No. 16-753

IN THE

Supreme Court of the United States

MARY JARVIS, SHEREE D'AGOSTINO, CHARLESE DAVIS, MICHELE DENNIS, KATHERINE HUNTER, VALERIE MORRIS, OSSIE REESE, LINDA SIMON, MARA SLOAN, LEAH STEVES-WHITNEY,

Petitioners,

v.

ANDREW CUOMO, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF NEW YORK, SHEILA J. POOLE, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK OFFICE OF CHILDREN AND FAMILY SERVICES, CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000 AFSCME, AFL-CIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF STATE RESPONDENTS

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QUESTION PRESENTED[1]

Whether Article 19-C of New York's Labor Law, which allows day-care providers to elect to be represented by a union in dealing with the State, violates the First Amendment rights of providers who are not union members when union membership is optional, non-members are not required to support the union financially, and non-members remain free to deal with the State separately, either as individuals or through an organization of their own choosing.

[1] This question responds to the first of petitioners' two questions presented. (*See* Petition for Certiorari (Pet.) at i.) Petitioners' second question does not relate to a claim against the State, and we therefore do not address it here.

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STATEMENT OF THE CASE

A. Introduction

Petitioners, home day care providers in upstate New York, brought this First Amendment challenge to Article 19-C of the New York Labor Law, N.Y. Lab. Law §§ 695-a through 695-g (McKinney 2015). Enacted in 2010, Article 19-C was based on Executive Order No. 12, issued by Governor Eliot Spitzer in 2007.[2] Like the executive order it superseded, Article 19-C permits day-care providers to organize and join a union. The statute does not require petitioners to approve, join, or fund a union, or to endorse the union's message, and they remain free to meet and correspond with any state agency regarding any relevant matter. Nevertheless, petitioners argue that their inclusion in a bargaining unit represented by the union selected by a majority of the unit's members—without more—unconstitutionally burdens their First Amendment rights.

Both the district court and the Second Circuit rejected this argument. The Second Circuit concluded that it was foreclosed by this Court's decision in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), in which the Court held that a state law requiring public employers to meet and confer with bargaining unit members only through the unit's exclusive representative did not violate the First Amendment rights of employees who were not union members. The Second Circuit also

[2] Although revoked by Governor Andrew Cuomo after the passage of Article 19-C, the text of Executive Order No. 12 may be found at N.Y. Comp. Codes R. & Regs. (N.Y.C.R.R.) tit. 9, § 6.12.

explained that this Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), did not address the validity of exclusive representation, but concerned only whether individuals who were not full-fledged state employees or union members could be compelled to pay fair share fees to their bargaining unit's exclusive representative. Finally, the Second Circuit observed that the only other court of appeals to consider a First Amendment challenge to a statute similar to article 19-C rejected it for those reasons. *See D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (former Justice Souter, sitting by designation).

Contrary to petitioners' argument, the Second Circuit's decision does not conflict with any decision of this Court or of another circuit. Indeed, no federal court has ever endorsed petitioners' First Amendment argument, and this Court should decline petitioners' invitation to be the first. Further, because article 19-C does not restrict petitioners' First Amendment rights, this case is a poor vehicle to consider the validity of exclusive representation as applied to persons who are not full-fledged state employees. The petition for certiorari should therefore be denied.

B. Home-Based Day Care in New York

To protect the health and welfare of children, the State of New York closely regulates the day care industry, including home-based day-care businesses. *See* N.Y. Soc. Serv. Law §§ 390 through 390-g, 391 McKinney 2010 & Supp. 2016); N.Y.C.R.R. tit. 18, part 417. Operating a "family day care home," which may serve up to eight children, requires registration with the Office of Children and Family Services (OCFS) and compliance with State

regulations. *See* N.Y. Soc. Serv. Law §§ 390(1)(e), 390(2)(b). (*See* CA2 J.A. 12.)[3] Operating a "group family day care home," which may serve as many as 16 children, requires a license from OCFS; providers must operate in accordance with the terms of the license and applicable regulations. *See* N.Y. Soc. Serv. Law §§ 390(1)(d), 390(2)(a). (*See* CA2 J.A. 12.)

New York also subsidizes the child-care expenses of qualified low-income families through various programs, principally the State Child Care Block Grant program. *See* N.Y.C.R.R. tit. 18, part 415. The Block Grant program is administered by OCFS and county social service districts. (Petitioners' Appendix (Pet. App.) 22a.)

