No. 18-1492

IN THE
Supreme Court of the United States

KATHERINE MILLER,

Petitioner,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON; 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

REPLY BRIEF FOR PETITIONER

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A. The Court's Review Is Needed to Establish That Exclusive Representation Is Subject to Constitutional Limits.

The State's and SEIU's briefs are remarkable not for what they say, but for what they do not say. Neither suggests any limit on which individuals states can compel to accept an exclusive representative for dealing with the state. In the State's (at 7) and SEIU's (at 4, 19) view and under the Ninth Circuit's opinion, states can appoint mandatory representatives to speak for individuals in any profession that interacts with the state. *See* Pet. 19-26.

But states do not possess such power. Even if states can designate representatives for their employees, it does not follow that states can designate a representative to speak for any individual in his or her relations with the state. The First Amendment severely curtails state power to compel association for speech and petitioning the government.

As this case shows, this limit on state power is being disregarded in at least fifteen states. Pet. 22-23. Individual childcare providers, many of whom operate home-based childcare business as Miller does, are being forced to accept exclusive representatives for petitioning states over their childcare subsidies. *Id.* at 21-24. Independent Medicaid providers who provide homecare services to the disabled are suffering a similar fate. *Id*. at 22. Lower courts are permitting this to occur based on a misinterpretation of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), under which regimes of exclusive representation for speaking with the state are

supposedly subject only to rational basis review. Pet. 6, 13, 21.

There is an urgent need for the Court to establish that exclusive representation is subject to exacting constitutional limits. Like other mandatory expressive associations, it is permissible under the First Amendment only in the "exceedingly rare" circumstance when it "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU, Local 1000,* 567 U.S. 298, 310 (2012) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

No matter whether an employment relationship constitutes such a rare circumstance, no compelling state interest justifies forcing childcare providers to accept a compulsory representative. Any state interest in workplace "labor peace" does not reach to individuals who are not government employees. *See Harris v. Quinn*, 573 U.S. 616, 649-50 (2014).

In *Harris*, the Court cabined compulsory union fee requirements to "full-fledged state employees" because otherwise "a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion" and "it would be hard to see just where to draw the line." *Id.* at 646-47 (footnote omitted). The same rationales require cabining compulsory union representation to government employees. It inflicts "a significant impingement on associational freedoms that would not

be tolerated in other contexts." *Janus v. AFSCME, Council 31*, __ U.S. __, 138 S. Ct. 2448, 2478 (2018).

B. The Lower Courts' Opinions Misunderstand *Knight*.

SEIU (at 11-13) and the State (at 10-13) acknowledge that the appellate courts that have concluded states need not satisfy First Amendment scrutiny to designate exclusive representatives for childcare and Medicaid homecare providers did so because they believed *Knight* mandates that conclusion. If the Court believes this is an untenable interpretation of its precedent, the Court should correct the lower courts' common and growing error.

The lower courts' interpretation of *Knight* is untenable for reasons detailed in the Petition (at 13-17) and by *Amicus Curiae* Buckeye Institute (entire brief) and *Amicus Curiae* Pacific Legal Foundation (at 12-17). As discussed, *Knight* addressed whether restricting employees from participating in union meet and confer sessions infringed on the employees' constitutional rights.

Knight says as much at both its beginning and its end. The opening paragraph states that "[t]he question presented in this case is whether this *restriction on participation* in the nonmandatory-subject exchange process violates the constitutional rights of professional employees," 465 U.S. at 273 (emphasis added), and the final paragraph concludes that "[t]he District Court erred in holding that appellees had been unconstitutionally denied *an opportunity to par-*

ticipate in their public employer's making of policy." *Id*. at 292 (emphasis added).

SEIU admits (at 16) the district court opinion in *Knight* addressed whether "*restricting participation* in meet-and-confer sessions to the exclusive representative" chilled associational rights. (Emphasis added). That is not the issue here.

Knight did not address whether, much less hold that, states are free to impose exclusive representatives on anyone for any reason, and without satisfying constitutional scrutiny. Yet that is how more and more courts now interpret *Knight*.

The Court should not wait for another case to correct this misapprehension of *Knight*. As SEIU (at 11-13) and the State (at 10-12) acknowledge, the circuit courts have now ruled on all five of the cases that challenge the constitutionality of extending exclusive representation to childcare or Medicaid homecare providers. There are no undecided cases in the lower courts on this issue.[1] The Court should take this case to correct the dangerous misconception that *Knight* gives states *carte blanche* to dictate which organizations speak for individuals in their relations with the state.

