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 *AMICI CURIAE* OF THE NFIB SMALL BUSINESS LEGAL CENTER, MACKINAC CENTER FOR PUBLIC POLICY, AND REASON FOUNDATION IN SUPPORT OF PETITIONER

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061 (Telephone)
(615) 916-5104 (Facsimile)
luke.wake@nfib.org

Manuel Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 West Fifth Street, Suite 800
Lose Angeles, California 90071
(213) 617-0414

Patrick J. Wright
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, Michigan 48640
(989) 631-0900

Counsel for Amici Curiae

Dated: January 16, 2018

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

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 AMICI CURIAE[1]

The **NFIB Small Business Legal Center** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership reflects American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Founded in 1987, the **Mackinac Center for Public Policy** is a Michigan-based nonprofit, nonpartisan research and educational institute that

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[1] In accordance with Rule 37.6, *Amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution to fund the brief's preparation or submission. All parties have filed blanket consent to *amicus* filings, and *Amici* gave advance notice of their intent to file on December 26, 2018.

advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The instant case concerns the Mackinac Center because it has challenged similar governmental activities within the State of Michigan.

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason files *amicus* briefs on significant constitutional issues.

This case concerns *amici* because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment associational and expressive rights.

SUMMARY OF ARGUMENT

The First Amendment protects both freedom of speech and freedom of association. These protections include the freedom against compelled speech and against compelled association. And whereas state laws impinging these rights are generally reviewed under strict scrutiny, the decision below declined to apply heightened scrutiny. *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018). As such, the Eighth Circuit has now joined the First Circuit and the Seventh Circuit in upholding exclusive

representation regimes that compel private economic actors to associate with labor unions as a condition of providing their services. *See D'Agostino v. Baker*, 812 F.3d 240, 242-43 (1st Cir. 2016); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017).

This Court should grant *certiorari* to clarify that individuals, and incorporated businesses, do not lose the protections of the First Amendment in choosing to provide their private services. Neither Medicaid nor childcare providers, nor anyone else, should surrender First Amendment protections simply in accepting public money as payment, or in accepting any other discretionary government benefit. The First Amendment protects private economic actors and those protections cannot be set aside simply because the state has—*ipse dixit*—labeled an entrepreneur as a "public employee."

Harris v. Quinn, 134 S. Ct. 2618 (2014), makes clear that, even if public sector employees enjoy lesser First Amendment protections than private individuals, the state cannot dub private sector workers as government employees for the purpose of defeating their First Amendment rights. Regardless of whether compelled association with a union is permissible for true public employees, there is no legitimate basis for denying freedom of association for private sector workers who do not wish to have a relationship with a public employee union. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (stating that the requirement that "a union serve as exclusive bargaining agent for [state] employees... [is a] significant impingement on associational freedoms that would not be tolerated in other contexts."). While concerns over maintaining

"labor peace" *might* justify exclusive representation for true public employees, such concerns simply cannot justify the expansion of exclusive representation to cover individuals, and businesses, that merely provide services that are paid for with public money. That justification is entirely pretextual in the absence of a bona fide employer-employee relationship with a public entity, and is completely inapposite in the case of independent business owners.

THE COURT SHOULD GRANT *CERTIORARI* TO AFFIRM THAT STRICT SCRUTINY APPLIES WHEN GOVERNMENT IMPOSES MANDATORY EXPRESSIVE ASSOCIATION

A. Exclusive Representation Is Disfavored under *Janus* because It Compels Expressive Association

Government union bargaining, and government union political activity are indistinguishable. *See Janus*, 138 S. Ct. at 2475-77.[2] As a result, homecare Medicaid providers who are unwillingly forced into an exclusive representation agreement are compelled to associate with political activity with which they may disagree. To be sure, they are compelled to speak *through the association*. But the First Amendment protects against both forced association and compelled speech. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also* Trevor Burrus, Harris v. Quinn *and the Extraordinary Privilege of Compulsory Unionization*, 70 N.Y.U. Am. L. Surv. 3 (2015).

The fact that a private service provider retains a right to withhold financial support does not alone

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[2] *Janus* concluded that "the union speech at issue in [that] case [was] overwhelmingly of substantial public concern." *Id.* at 2477. For example, referencing a union demand in a grievance proceeding that would compel an appropriation of $75 million, the opinion recognized that union advocacy on public spending represents an inherently political matter. *Id.* Moreover, the majority observed that public employee unions commonly speak on other political matters that are of only tenuous concern—if any—to the economic interests of the exclusive representation group for which they speak. *Id.* at 2475-76 (citing examples of public employee advocacy on controversial subjects such as "climate change").

cure the compelled expressive association problem. For one, an individual who is covered by a state mandated exclusive representation regime must often comply with burdensome administrative requirements in order to withdraw membership from the union, or to withhold financial support. But even where one has declined full membership with a public employee union, and withheld financial support, there is still a compulsory associational relationship so long as state law dictates exclusive representation.