Families enrolled in day-care assistance programs can choose among eligible providers. *See* N.Y.C.R.R. tit. 18, § 415.4(c). OCFS sets market rates for the compensation of providers. *See id.* § 415.9(j). OCFS also regulates the providers offering services to families that receive subsidies, and sets minimum standards of quality for licensed and registered day-care homes, programs, and facilities. *See* N.Y. Soc. Serv. Law § 390(2-a)(a); N.Y.C.R.R. tit. 18, parts 416, 417.

C. The Legislation at Issue

New York first recognized the right of day-care providers to unionize in May 2007 by Executive Order No. 12 of Governor Eliot Spitzer, N.Y.C.R.R. tit. 9, § 6.12,

[3] Material from the record in the lower courts is cited by page of the Joint Appendix from petitioners' appeal to the Second Circuit, No. 16-441, ECF No. 31 (CA2 J.A.).

which Governor David A. Paterson continued in effect. In 2010, the State enacted article 19-C of the Labor Law, which largely codified the executive order's provisions.

In Executive Order No. 12, Governor Spitzer recognized that "child care providers perform an essential service for working parents and guardians in this state," but observed that "long hours, limited benefits and low pay for child care providers can drive them from the market, thereby limiting the availability of quality care." *Id.* The Governor believed that giving child-care providers "the option to organize themselves and select representatives" would help "improve the environment in which they work, and the benefits and funding that they receive," which in turn would make quality child care more available. *Id.*

Executive Order No. 12 divided day-care providers into four bargaining or representation units, one of which included "all registered or licensed child care providers outside New York City." *Id.* ¶2(c). (*See* Pet. App. 22a-23a.) That unit encompassed petitioners. (*See* Pet. App. 24a.) The executive order stipulated that the State would recognize a representative "designated by a majority of the providers in the unit." N.Y.C.R.R. tit. 9, § 6.12, ¶3. A representative could demonstrate majority designation by submitting to the New York State Public Employment Relations Board authorization cards, signed within the past 12 months, from more than 50% of the providers in the bargaining unit. *Id.* ¶4. If the Board, after reviewing the cards, confirmed that more than 50% of the providers had authorized the union, it would "certify the party making the application as the designated representative of that unit." *Id.*

Any party could challenge a representative's status by submitting to the Board information indicating that a majority of the unit wished to be represented by a different representative, or did not wish to be represented at all. *Id.* ¶6.

OCFS was to meet with the designated representative "for the purpose of entering into a written agreement to the extent feasible." *Id.* ¶7. If an agreement were reached and implemented, it would bind the State. *Id.* ¶8.

Executive Order No. 12 clarified that it did not render any child-care provider a state officer or public employee, interfere with the existing relationship between consumers and child-care providers, or permit child-care providers to strike. *Id.* ¶¶11(a), (b), (d). The Executive Order further stated that it did not "interfere with any ability that child care providers, or any organization that represents such providers, may otherwise have to meet or correspond with, or otherwise appear before, state agencies in regard to any matter of relevance, including any matter under discussion or set forth in any agreement between the agency and a unit representative." *Id.* ¶11(e).

The State codified Executive Order No. 12 by adopting Article 19-C of the Labor Law (sections 695-a through 695-g), which became effective on October 1, 2010. *See* 2010 N.Y. Laws 1414. In its statement of public policy, the Legislature found that allowing child-care providers to secure union representation would serve the State's interest in "maintain[ing] a child care delivery system that fosters quality child care options and compensation, and benefits and working conditions for child care providers." N.Y. Lab. Law § 695-a. The statute divided

child-care providers into the same four bargaining units as did the executive order. *Id.* § 695-c. It also set forth the same procedures for obtaining union recognition and challenging such recognition—either of which, to be successful, required the endorsement of a majority of the providers in the bargaining unit. *Id.* §§ 695-d(1), 695-e.

Like the executive order that preceded it, Article 19-C authorized the State to contract with the child-care providers' representative (*id.* § 695-f), clarified that the providers are not State employees (*id.* § 695-g(2)), and did not interfere with the "ability of child care providers or child care provider representatives to meet or correspond with any state agency with regard to any matter of relevance" (*id.* § 695-g(5)).

D. CSEA is Recognized and Negotiates with the State

In July 2007, the State certified the respondent Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) as the representative of all registered or licensed day-care providers outside New York City, based on CSEA's submission of signed authorization cards from a majority of providers in the bargaining unit. (Pet. App. 24a.)