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[1] As SEIU (at 13-14) and the State (at 10, n.5) point out, there are other cases involving public employees challenging the constitutionality of exclusive representation pending in the lower courts, but they do not involve providers or the unique issue Miller raises here. *See* Pet. 18-19.

C. An Exclusive Representative Is a Mandatory Expressive Association.

The State and SEIU do not contest the expressive and political nature of SEIU's advocacy as childcare providers' exclusive representative, nor could they. SEIU's function as an exclusive representative is to petition state policymakers over several subsidized childcare policies. *See* Pet. 19-20.

They do, however, argue that childcare providers represented by SEIU are not associated with SEIU or its speech as their proxy. Their contentions in support of this counter-intuitive proposition, however, are either self-defeating or inapposite.

1. SEIU contends (at 10) that "neither the State nor reasonable outsiders would believe that every childcare provider necessarily *agrees* with the union's speech." (Emphasis added). That Miller and other childcare providers disagree with SEIU's speech only proves the constitutional injury. The First Amendment prohibits states from forcibly associating individuals with messages with which they disagree. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 651–52 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573–74 (1995); *Wooley v. Maynard,* 430 U.S. 705 (1977).

That outside observers may realize Miller and other childcare providers oppose being forcibly associated with SEIU and its speech changes nothing. Public knowledge of government-compelled association does not mitigate the injury it inflicts. If anything, it

makes it worse, for "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464.

Equally self-defeating is SEIU's assertion (at 1, 21-22) that exclusive representation is based on majority rule.[2] The First Amendment exists to protect individual speech and associational rights *from* majority rule. As the Court stated in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of majorities* and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights

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[2] SEIU's assertion is audacious given that only 22.7% of eligible providers voted for SEIU representation. *See* Tally of Election Ballots, Case No. 20272-E-06-3134, State–DSHS (Child Care), page three (PERC, June 15, 2006), https://decisions.perc.wa.gov/waperc/decisions/en/175970/1/document.do (last visited Sept. 9, 2019). In general, most unionized employees never voted for union representation. *See* James Sherk, *Unelected Representatives: 94 Percent of Union Members Never Voted for a Union*, Heritage Found. Backgrounder No. 3126 (Aug. 30, 2016), https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union (last visited Sept. 9, 2019) (finding that only 6% of unionized private sector employees voted for their exclusive representative).

> *may not be submitted to vote*; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943) (emphasis added). It was antithetical to basic First Amendment guarantees for Washington to subject to majority rule each childcare provider's individual right to choose which advocacy group represents his or her interests before the State.

2. Turning from Respondents' self-defeating arguments to their inapposite one, Respondents both assert childcare providers need not join or subsidize SEIU. SEIU Br. 1, 20; State Br. 5. That does not change the fact that forcing dissenting providers into an unwanted agency relationship with SEIU associates them with SEIU and its speech. As the Eleventh Circuit reasoned in *Mulhall v. UNITE HERE Local 355*, "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 the individual is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he or she disagrees. 618 F.3d 1279, 1287 (11th Cir. 2010).

That *Mulhall* concerned a question of standing, as SEIU (at 13) and the State (at 12) note, does not render the decision any less persuasive or any less in conflict with other circuits' decisions. *Mulhall* held exclusive representation of employees "amounts to 'compulsory association,'" but that this "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) (other citation omitted). That holding conflicts with other circuits' holdings that exclusive representation does not impinge on associational rights at all, and requires no compelling justification.

It is also immaterial that Miller "is free to communicate her opinions as she sees fit" with government or others and "to associate, or not to associate, with whomever they please." State Br. 13, 14. The government is not free to *compel* speech and association so long as it does not also *restrict* speech and association.

In compelled speech and association cases in which the Court found constitutional violations, victims almost always were otherwise free to speak or associate with others. In *Wooley*, motorists were free to express messages different from the motto inscribed on the license plates they had to display. 430 U.S. at 714. In *Dale,* the Boy Scouts spoke against the positions of the activists with whom they were compelled to associate. 530 U.S. at 651-52. And in *Miami Herald Publishing Co. v. Tornillo*, "the statute in question . . . [did] not prevent[] the Miami Herald from saying anything it wished," in addition to the articles it was compelled to publish. 418 U.S. 241, 256 (1974) (footnote omitted). Yet the Court held each instance of compelled speech or association unconstitutional.