The problem remains that the union speaks (on inherently politicized matters) for all individuals covered within an exclusive representation group. This raises serious constitutional issues because the union has a state-conferred monopoly on speech when speaking to the government on behalf of the covered group.[3] More fundamentally, the issue is that state law dictates that the union—and the union alone—shall speak on behalf of all individuals within an exclusive representation group, *regardless of whether they've declined full membership*.[4] No matter how adamantly a dissenting member may oppose the position advanced by the union in lobbying state officials, the union's stated position is

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[3] "Even if the [dissenters] leased a billboard prominently placed within view of [the governmental decisionmakers], declaring their opposition to the union's positions, the [government] is compelled to ignore it in favor of the union's positions." Br. Amici Curiae of Pacific Legal Foundation, et. al., *Branch v. Dep't of Labor Relations*, Sup. J. Ct. of Mass., No. 12603 (Dec. 11, 2018).

[4] The bargaining power (*i.e.*, lobbying strength) of the union is necessarily greater when it is said to speak on behalf of an entire industry.

attributed to both union and non-union members alike.

This may be constitutionally permissible in the context of a traditional public employee working unit because there is at least an argument that this sort of regime is needed in the interest of maintaining labor peace. But, *Janus* was clear in saying that this sort of "impingement on associational freedoms … [can] not be tolerated in other contexts."[5] *Id.* at 2478. By contrast to the traditional public employer-employee relationship, there is no state interest in compelling exclusive representation on independent private sector service providers.

What is more, there are often real and practical consequences because the union may take positions materially adverse to the dissenters' interests. For example, under the decision below, a state might seek to impose a compulsory exclusive representation regime on contractors providing information technology services to public entities—covering even service providers who have incorporated their business, and who have hired their own employees. If forced into an exclusive representation group, dissenting providers offering highly innovative services may be disadvantaged depending on sort of public spending the union advocates. Given that public entities have only a finite budget, a decision to spend proportionally

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[5] "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Id.* at 2460. "Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 2463–64.

more on X project(s) necessarily means less money may be allocated to Y project(s)—which may effectively shut out more specialized consultants.

B. Private Healthcare Providers Cannot Be Compelled to Associate with a Union Because They Are Not "Full-Fledged State Employees" Under *Harris v. Quinn*

In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court said that the infringement of First Amendment rights may be justified by the states' in the interest of maintaining "labor peace" among public workers; however, *Abood* is no longer good law in the wake of *Janus*. And even if concerns over maintaining "labor peace" may still justify exclusive representation in the context of a traditional public employee workplace, that interest is not implicated when the purported "employees" are not hired or fired by the state, are not supervised by the state, and do not work in state facilities.[6] *Harris*, 134 S. Ct. at 1634-42. Accordingly, the Eighth Circuit should have asked whether homecare Medicaid providers are properly classified as "public employees," or whether that classification was merely pretext for subverting dissenters' First Amendment rights.

Harris held that homecare workers, who were designated "public employees" and organized by the Service Employees International Union (SEIU), were not bona fide state employees and therefore could not be compelled to pay union dues as "public employees." *Id.* Justice Alito explained that for true

[6] There is no common law employer-employee relationship between Petitioners and the State. Nor can one say that Petitioners, or other independent service providers, are "employed" by Minnesota under any other meaning of the word.

employees, the employer establishes the position's duties, reviews applications, decides who to hire, arranges training and evaluations, "imposes corrective measures," and may terminate employees "in accordance with whatever procedures are required by law." *Harris*, 1134 S. Ct. at 2634. By comparison, the personal assistants who challenged Illinois' scheme were not employed by the state because their job duties, reviews, and all hiring and termination decisions were made by their customers. As such, they were self-employed as private and independent economic actors.

The Court also noted that many state employee benefits were not available to personal assistants, including "a deferred compensation program, full worker's compensation privileges, behavioral health programs, a program that allows state employees to retain health insurance for a time after leaving state employment, a commuter savings program, dental and vision programs, and a flexible spending program." *Id*. at 2635. Additionally, the scope of collective bargaining for personal assistants was very limited as compared to items that real employees could bargain over; *Harris* specified that a union representing true "public employees" would have the prerogative to bargain over "the days of the week and the hours of the day during which an employee must work, lunch breaks, holidays, vacations, terminations of employment and changes in job duties." *Id*. at 2636. Because of these differences, the Court "refuse[d] to extend *Abood*" to cover "partial-public employees, quasi-public employees, or simply private employees." *Id*. at 2638.