The State and CSEA negotiated and executed a contract effective October 1, 2009 through September 30, 2013. (Pet. App. 24a; *see* CA2 J.A. 15, 23-42.) Among other things, the contract adopted "guiding principles" under which child-care providers would be treated as "professional[s] with courtesy, dignity, consideration and respect" (CA2 J.A. 29, 40-41); established rights for day-care providers whose homes were inspected by

OCFS (CA2 J.A. 30); directed changes to the OCFS website that would protect child-care providers' privacy (CA2 J.A.31); instituted dispute resolution processes (CA2 J.A. 31-35); authorized a joint review of OCFS's method for determining market rates (CA2 J.A. 35); provided that OCFS would allocate $7,470,000 for quality grants that would help providers "increase the quality of the environment in which they provide their services" (CA2 J.A. 35-36); provided $500,000 for professional development grants (CA2 J.A. 36); and arranged for CSEA's purchase of health insurance coverage for day-care providers, funded in part by contributions from the State exceeding $14,000,000 (CA2 J.A. 37-38).

Like Executive Order No. 12 and Article 19-C, the State's contract with CSEA preserved the right of child-care providers, "or any other organization that represents such providers," to "meet or correspond with, or otherwise appear before, OCFS or other state agencies in regard to any matter of relevance," including matters dealt with in the contract. (CA2 J.A. 28.)

E. This Court Restricts Agency Fees and Respondents Comply

The 2009 contract between the State and CSEA contemplated the deduction from day-care subsidies, and transfer to CSEA, of a "fair share" payment for child-care providers who did not choose to join the union. (Pet. App. 24a.) Also known as "agency fees," fair-share payments were not union membership dues, but instead were paid by nonmembers who benefited from the union's efforts on behalf of the bargaining unit. For about 40 years, agency fees had been deemed constitutionally permissible for

public-sector employees so long as they were (a) authorized by State law; (b) used to finance collective bargaining, contract administration, or grievance adjustment; and (c) used to fund political expression only with the payer's consent. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 224-26, 235-36 (1977).

In 2014, this Court ruled in *Harris* that *Abood*'s holding concerning agency fees did not extend to service providers who were funded and regulated by the State, but were not full-fledged State employees. Accordingly, the Court struck down the assessment of agency fees from unionized home-care workers in Illinois. In compliance with *Harris,* CSEA and the State agreed to end agency-fee deductions, the State ceased such deductions, and CSEA refunded, with interest, all agency fees received post-*Harris.* (Pet. App. 10a-11a; *see* CA2 J.A. 106, 123.)

F. Proceedings Below

Petitioners operate home-based day-care businesses in upstate New York. (Pet. App. 3a, 21a.) In late 2014, following *Harris,* petitioners sued the State defendants and CSEA. (CA2 J.A. 10-22.) Among other things,[4] petitioners contended that allowing their bargaining unit to be represented by CSEA violated their associational rights under the First Amendment both facially and as applied to petitioners. (CA2 J.A. 19.)

The district court dismissed all of petitioners' claims. (Pet. App. 8a-20a, 21a-35a.) With respect to the freedom of association claim, the district court reasoned that, under

[4] Petitioners also challenged the deduction of agency fees.

this Court's decision in *Knight*, "exclusive representation by a union does not violate non-union members' First Amendment rights." (Pet. App. 26a.) Notwithstanding CSEA's recognition by the State, petitioners remained "entitled to associate with whomever they choose and can express whatever views they choose." (Pet. App. 31a.) Nor could a burden on petitioners' associational rights be derived from CSEA's duty of fair representation, which imposes no obligations on non-members but instead benefits them. (Pet. App. 31a-32a.) And representation of the bargaining unit by CSEA "would not be likely to create the perception that [petitioners] endorse CSEA's expressive activities" because a reasonable person would not equate the views of a majority-elected representative with those of every day-care provider it represents. (Pet. App. 33a.)

The court of appeals unanimously affirmed the district court's ruling in a summary order. (Pet. App. 1a-7a.) The court of appeals held that this Court's decision in *Knight* foreclosed petitioners' First Amendment claim. (Pet. App. 4a.) As in *Knight*, the court of appeals explained, petitioners were not required to become members of the union and, in fact, were not members of CSEA. (Pet. App. 4a.) Accordingly, petitioners could not "demonstrate a constitutionally impermissible burden on their right to free association." (Pet. App. 4a.)

