and on weekends. Providers may receive child care subsidies for their care of children. Providers are either licensed by the state under RCW 74.15.030 or are exempt from licensing under chapter 74.15 RCW. RCW 41.56.030.

12. Reimbursements to family child care providers are funded through public programs such as Working Connections Child Care ("WCCC"), Washington's largest-such program, that subsidize child care for qualified low-income working families.[1] WAC 170-290-0001; WAC 170-290-0240.

13. Licensed providers who care for children from families eligible for subsidized care receive a subsidy payment from the state. WAC 170-296A-1075; WAC 170-290-0200. Licens[e]-exempt providers also receive a child care subsidy from Washington when caring for children participating in WCCC and other similar programs. WAC 170-290-0240.

14. The subsidy payments minus any deductions are administered and remitted to providers by DSHS

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[1] Other Washington programs include, for example, the Early Childhood Education and Assistance Program ("ECEAP"), Head Start, the DSHS Children's Administration, the DSHS Division of Alcohol and Substance Abuse, and the DSHS Division of Vocational Rehabilitation.

through the Social Service Payment System. WAC 170-290-0240.

II. Washington law compels family child care providers to accept and financially support a mandatory exclusive representative for purposes of collective bargaining.

15. Washington family child care providers are public employees solely for the purposes of collective bargaining. RCW 41.56.028(1). Washington's Governor is the public employer of family child care providers. *Id.* However, the same statute notes that family child care providers are not public employees of the state for any purpose other than collective bargaining. RCW 41.56.028(3).

16. Washington law requires all family child care providers receiving a subsidy to be represented by a single, exclusive bargaining representative in a single, state-wide bargaining unit. RCW 41.56.028(2)(a); RCW 41.56.060; CBA, Art. 1.1.

17. On June 23, 2006, the Washington Public Employment Relations Commission certified SEIU 925 as family child care providers' exclusive bargaining representative for the purpose of collective bargaining. In the matter of the petition of: *Service Employees International Union, Local 925*, Decision 9362, Case 20272-E-06-3134 (PECB, 2006), available at http://www.perc.wa.gov/databases/certifications/09362.htm (last visited on February 12, 2015).

18. SEIU 925, as the providers' sole and exclusive bargaining representative, is signatory to a collective bargaining agreement ("CBA") with the Governor of Washington that determines the terms and conditions of employment of all bargaining unit members, including Plaintiffs. That CBA prevents the State from

meeting, discussing, conferring, subsidizing or negotiating with any other individual, employee organization or their representatives on any matters pertaining to the terms and conditions of employment. CBA, Art.1.1, 4.1, available at http://www.ofm.wa.gov/labor/agreements/13-15/nse_cc.pdf (last visited February 12, 2015).

19. Until superseded by the September 18, 2014 MOU, the CBA between the state of Washington and SEIU 925 contained a "union security" provision requiring the following: "every child care provider covered by this Agreement shall, as a condition of acceptance of subsidy payments for child care services provided and continued eligibility to receive payment for services provided, become and remain a member of the Union paying the periodic dues, or for nonmembers of the Union, the fees uniformly required." CBA, Art. 5.1.

20. RCW 41.56.113 directs the state to withhold union dues from providers who are members of SEIU 925 and dues equivalent fees from Plaintiff Mentele who was never a union nonmember. RCW 41.56.113(1)(b)(i).

21. SEIU 925, by and through its secretary, determines the amount of the membership dues and equivalent nonmember fees. RCW 41.56.113(1)(a); CBA Art. 5.1, 6.1.

22. DSHS administers the deductions and remits payment directly to SEIU 925's Treasurer. WAC 170-290-3800; WAC 170-290-0240.

III. The state and SEIU 925 are forcing Plaintiffs and other family child care providers to associate with mandatory representatives.

23. Washington's certification of SEIU 925 as the exclusive bargaining representative of all family child

care providers forced Plaintiff Mentele and forces Plaintiff Miller into a mandatory agency relationship with SEIU 925, wherein SEIU 925 has the sole legal authority to act as their agent for purposes of petitioning the state regarding its child care policies, contracting with the State, and petitioning the State for enactment of regulations and legislation.

24. By certifying SEIU 925 as the exclusive representative of all family child care providers, the State forcibly associated or associates and affiliated or affilates Plaintiffs with SEIU 925's petitioning, speech, contracts, and public policy positions.

25. Plaintiffs oppose being forced to accept SEIU 925 as their mandatory representative for petitioning and contracting with the state. They do and did not want to be forced into an agency relationship with this advocacy group, and do and did not want to be affiliated with its expressive activities.

26. At various times since March 5, 2012, Plaintiff Mentele has provided child care services to one or more children enrolled in a State public assistance program. As a result, she was subjected to the compulsory fee requirements of RCW 41.56.113, and had union fees automatically taken from her payments, without her authorization, through the October 2, 2014 payment.

27. Plaintiff Mentele opposes being forced to pay compulsory fees to SEIU 925, and did not want to subsidize the organization or its expressive activities.

CLAIMS FOR RELIEF

28. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

29. The First Amendment to the United States Constitution guarantees each individual a right to choose whether, how, and with whom he or she associates to "petition the Government for a redress of grievances" and engage in "speech." A state grievously infringes on these First Amendment rights when it compels citizens to be represented by and associate with and inancially support an expressive organization or its expressive activities. Those infringements are subject to at least exacting constitutional scrutiny, and are permissible only if they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.