That logic must apply in the same manner here. Homecare providers negotiate rates and choose their work hours while accommodating customer needs and preferences. They do not report to anyone in government, are not reviewed by anyone in government, and are not supervised by government except to the extent that government regulates private industry.[7] Indeed, homecare providers are not even paid by the government directly; they are paid by their customers, who can choose to switch providers if dissatisfied with their care.

The only difference with *Harris* is that the Petitioners here allege that compelled unionization infringes on their right to free association—as opposed to their right to refrain from paying dues. As in *Harris*, First Amendment rights are impinged here, and the burden should rest on the State to point to a compelling state interest sufficient to override those First Amendment rights. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (holding that freedom of association may be impinged only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) ("If the State has

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[7] In like manner, Massachusetts and Illinois impose exclusive representation on private homebased childcare providers, including owners with incorporated businesses who have hired their own employees. In fact, a few of the plaintiffs in *Hill* "operate[d] childcare businesses" serving customers whose family received state assistance. *See* Comp. of Rebecca Hill, et al., *Hill v. SEIU*, 1:15-cv-10175 (N.D. Il. Nov. 10, 2015), available online at https://ljc-assets.s3.amazonaws.com/2016/11/Hill-v.-SEIU-001-Complaint-2015.11.10.pdf (last visited Jan. 14, 2019).

open to it a less dramatic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."). Instead, the decision below declined to apply heightened scrutiny. *Bierman*, 900 F.3d at 574.

The Eighth Circuit choose to limit *Harris* strictly to its facts, and held that it was bound by *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984), to rule that there is no impingement of First Amendment rights for homecare workers forced into Minnesota's exclusive representation regime. *Bierman*, 900 F.3d at 574. Not only did the Court of Appeal misconstrue *Harris*, but it misapplied *Knight* for the reasons set forth in the Petition.[8] Yet, even assuming, for the sake of argument, that *Knight* forecloses freedom of association claims in challenge to exclusive representation agreements, this Court should grant *certiorari* to reconsider the issue. Especially in the wake of *Janus* and *Harris*, this Court's First Amendment jurisprudence has eroded away the foundation for any such rule.[9] Indeed, *Janus* emphasized the need for the state to justify any impingement of First Amendment rights in the field

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[8] "*Knight* stands only for the proposition that government officials are constitutionally free to choose to whom they listen in nonpublic forums." Pet. for Cert. at 14.

[9] *Knight* was predicated in large part on *Abood*, which this Court overturned in *Janus*. *Knight*, 465 U.S. at 291 (stating that "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.'") (citing *Abood*, 431 U.S. at 224). *See also D'Agostino*, 812 F.3d at 243 (relying on *Abood* in pronouncing "non-union public employees have no cognizable associational rights objection to a union exclusive bargaining agent's agency shop agreement . . . .").

of labor law under the same exacting standards generally applicable in other arenas.

C. The Petition Presents Questions of Growing Importance Nationwide

Harris arose from an executive order signed by Democratic Illinois Governor Pat Quinn in 2009 making SEIU the exclusive bargaining representative of homecare workers, who are usually self-employed and do not report to state officials. Jacob Huebert, Harris v. Quinn: *A Win for Freedom of Association*, 2014 Cato Sup. Ct. Rev. 195, 198-99 (2014). With the stroke of a pen, Quinn dubbed thousands of homecare workers "public employees." *Id*. This was part of a nationwide strategy by public-sector unions to boost diminishing union membership. Kris Maher, Unions Target Home Workers, Wall St. J., June 19, 2013.

Despite serious decline in private-sector union membership over the last two decades, public unions have held their own, or even grown, thanks in part to efforts aimed at workers paid through public subsidies. Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1390 (2008). The unions' playbook calls for converting independent small business owners and other unsuspecting service providers, who receive government subsidies for providing services to a third party, into public union employees. Before the Supreme Court's decision in *Harris,* in 2014, fourteen states had authorized exclusive representation on behalf of homecare providers, eleven states had authorized compulsory unionization for home childcare providers, and two

states had authorized exclusive representation for foster-care providers. Huebert, *Supra* at 198-99.

This trend has continued, undeterred in the wake *Harris*.[10] And if Minnesota can require homecare providers to become unionized for the purposes of collective bargaining, even though they are not true employees, the State could do the same with regard independent contractors operating in any industry.

The decision below suggests that First Amendment concerns can be swept away because homecare providers constitute "public employees" in so far as they receive subsidies from the State. But by that rationale, First Amendment rights could be manipulated out of existence for anyone who accepts funds for anything—or, for example, anyone who accepts discretionary tax benefits. *See Frost v. Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 590 (1926) (holding government cannot compel waiver of constitutional rights as a condition of attaining a discretionary government benefit); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (government cannot condition economic liberties on the waiver of First Amendment rights).