The court of appeals rejected petitioners' argument that *Harris* required a different result, reasoning that the *Harris* Court had not considered the constitutionally of exclusive representation; instead, *Harris* "addressed only the narrow question of whether individuals who were neither full-fledged state employees nor union members

could be required to pay fair share fees to their bargaining unit's exclusive representative." (Pet. App. 4a-5a.) The court cited the First Circuit's decision in *D'Agostino*, in which former Justice Souter, writing for the panel, explained that *Harris* did not limit the application of *Knight* because the issues before the Court in the two cases were different. (App. 5a.)

REASONS FOR DENYING THE PETITION

The court of appeals' decision does not create or deepen any conflict meriting this Court's review. Additionally, this case is a poor vehicle to consider the First Amendment implications of exclusive representation: Article 19-C does not require petitioners to approve, join, or fund a union or to endorse the union's message; nor does it limit their freedom to meet and correspond with any state agency regarding any relevant matter.

I. The Second Circuit's Decision Does Not Conflict with Decisions of This Court or of Any Circuit.

Petitioners mistakenly argue that certiorari is warranted because the Second Circuit's decision here conflicts with decisions of this Court and of another circuit. The conflicts that petitioners posit are illusory. The Second Circuit's decision accords with *Knight*, in which this Court held that the election of an exclusive bargaining representative did not violate the First Amendment rights of dissenting workers.

A. The Second Circuit's Decision Follows from This Court's Decision in *Knight*

Plaintiffs urge that CSEA's status as the day-care providers' exclusive representative impermissibly "impinges on [their] associational rights." (Pet. 19.) As both courts below recognized, *Knight* forecloses such a claim. (*See* Pet. App. 4a, 26a-29a.)

In *Knight,* the State of Minnesota permitted public employees to bargain collectively over the "terms and conditions of employment," and also required public employers "to engage in official exchanges of views with their professional employees on policy questions relating to employment but outside the scope of mandatory bargaining." *Knight,* 465 U.S. at 273. The negotiations and conferences were conducted by the association that the bargaining unit had chosen as its exclusive representative. *Id.* at 275-76

The plaintiffs in *Knight*, community college instructors, were not members of the association. *Id.* at 273. They challenged the constitutionality of the association's exclusive representation of community college faculty in both collective bargaining and in the conferences to exchange views on nonmandatory subjects. *Id.* at 278.

This Court held that the State's recognition of the association as the instructors' exclusive representative did not violate nonmembers' rights. The Court made clear that Minnesota could "bas[e] policy decisions on consideration of the majority view of its employees" and, to that end, "give only the exclusive representative a particular formal setting in which to offer advice on policy." *Id.* at 292.

That structure, the Court held, did not abridge the instructors' First Amendment rights. This Court observed that "[n]ot every instructor in the bargaining unit is a member" of the association, and "not every instructor agrees with the official faculty view on every policy question." *Id.* at 276. It further observed that "[t]he state has in no way restrained [the plaintiffs'] 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 same is true here. While CSEA can advance its "official" view as the day-care providers' recognized representative, nonmembers and dissenting members remain free to "meet or correspond with any state agency with regard to any matter of relevance." N.Y. Lab. Law § 695-g. The State's contracts with CSEA contain a similar guarantee. (CA2 J.A. 28, 123.)

Indeed, the First Amendment interest here is much weaker than the claim this Court rejected in *Knight.* The Minnesota State Board recognized an "exclusive representative" for the faculty *and* provided that the Board would "exchange views on nonmandatory subjects *only* with the exclusive representative." *Knight,* 465 U.S. at 273 (emphasis added). Despite that restriction on communication, this Court concluded that the plaintiffs' "speech and associational rights . . . have not been infringed by Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative." *Id.* at 288.

Here, in contrast, the State has *not* sought to restrict its communications with nonmembers who disagree with

the union. Petitioners' associational objection fails because New York's statute is more protective of associational freedom than the Minnesota regime upheld in *Knight*.

B. The Second Circuit's Decision is Consistent with *Knox* and *Harris*

Nor is there any conflict, as petitioners contend (Pet. 15-16), between the decision in this case and this Court's decisions in *Knox v. Service Employees Int'l Union, Local 1000,* __ U.S. __, 132 S. Ct. 2277 (2012) and *Harris*.

