No. 18-766

In the
Supreme Court of the United States

TERESA BIERMAN, KATHY BORGERDING, LINDA BRICKLEY, CARMEN GRETTON, BEVERLY OFSTIE, SCOTT PRICE, TAMMY TANKERSLEY, KAREN YUST,
Petitioners,

v.

MARK DAYTON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MINNESOTA, ET AL.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The State of Minnesota compels individuals who are not public employees, namely individual Medicaid providers, to accept an exclusive representative for speaking with the State over certain public policies. The questions presented are:

1. Can the government designate an exclusive representative to speak for individuals for any rational basis, or is this mandatory expressive association permissible only if it satisfies heightened First Amendment scrutiny?

2. If exclusive representation is subject to First Amendment scrutiny, is it constitutional for the government to compel individuals who are not government employees to accept an organization as their exclusive representative for dealing with the government?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), and *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief through a letter granting blanket consent, filed December 20, 2018. More than 10 days in advance, all parties received notice of the intended filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The idea that "there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations" is one of the primary justifications for the addition of a Bill of Rights to the U.S. Constitution. *See* James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military*, June 16, 1788, *in* History of the Virginia Federal Convention of 1788, vol. 1, p. 130 (H.B. Grigsby ed. 1890). The present case, in which the State of Minnesota seeks to force private home healthcare workers into unwelcome exclusive representation by a labor union in violation of their rights to free speech and association under the First Amendment, is a prime example of the continuing danger of this dynamic.

In 2013, Minnesota extended the state's public employee labor relations statute to individuals who provide in-home care to disabled Medicaid recipients, deeming them to be state employees for the purpose of collective bargaining.[2] Under this law, state employees may designate an exclusive representative to negotiate employment terms with the state.

Petitioners are Minnesota mothers and fathers who provide in-home care to a son or daughter enrolled in a Medicaid program that provides home-based care for persons with disabilities who would otherwise be institutionalized. Petitioners are not

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[2] *See* Individual Providers of Direct Support Services Representation Act, ch. 128, part. 2, 2013 Minn. Laws 2173 (codified as amended at Minn. Stat. §§ 179A.54, 256B.0711).

employed by the State of Minnesota, but rather are employed by the disabled person they care for and their employment is subsidized through Medicare. Pet. App. 9a.

Petitioners contend that the Minnesota law violates their freedom of association under the First and Fourteenth Amendments by compelling them to associate with SEIU Healthcare Minnesota (SEIU), the exclusive representative for their bargaining unit. As the exclusive representative, SEIU has the legal authority to speak and contract for all of Minnesota's home healthcare providers with the state over public policies that affect their employment—regardless of whether those providers want SEIU to speak on their behalf. As part of the contract negotiated between SEIU and the state, the state is barred from negotiating with any individual provider or other association of providers. 2015 Minn. Law. Ch. 71, Art. 7 §§ 52-53.

The district court rejected Petitioners' argument, relying on *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), which upheld a state's decision to listen to a designated group rather than all those who wished to speak. Pet. App. 20a. The Eighth Circuit affirmed, concluding that there is no meaningful distinction between the instant case and *Knight*, and that the Supreme Court's decisions in *Janus*, 138 S. Ct. at 2448, and *Harris*, 134 S. Ct. at 2618, do not supersede *Knight*. Pet. App. 6a.

However, as this Court recently acknowledged, allowing a union to serve as the exclusive bargaining agent for public employees is a "significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct.

at 2478. Petitioners' case presents just such an "other context," and affords this Court the opportunity to squarely examine exclusive representation in light of its impact on workers' First Amendment freedoms of speech and association.

This Petition also allows this Court to consider whether *Knight* is still good law in light of the Court's recent decisions rejecting compelled funding of labor unions' political speech. The courts below found no meaningful distinction between the instant case and *Knight*, concluding in a broad reading of *Knight* that the state has not impinged on the Petitioners' First Amendment rights in part because they are not compelled to pay a mandatory fee to the union. Pet. App. 6a. However, after this Court's decisions in *Harris* and *Janus*, *Knight* can no longer support such an extensive infringement on the Petitioners' constitutional rights.