COUNT I

(Exclusive representation in violation of 42 U.S.C. § 1983 and the United States Constitution)

30. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

31. By and through RCW 41.56.028, RCW 41.56.080, and 41.56.113(1)(b), along with Article 1 and 4.1 of the CBA, and related provisions, as well as the certification of an exclusive representative, Defendants have deprived Plaintiffs of their constitutional rights to not associate with an organization for purposes of speech and "petition[ing] the Government for a redress of grievances" in violation of the First Amendment, as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

32. No compelling state interest justifies this infringement on Plaintiffs' First Amendment rights.

33. RCW 41.56.028 and RCW 41.56.080 to the extent that those statutes mandate an exclusive bargaining representative on behalf of all nonmember family child care providers, and 1.56.113(1)(b), along

with Articles 1 and 4.1 of the CBA, are thus unconstitutional both on their face and as applied to Plaintiffs.

COUNT II
(Compulsory financial support of SEIU 925 is a violation of 42 U.S.C. § 1983 and the United States Constitution)

34. Plaintiff Mentele re-alleges and incorporates by reference the paragraphs set forth above.

35. By and through RCW 41.56.113(1)(b)(i), along with Article 5 of the CBA prior to the September 18, 2014, MOU, and related acts, as well as the automatic seizure of dues equivalent mandatory fees from Plaintiff Mentele, unless she specifically opted out and requested the deductions to cease, Defendants have compelled Plaintiff Mentele to financially support SEIU 925 as her representative for petitioning and contracting with the State. By so doing, Defendants have violated, and continue to violate, the First Amendment rights of Plaintiff Mentele, as secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, not to associate with a mandatory representative and not to support, financially or otherwise, petitioning and speech.

36. No compelling state interest justifies this infringement on Plaintiff Mentele's First Amendment rights.

37. RCW 41.56.113(1)(b)(i), along with Article 5 of the CBA prior to the September 18, 2014 MOU, and related acts requiring opt out, are thus unconstitutional both on their face and as applied to Plaintiff Mentele.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that this Court:

A. Declaratory judgment: enter a declaratory judgment that RCW 41.56.028 and RCW 41.56.080, to the extent that those statutes mandate an exclusive bargaining representative on behalf of all family child care providers, and those portions of RCW 41.56.113(1)(b)(i) and RCW 41.56.122(i) applicable to family child care providers, along with Articles 1, 4.1 and 5 of the 2013-2015 Collective Bargaining Agreement between the State of Washington and SEIU Local 925, and similar language in any future CBAs which implement those statutory provisions are unconstitutional under the First Amendment, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, and are null and void;

B. Permanent injunction: issue a permanent injunction enjoining Defendants from engaging in any activity this Court declares illegal; and the enforcement of RCW 41.56.028 and RCW 41.56.080, to the extent that those statutes mandate an exclusive bargaining representative on behalf of all nonmember family child care providers;

C. Damages: enter a judgment awarding Plaintiff Mentele compensatory damages under Count I and Count II in an amount equal to the union fees deducted from her child care payments between March 2012 and October 2014 (inclusive), with interest, and such other amounts as principles of justice and compensation warrant, and hold SEIU Local 925 liable for said damages;

D. Costs and attorneys' fees: award Plaintiffs their costs and reasonable attorneys' fees pursuant to the

Civil Rights Attorneys' Fees Award Act of 197642 U.S.C. § 1988; and

E. Other relief: grant Plaintiffs such other and additional relief as the Court may deem just and proper.

Dated: October 16, 2015

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APPENDIX E

RCW 41.56.028

Application of chapter to family child care providers—Governor as public employer—Procedure—Intent.

(1) In addition to the entities listed in RCW 41.56.020, this chapter applies to the governor with respect to family child care providers. Solely for the purposes of collective bargaining and as expressly limited under subsections (2) and (3) of this section, the governor is the public employer of family child care providers who, solely for the purposes of collective bargaining, are public employees. The public employer shall be represented for bargaining purposes by the governor or the governor's designee appointed under chapter 41.80 RCW.

(2) This chapter governs the collective bargaining relationship between the governor and family child care providers, except as follows:

(a) A statewide unit of all family child care providers is the only unit appropriate

(b) The exclusive bargaining representative of family child care providers in the unit specified in (a) of this subsection shall be the representative chosen in an election conducted pursuant to RCW 41.56.070, ...

(c) Notwithstanding the definition of "collective bargaining" in RCW 41.56.030(4), the scope of collective bargaining for child care providers under this section shall be limited solely to: (i) Economic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; (ii) health and welfare benefits; (iii) professional

development and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters. Retirement benefits shall not be subject to collective bargaining. By such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

* * *

(e) Family child care providers do not have the right to strike.

(3) Family child care providers who are public employees solely for the purposes of collective bargaining under subsection (1) of this section are not, for that reason, employees of the state for any purpose. This section applies only to the governance of the collective bargaining relationship between the employer and family child care providers as provided in subsections (1) and (2) of this section.

(4) This section does not create or modify:

(a) The parents' or legal guardians' right to choose and terminate the services of any family child care provider that provides care for their child or children;

(b) The secretary of the department of social and health services' right to adopt requirements under RCW 74.15.030, except for requirements related to grievance procedures and collective negotiations on personnel matters as specified in subsection (2)(c) of this section;

(c) Chapter 26.44 RCW, RCW 43.43.832, 43.20A.205, and 74.15.130; . . .

* * *

(11) In enacting this section, the legislature intends to provide state action immunity under federal and state antitrust laws for the joint activities of family child care providers and their exclusive bargaining representative to the extent such activities are authorized by this chapter.

RCW 41.56.080

Certification of bargaining representative—Scope of representation.

The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative: PROVIDED, That any public employee at any time may present his or her grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.