Knox was a dispute over the administration of agency fees. Under *Abood* and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), a public-sector union could bill nonmembers for expenses related to collective bargaining, but could not require nonmembers to fund its political and ideological projects. Before agency fees could be exacted, *Hudson* required (among other things) a notice providing potential objectors with "sufficient information to gauge the propriety of the union's fee." *Chicago Teachers Union*, 475 U.S. at 306-07. In *Knox*, when a union imposed a special fee to fund political and ideological activities, this Court held that a new, opt-in notice was required. *Knox,* 132 S. Ct. at 2293, 2296. The Court based its holding on the "general rule" that "individuals should not be *compelled to subsidize* private groups or private speech." *Id. at* 2295 (emphasis added).

The Court's constitutional scrutiny in *Knox* thus zeroed in on "compulsory [agency] fees," which it found "constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights'" and consequently are "subject to exacting First

Amendment scrutiny." *Id.* at 2289 (citation omitted). The Court held that the "procedure for exacting fees from unwilling contributors" must be "'carefully tailored to minimize the infringement'" of free speech rights. *Id.* at 2291 (citation omitted).

CSEA and the State ended their agency fee arrangement in 2015, and CSEA repaid nonmembers' agency fees retroactive to July 1, 2014. (Pet. App. 10a-11a; *see* CA2 J.A. 105-106, 123.) Therefore, *Knox* no longer applies here. Nowhere did the *Knox* Court suggest that, by acting on behalf of its bargaining unit, the union impermissibly compelled non-members to be associated with it. If that proposition were correct, the issues resolved in *Knox* would have been superfluous because the entire structure under which the bargaining unit elected a union as its exclusive representative would have been invalidated.

Harris similarly concerned whether non-members could be required to "subsidize" union activities through the assessment of mandatory agency fees. *See Harris*, 134 S. Ct. at 2623, 2625, 2644. *Harris* did not call into question the rule that members of a bargaining unit may elect a union as their exclusive bargaining representative: the Court carefully noted that plaintiffs did not "challenge the authority of the [union] to serve as the exclusive representative of all the personal assistants in bargaining with the State." *Id.* at 2640. While striking down mandatory agency fees, the *Harris* Court made clear that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* And the Court noted with approval a federal law under which "employees . . . 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." *Id.*; *see* 5 U.S.C.A. § 7102 (West 2007). *Harris* did not even mention *Knight*, let alone overturn it.

Consequently, both the court of appeals and the district court correctly ruled that *Knight* continues to control this case (App. 4a, 26a-29a) and that *Harris* does not change the result (App. 4a-5a, 29a-30a).

C. There is No Conflict Among the Circuits

There exists no conflict among the circuits over whether exclusive representation by a union violates non-members' associational rights—all federal courts to decide the issue have concluded that it does not.

As petitioners acknowledge (Pet. 7), the First Circuit recently rejected a similar challenge brought against a Massachusetts statute that enabled home-based day-care providers to unionize. *See D'Agostino v. Baker,* 812 F.3d 240 (1st Cir. 2016) (former Justice Souter, sitting by designation). Relying on *Knight*, the First Circuit ruled that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *Id.* at 244. All other federal courts to decide this question have reached the same conclusion. *See Bierman v. Dayton,* __ F. Supp.3d __, 2017 WL 29661, *5-7 (D. Minn. Jan. 3, 2017); *Hill v. Service Employees Int'l Union*, No. 15 CV 10175, 2016 WL 2755472, *2-3 (N.D. Ill. May 12, 2016), *appeal pending*, No. 16-2327 (7th Cir.); *Mentele v. Inslee*,

No. C15-5134, 2016 WL 3017713, *2-4 (W.D. Wash. May 26, 2016), *appeal pending*, No. 16-35939 (9th Cir.).

The sole decision cited by petitioners to establish a circuit split, *Mulhall v. UNITE HERE Local 355,* 618 F.3d 1279 (11th Cir. 2010) (*see* Pet. 23-24), does not contradict those holdings. In *Mulhall*, a non-union employee alleged that a union had entered into "an illegal and collusive arrangement" with management to obtain assistance in organizing the workforce. *Id.* at 1283-85; *see* 29 U.S.C.A. § 186(a)-(b) (West 1998). At issue was whether Mulhall had standing to sue to enjoin the collusive arrangement. *Id.* at 1284, 1286.