The petition for a writ of certiorari should be granted.

REASONS TO GRANT THE PETITION

I

EXCLUSIVE REPRESENTATION IMPINGES UPON WORKERS' FIRST AMENDMENT RIGHTS

A. The Intertwined Freedoms of Speech and Association Demand Equally Rigorous Constitutional Protection

The First Amendment encourages an "open marketplace" where the ideas of individuals and groups are free to compete without government interference. *N.Y. State Bd. of Elections v. Torres*, 552

U.S. 196, 208 (2008). The Constitution firmly guards the First Amendment rights of individuals and groups—the state may not prohibit ideas it disfavors or compel endorsement of ideas it approves, *see Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam), or "place obstacles" to a person's exercise of his or her First Amendment freedoms, *see Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549-50 (1983). A governmental interest in favoring one form of speech over another is constitutionally illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980).

Freedom of association, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In large part this is because the right to associate "makes the right to express one's views meaningful." *Knight*, 465 U.S. at 309. The right to associate logically includes a corresponding right *not* to associate. *Knox*, 567 U.S. at 309 ("Freedom of association…plainly presupposes a freedom not to associate."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("[F]reedom of speech…necessarily compris[es] the decision of both what to say and what not to say.").

An association takes on the characteristics and preferences of its membership, and its speech can be powerful. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members."). This premise underlies the concept of associational standing, which recognizes that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union,*

United Auto., Aerospace and Agric. Implement Workers of America v. Brock, 477 U.S. 274, 290 (1986). Labor unions, as one of those "other associations," derive their right to speak from the rights of their union members. Petitioners in this case are not union members, and therefore the state must not grant to the union the extraordinary right to speak on their behalf.

The right to speak and associate and the corresponding right to refrain from speaking and associating are protected by the First Amendment through closely intertwined analyses. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association."). The link between freedom of speech and freedom of association is most commonly seen in the context of political speech. For instance, political parties may determine who is entitled to membership and, conversely, the parties are not presumed to speak for those who may be eligible for membership but choose not to participate. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (An individual voter has the right to associate with the political party of his or her choice and a political party has a right to "identify the people who constitute the association.").

B. Exclusive Representation Deprives Non-Members of the Right to Communicate with the State

Unions designated as exclusive representatives have special privileges not available to non-members. *See Janus*, 138 S. Ct. at 2467. Exclusive representation allows the SEIU, and the SEIU alone, to determine the employment terms and conditions of Minnesota home healthcare workers, and purports to represent the entire workforce in its lobbying efforts. *See NLRB v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("[I]ndividual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and "[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."). If unions "have no constitutional entitlement to the fees of non-member-employees," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007), how can unions be entitled to the forced association of non-member employees through exclusive representation laws? *See* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 Boston Coll. L. Rev. 857, 870 n.87 (1988) ("One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle.").

The court below found no meaningful distinction between this case and *Knight* because the 2013 statute allows home healthcare workers to form their own advocacy groups and does not require them to join the SEIU. Pet. App. 6a. However, Petitioners' refusal

to join the union does not absolve the state from its constitutional violation. The Act prohibits home healthcare workers from any communication with the state that may be considered to "interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative." Minn. Stat. §§ 179A.06, subdiv. 1. The collective bargaining contract between SEIU and the Minnesota Department of Human Services, ratified by the Minnesota Legislature, bars all non-union home healthcare workers and any association of non-union workers from negotiating their own contracts. 2015 Minn. Law. Ch. 71, Art. 7 §§ 52-53. Thus, 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." *NLRB*, 388 U.S. at 180.