3. Finally, SEIU and the State have no answer for the principal reason why an exclusive representative is a mandatory association: it has *legal authority* to speak and enter into binding contracts for individuals. *See* Pet. 8-10; Wash. Rev. Code § 41.56.080; *accord* State Br. 5-6. This form of government-compelled association is not conceptual, but actual. As a matter of law, exclusive representatives have the "exclusive right to speak for all the employees in collective bargaining." *Janus*, 138 S. Ct. at 2467. An individual "may disagree with many of the union decisions, but is bound by them." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[3]

SEIU (at 23) and the State (at 5, 19) support this point by recognizing that the union bears a duty of fair representation to providers. SEIU owes that duty because the "exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). SEIU's "power to act in behalf of"

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[3] That distinguishes *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, cited by SEIU (at 20, 21) and the State (at 16), which found that requiring a school to provide military recruiters with access to school property did not associate the school with the recruiters' message. 547 U.S. 47, 69 (2006). A requirement that a school merely allow individuals to use its property is nothing like a state making an interest group its citizens' statutory agent.

childcare providers is why those providers are associated with SEIU and its expressive actions.

SEIU's notion (at 22) that it "does not act as the personal agent of any individual worker but as bargaining representative of the unit as a whole," makes little sense. SEIU cannot speak for everyone in the unit, but no one in particular. The greater includes the lesser. The contracts SEIU enters into as childcare providers' proxy apply to each provider individually.

The Court was thus correct to find in *Janus* that a state "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights," 138 S. Ct. at 2469, and inflicts a "significant impingement on [their] associational freedoms." *Id.* at 2478. Significant impingements on "the right to associate for expressive purposes" are subject to exacting First Amendment scrutiny. *Roberts*, 468 U.S. at 623.

D. The Lower Court's Alternative Reasoning Does Not Save Exclusive Representation.

SEIU (at 10, 24-25) maintains that the lower court's alternative reasoning, that exclusive representation serves a "compelling—and enduring—state interest of labor peace," Pet.App. 16a, justifies denying the Petition. The opposite is true. This holding make the case an ideal vehicle for resolving the questions presented because the lower court addressed both whether First Amendment scrutiny applies when a state imposes a compulsory representative on

childcare providers and whether this form of mandatory association survives that scrutiny.

The Ninth Circuit' finding that "labor peace" is a compelling interest in the context of childcare providers conflicts with *Harris*' holding that a state's labor peace interest does not extend to individuals who are not government employees. 573 U.S. at 649-50. There are "means significantly less restrictive of associational freedoms," *Janus*, 138 S. Ct. at 2465 (*quoting Knox*, 567 U.S. at 310), for states to administer their childcare programs effectively than forcing individuals who operate home-based childcare businesses to accept a mandatory advocate for lobbying the state over its childcare programs. *See* Pet. 17-19.[4]

The State (at 21) is wrong that Miller has the burden of showing that the State's interest can be "achieved through means significantly less restrictive of associational freedoms." SEIU's claim (at 25) that Miller's failure to introduce any evidence on this matter leaves "no basis for challenging the Ninth Circuit's alternative holding," is also error. It is the State (or SEIU) that has the burden of establishing the lack of any significantly less restrictive means. *See Reed v. Town of Gilbert*, ____ U.S. ____, 135 S.

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[4] The declarations SEIU submitted to the lower court that argue exclusive representation benefits the State (*see* SEIU Br. 24-25) are not "expert" testimony, but the mere political opinion of the declarants. SEIU's reliance on those declarations belies the State's claim (at 20-21) that the lack of any factual record on the "benefits" of exclusivity requires a denial of the Petition.

Ct. 2218, 2226 (2015) (government must prove challenged laws are narrowly tailored to serve compelling state interests).

Whatever its merits in the context of an employment relationship, no compelling state interest justifies extending exclusive representation for dealing with the government beyond that context. As the Court held in *Janus*, exclusive representation inflicts "a significant impingement on associational freedoms that would not be tolerated in *other contexts*." *Janus*, 138 S. Ct. at 2478 (emphasis added).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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