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.

TIM WALZ, 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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

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 who states can compel to accept an exclusive representative for dealing with the state. Neither disputes that states could appoint mandatory representatives to speak for individuals in any profession if only a rational basis is required. *See* Pet. 17-24.

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 citizen in his or her relations with the state. The First Amendment severely curtails state power to compel association for speech and petitioning the government.

This limit on state power is being disregarded. Individual homecare providers, many of whom are parents caring for their children, are being forced to accept exclusive representatives for petitioning states over their Medicaid programs. Pet. 20-22. Individuals who operate home-based daycare businesses are suffering a similar fate. *Id*. Several circuit courts, based on a misinterpretation of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), have declared the First Amendment to be no barrier whatsoever to states designating exclusive representatives to speak and contract for these individuals. Pet. 13-14.

There is an urgent need for the Court to establish that exclusive representation is subject to 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, 309 (2012) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Irrespective of whether an employment relationship constitutes such a rare circumstance, no compelling state interest justifies forcing individual providers to accept a compulsory representative. Any state interest in workplace "labor peace" does not reach that far. *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 648. The same rationales require cabining compulsory union representation to full-fledged state employees. It inflicts "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).

B. The Lower Court's Opinions Are Predicated on a Misunderstanding of *Knight*.

SEIU acknowledges (at 11) that the appellate courts that have concluded states need not satisfy First Amendment scrutiny to designate exclusive repre-

sentatives for Medicaid or daycare 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 error.

The lower courts' interpretation of *Knight* is untenable for reasons detailed in the Petition (at 13-17) and by *Amicus Curiae* Buckeye Institute. 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 participate* in their public employer's making of policy." *Id.* at 292 (emphasis added). SEIU admits (at 15) 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 rational basis, and without satisfying constitutional scrutiny. Yet that is how broadly several circuit courts now interpret *Knight*.

The Court should not wait for another case to correct this misapprehension of *Knight*. As SEIU acknowledges (at 10-11), the circuit courts have now ruled on all five of the cases that challenge the constitutionality of extending exclusive representation to Medicaid or daycare providers. There are no undecided cases in the lower courts on this issue. 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.

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 providers' exclusive representative, and nor could they. SEIU's function as an exclusive representative is to petition state policymakers over several Medicaid policies. *See* Pet. 16-19.

Respondents do, however, argue that 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 homecare worker necessarily *agrees* with the union's speech." (Emphasis added). That Petitioners and other 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 Petitioners and other 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 20-21) that exclusive representation is based on majority rule.[1] The First Amendment exists to protect individual speech and associational rights *from* majority rule. As the Court stated in *West Virginia State Board v. Barnette*:

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[1] SEIU's assertion is audacious given only 13% of providers voted for SEIU representation. Pet.App. 57a. In general, the vast majority of 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) (available at http://thf-reports.s3.amazonaws.com/2016/BG3126.pdf) (finding that only 6% of unionized private sector employees voted for their exclusive representative).

> 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 *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 Minnesota to subject to majority rule each provider's individual right to choose which advocacy group represents his or her interests before the State.

2. Turning to Respondents' inapposite arguments, both assert providers need not join or subsidize SEIU. 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 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)). 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 providers "remain free to communicate with the government, to criticize the union, and to associate with whomever they please." State Br. 17. 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. 705. 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). Yet the Court held each instance of compelled speech or association unconstitutional.

3. Finally, Respondents 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. 9-11; Minn. Stat. 179A.03, subd. 8. 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).[2]

SEIU supports this point by recognizing (at 22) that it 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

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[2] That distinguishes *Rumsfeld v. Forum for Academic & Institutional Rights*, which found that requiring 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.

to act in behalf of" providers is why those providers are associated with SEIU and its expressive actions.

SEIU's notion (at 21) that it "does not act as the personal agent of any individual provider 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 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 Second Question Is Before the Court.

The State and SEIU stand little chance of prevailing on the second question. So they seek to avoid it by arguing it is not before the Court because the lower courts, having found no First Amendment infringement, did not address whether a compelling state interest justifies exclusive representation of individual providers. SEIU Br. 23; State Br. 18.

The Court's "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation

marks omitted) (emphasis added). "[T]his rule operates (as it is phrased) in the disjunctive." *Id*. It permits review where an issue was argued below, but not directly ruled upon, and vice versa.

Petitioners certainly "pressed" the second question in the courts below.[3] Those courts also "passed upon" it by (1) rejecting the claim that "exclusive representation is subject to First Amendment scrutiny," and (2) finding "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." Pet. (i); *see* Pet.App.2a, 25a The second question is before the Court under either prong of the Court's rule.

The State's citation to *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) is inapposite because the Court "reverse[d] on a threshold question," namely jurisdiction, and the merits were not reached below. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) involved the threshold issue of standing. Here, by contrast, the lower courts reached the merits of the case.

SEIU claims (at 23) that it wants to submit evidence in support of a compelling state interest. SEIU can do so if the Court finds that Minnesota's Representation Act can survive First Amendment scrutiny as a matter of law. That is unlikely, however, given that the

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[3] *See* Petitioners' C.A. Br. 30-39 (filed April 7, 2017); Pls.' Resp. to Defs.' Mot. For J. on the Pleadings, D.Ct. ECF No. 101 at 23-35 (filed July 20, 2017).

Court already held in *Harris* that a state's interest in labor peace, which ostensibly justifies exclusive representation of public employees, has little force applied to homecare providers. 573 U.S. at 626; *see* Pet. 24-26.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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