Justice Stevens expanded on this point in his dissent in *Knight*. While the majority in that case rested on a unique theory that the government is not bound to listen just because people choose to speak, *Knight*, 465 U.S. at 283, the dissenting Justices' view reflected the reality that a government communicative prohibition based on the identity of a speaker in favor of a communicative monopoly for a preferred speaker is odious to the First Amendment. *Id*. at 301 (Stevens, J., dissenting).[3] While it is true that the government is under no affirmative duty to listen, preventing citizens from competing in the marketplace of ideas renders their speech futile. *Id*. at 308-09 (Stevens, J., dissenting) ("[T]he First

[3] Justices Brennan and Powell joined Justice Stevens in this portion of his dissent.

Amendment was intended to secure something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views."). By extension, the freedom of association is protected by the First Amendment because it "makes the right to express one's views meaningful." *Id.* at 309 (Stevens, J., dissenting). A government grant of a communicative monopoly stands directly at odds with the well-recognized principle that government endorsing one form of speech over another is illegitimate. *Carey*, 447 U.S. at 468; *see also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[I]t is hazardous to discourage thought, hope, and imagination; [the Founders understood] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]").

Even if Petitioners lease local billboards or place television commercials declaring their opposition to the SEIU's bargaining positions, the state is required by the terms of the SEIU contract to ignore them in favor of the exclusive representative's positions. Collective Bargaining Agreement between SEIU and State of Minn., 2015 Minn. Law. Ch. 71, Art. 7 §§ 52-53. Whether or not Petitioners join the union, their voices are effectively silenced, and any attempt to speak contrary to the union would be futile.

Particularly in the context of a labor union, a decision that no constitutional infringement arises if dissenters or non-members can speak on their own invites retribution from union loyalists if those dissenters *do* speak. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and non-members from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed., 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down their Members and Corrupt American Politics* 44-46 (2004).

This is why nonconformists like Petitioners must rely on the Constitution for protection. *See, e.g., W. Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (The judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process.). While the First Amendment union cases have thus far focused largely on compelled financial subsidization, *e.g. Janus*, 138 S. Ct. 2448; *Harris*, 134 S. Ct. 2618; *Knox*, 567 U.S. 298, the exclusive representation aspect equally forces non-union workers to be used as "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

The lower courts in this case held that exclusive representation laws are a carve-out from normal constitutional scrutiny of infringements on First Amendment guarantees like freedom of association.

That holding conflicts with this Court's jurisprudence that requires the government to provide compelling justifications for silencing those who would address their government. As Judge Learned Hand explained, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

II

HARRIS AND *JANUS* SUPERSEDE *KNIGHT*

The court below found no meaningful distinction between the instant case and *Knight*, concluding in its broad reading of *Knight* that the state has not impinged on Petitioners' First Amendment rights in part because they are not compelled to pay a mandatory fee to the union. Pet. App. 6a-7a. However, after this Court's decisions in *Harris* and *Janus*, *Knight* is no longer good law to the extent it supports such an extensive infringement on Petitioners' constitutional rights.

A. Compelled Speech Is the Same As the Compelled Funding of Speech

Compelled speech, like the kind inflicted on Petitioners by SEIU's exclusive representation, presents the same dangers as the compelled funding of speech. *Harris*, 134 S. Ct. at 2639; *Knox*, 567 U.S. at 309. The compelled funding of speech of private home healthcare workers specifically and public employees generally was definitively struck down in *Harris* and *Janus*. *See Harris*, 134 S. Ct. at 2639 ("If

we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood's* reach to full-fledged state employees"); *see also Janus*, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to a union may be deducted from a nonmember's wages, nor any other attempt made to collect such a payment, unless the employee affirmatively consents to pay."). The lower courts in the instant case erroneously distinguished compelled speech from the compelled funding of speech, allowing exclusive representation to survive the sea-change in this Court's conception of an employee's First Amendment rights after *Janus*. This Court should grant certiorari in this case to squarely consider the effects of *Janus* on *Knight* in particular and exclusive representation more generally.