If permitted to stand, the decisions of the Eighth, Seventh and First Circuits will embolden labor unions to push for compulsory exclusive representation schemes for other private sector workers. *See D'Agostino*, 812 F.3d at 242-43; *Hill*,

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[10] Petitioner observes that as of December, 2018: "[F]ifteen states have authorized mandatory representation for Medicaid providers, eighteen states for home-based daycare businesses and other childcare providers, and three states for individuals who operate foster homes for persons with disabilities." Pet. for Cert. at 21.

850 F.3d at 864 (concluding that "[n]egotiating with one majority-elected exclusive bargaining representative seems a rational means of serving [asserted state] interests."). For example, pharmacists and other healthcare professionals receiving public funding through Medicaid and Medicare have an interest in lobbying for greater payouts for services provided to third parties. They might just as well seek to organize and to obtain legislation compelling unionization, so as to force all participants in that industry to uniformly advocate for those special interests.

By that same token any business contracting with the government to perform public services could do the same. Viewed as a collective, engineering consultants, certified public accountant firms, landscaping and gardening companies, and maintenance contractors would all stand to benefit from forcing others, in their respective industries, into a cartel for the purpose of lobbying for more generous government contracts. This is true even though union advocacy may subvert minority interests within an exclusive representation group. For example, a public employee union representing private landscapers might lobby for greater public spending on landscaping services in more urban areas, to the disadvantage of landscaping companies in smaller communities.

If the dissenter's freedom of association claims are to be dismissed under rational basis review, states might enact legislation compelling essentially any profession, accepting state benefits, to organize collectively to the disadvantage of minority interests—even though the state exercises little or

no control over their work. A state might enact legislation compelling independent farmers to associate with a union if the state confers subsidies on farmers.[11] The state might just as well impose a compulsory exclusive representation regime on attorneys if state law provides for the appointment of counsel for indigent criminal defendants with payment from the state. Likewise, the state might compel exclusive representation for dentists—or even landlords—accepting state funds.

If states are permitted to dub private workers as "public employees" for the purpose of compelling association with a public employee union they might just as well target grocers accepting food-stamps. For that matter, states might seek to impose compulsory exclusive representation on private operators within any industry deemed to serve the public—as the City of Seattle demonstrated recently with enactment of an ordinance seeking to unionize Uber drivers. The Ninth Circuit held that Seattle's ordinance was not exempt from federal antitrust law, which prohibits municipalities from conferring a monopoly on private actors without explicit authorization and oversight from the state. *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 787 (9th Cir. 2018); *see also F.T.C. v.*

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[11] Under the Eighth Circuit's decision, dissenting farmers would have no First Amendment right against this forced association—and against the derivative speech that it necessarily compels. Yet, even though forced into a collective group, the interests of farmers may diverge widely. For example, strawberry growers may find that their interests are subverted by an exclusive representation group dominated by soybean and corn farmers. Likewise, farms producing organic products may be at odds with positions advocated by a farmer's union dominated by more conventional farming entities.

Phoebe Putney Health Sys., Inc., 568 U.S. 216, 227 (2013). But that litigation is still ongoing. And, in any event, the Ninth Circuit left open the possibility that Washington, Oregon or California might authorize unionization of independent contractor drivers for the purpose of collectivizing and enabling their concerted lobbying of state and local officials.[12]

And there is no reason to suppose that states would stop with imposing compulsory exclusive representation on ride-share drivers. They might just as well seek to compel unionization of hair stylists, cleaning services professionals, or any other independent contractor for the purpose of lobbying the government. There is simply no limiting principle.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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[12] "The Court went on to reject NFIB's argument that the NLRA preempts state and local regulation conferring collective bargaining rights on independent contractors. This portion of the decision may invite state legislatures to follow Seattle's model—while potentially avoiding the antitrust problems presented in this case." Federal Court Rules that Seattle's "Uber Ordinance" Violates Federal Antitrust Law, NFIB (May 22, 2018), *available* online at https://www.nfib.com/content/legal-blog/economy/federal-court-rules-that-seattles-uber-ordinance-violates-federal-antitrust-law/ (last visited Jan. 14, 2019).

Respectfully submitted,

Karen R. Harned
Luke A. Wake*
Counsel of Record
NFIB Small Business Legal Center
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061 (Telephone)
(615) 916-5104 (Facsimile)
luke.wake@nfib.org

Manuel Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 West Fifth Street, Suite 800
Lose Angeles, California 90071
(213) 617-0414

Patrick J. Wright
MACKINAC CENTER FOR PUBLIC POLICY
(989) 430-3912
140 West Main Street, P.O. Box 568
Midland, Michigan 48640
(989) 631-0900