The Eleventh Circuit acknowledged that "compulsory affiliation" with a union "does not, without more, violate the First Amendment rights" of employees. *Id.* at 1288 (quoting *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 517 (1991)). The court also noted that standing to sue "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 1286 (quoting *Warth v. Seldin,* 422 U.S. 490, 500 (1975)). Thus, while the Eleventh Circuit found that Mulhall had alleged a "legally cognizable associational interest" sufficient for "admission to federal court" to challenge the union's collusion with management, the court did "not purport to assess the strength of Mulhall's interest." *Id.* at 1288. Petitioners' suggestion that *Mulhall* held that "exclusive representation infringes on associational rights" (Pet. 24) is mistaken because it ignores that decision's limited scope. There is no conflict here that would support a grant of certiorari.

II. This Case is a Poor Vehicle for Considering the First Amendment Implications of Exclusive Representation

Depicting a parade of horribles that ends with the State forcing "grandparents who watch their grandchildren in their own homes" to become "politically collectivize[d]" (Pet. 13), petitioners argue that their First Amendment rights are violated because New York "is forcing a profession to accept a government-appointed lobbyist" (Pet. 10). This case is a poor vehicle for considering petitioners' arguments, because Article 19-C of the Labor Law does no such thing.

First, Article 19-C does not "force" day-care providers to unionize. If a majority of the providers in a particular bargaining unit decline to vote for union representation, then no union will be recognized. *See* N.Y. Lab. Law § 695-d(1). Indeed, the Labor Law provides a procedure for challenging the vote and determining whether "a majority of the unit decides [to have] no representation." N.Y. Lab. Law § 695-e. Petitioners did not attempt such a challenge.

Second, the union is not "government-appointed" to be the day-care providers' representative; under Article 19-C, it is elected by the day-care providers themselves. A union may become the day-care providers' exclusive representative only if a majority of the providers in the bargaining unit vote to be represented by that union. N.Y. Lab. Law § 695-d(1). Recognizing and negotiating with an organization that the providers have elected as their representative is quite different from appointing an organization to represent the providers.

Third, the record does not reflect that CSEA has acted as a "lobbyist." Rather, the contracts negotiated between CSEA and the State have focused on practical, quotidian details of the workplace: staffing ratios (CA2 J.A. 29-30, 125-126); health insurance (CA2 J.A. 37-38, 133); workplace inspections (CA2 J.A. 30, 126-127); dispute resolution (CA2 J.A. 31-35, 127-131); time, attendance, billing, and payments (CA2 J.A. 35, 131-132). Petitioners' complaint did not identify any action or position taken by CSEA with which petitioners disagreed or to which they objected.

Finally, Article 19-C does not force anyone to join a union or to pay dues or agency fees. Contrary to petitioners' argument that the government has asserted a "monopoly" on expression (Pet. 13-14), providers remain free to oppose the union's message. Indeed, Article 19-C expressly preserves petitioners' freedom to "meet or correspond with any state agency with regard to any matter of relevance," either independently or through other "provider representatives" of their own choosing. *See* N.Y. Lab. Law § 695-g(5). The collective bargaining agreements between CSEA and the State also preserve this freedom, even as to matters within the agreements' scope. (CA2 J.A. 28, 123.)

That arrangement is not truly "exclusive representation," at least as the term has traditionally been understood. Day care in New York is an open shop. The mandatory aspect of Article 19-C is simply that, if more than 50% of the bargaining unit votes for a union, then the State must recognize that union and meet with it. *See* N.Y. Lab. Law §§ 695-d, 695-f. The statute does not foreclose other viewpoints, meetings, messages, or

representatives. Because New York's statute does not present the First Amendment issues that petitioners seek to litigate,[5] the Court should not grant certiorari.[6]

[5] This case also presents a poor vehicle for considering the arguments advanced in the amicus curiae briefs filed by the Cato Institute and the Pacific Legal Foundation. The Cato Institute argues that "labor peace" does not present a sufficient justification for exclusive representation in the public sector, but Article 19-C and Executive Order No. 12 relied upon different considerations, most notably the need for quality day care and the benefits of unionization for day-care providers. Similarly, the Pacific Legal Foundation and its co-amici challenge the traditional concept of exclusive representation rather than the idiosyncratic version adopted in Article 19-C.

[6] OCFS informs us that the First Amendment claims are likely moot for petitioners Sheree D'Agostino, whose license became inactive at her request effective June 15, 2016, and Linda Simon, who closed her day-care business voluntarily on December 19, 2015. We are further informed that petitioners D'Agostino and Katherine Hunter were members of CSEA at the time the lawsuit was filed, which would bring into question their standing to sue over allegations of forced association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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