This Court's decision in *Knight* was based largely upon *Abood*, 431 U.S. 209. *Abood* was significantly called into question by *Harris*, 134 S. Ct. at 2632 ("The *Abood* Court's analysis is questionable on several grounds."), and outright overruled by *Janus*, 138 S. Ct. at 2486. *Abood* wrongly permitted states to allow unions to violate public employees' First Amendment rights, and any case built upon that foundation, like *Knight*, must be reconsidered and overruled. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (Only this Court has the "prerogative . . . to overrule one of its precedents.").

Abood was the first time in American history that the Court held that the state had no affirmative obligation to show a compelling interest when a state law intruded upon protected speech, *Abood*, 431 U.S. at 263, and was based upon a misreading of precedent, *Harris*, 134 S. Ct. at 2632 ("The *Abood* Court seriously

erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union."). *Abood* relaxed First Amendment protections based on two justifications: the preservation of "labor peace" and the prevention of "free riders." *Harris*, 134 S. Ct. at 2631. These justifications were held to be insufficiently compelling in *Janus*, 138 S. Ct. at 2466-69 (noting that labor peace can be achieved "through means significantly less restrictive of associational freedoms," and that "avoiding free riders is not a compelling interest."). If the justifications for impinging on the First Amendment are not present, then the case advancing those justifications is inapplicable. And if the *Abood* foundation is removed, the entire structure of *Knight* as applied to this case must fall.

B. *Knight* Cannot Support Infringement On Freedom of Association

Further, *Knight* only briefly touches upon the question of freedom of association, which is central to the instant case. In *Knight*, the Court likens the pressure to join a public-sector union with the pressure to join a majority political party, which is "inherent in our system of government." 465 U.S. at 290. This brief comment, addressing a tangential issue to the main question of the case and directed squarely at public employees, and not "quasi-public" employees like Petitioners, *Harris*, 134 S. Ct. at 2638, has been seized upon and advanced by pro-unionization advocates in recent years.

Nowhere does *Knight* suggest that this limited observation was intended to apply across the board to all non-union members at all possible times. Since it was decided in 1984, *Knight* has been overwhelmingly

cited for the proposition that the right to speak does not guarantee a commensurate right to be heard by the government. *See*, *e.g.*, *Bridgeport Way Cmty. Ass'n v. City of Lakewood*, 203 F. App'x 64, 66 (9th Cir. 2006) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). The D.C. Circuit's rationale in *Autor v. Pritzker* explicitly recognizes this limited scope. 740 F.3d 176, 181 (D.C. Cir. 2014) ("[T]he Supreme Court recognized [in *Knight*] that the government may choose to hear from some groups at the expense of others . . .") This application of *Knight* to infringe on the First Amendment freedoms of privately employed, non-government employees does not represent *Knight* as traditionally applied, but rather constitutes an unwarranted interpretation that this Court should reject in light of its recent cases applying the First Amendment to instances of union compulsion.

Stare decisis should not deter this Court from reconsideration of *Knight*. An exceptionally important constitutional issue is presented in this case: whether the exclusive representation of non-government employees by a public employee union impinges on their First Amendment rights. Stare decisis is a high bar to overcome, but "not an inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The doctrine applies "with perhaps least force of all to decisions that wrongly denied First Amendment rights: 'This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one.).'" *Janus*, 138 S. Ct. at 2478 (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551

U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment). It is particularly appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In this case, *Harris* and *Janus* have significantly weakened the concepts underpinning *Knight*, and this Court should review *Knight* in light of those intervening changes.

With the compelled funding of speech now firmly dismantled, the tenuous distinction between compelled speech and the compelled funding of speech must fall. It does not matter that Petitioners are not forced to financially support SEIU; their forced association with SEIU as bargaining unit members and the union's speech on their behalf as the exclusive representative is unconstitutional. To the extent *Knight* supports such schemes, it should be overruled, and this Court should seize this opportunity to address this important and recurring issue.

CONCLUSION

This Court is fully cognizant of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Exclusive representation severely infringes on these rights of workers who would use their own voice to state their employment preferences.

This Court should grant the petition for a writ of certiorari and uphold home healthcare workers' First Amendment rights.

DATED: January 16, 2019.

Respectfully submitted,

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