No. 16-1480

In the

Supreme Court of the United States

REBECCA HILL, *et al.*

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler Sch. of Law at Chapman Univ.
One University Drive
Orange, California 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae Center for Constitutional Jurisprudence

QUESTION PRESENTED

May the State force individuals, who are not employees of the State, into a "bargaining unit" and designate a private association as "exclusive bargaining representative" with privileged status to lobby legislative and executive officials on state budgetary issues, purportedly on behalf of the care workers forced into the bargaining unit?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for freedom of speech and association enshrined in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of concerning the constitutionality of compelled speech and association, including *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016); *Harris v. Quinn*, 134 S.Ct. 2618 (2014); and *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012.

SUMMARY OF ARGUMENT

The purpose of many provisions of the First Amendment is to preserve our Nation's commitment to self-government. *Knox*, 567 U.S. at 308. Protec-

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[1] Pursuant to this Court's Rule 37.2, petitioners and state respondents have filed blanket consents to amici with the Clerk of the Court. Counsel for union respondents has consented to the filing of this brief and a copy of that consent has been lodged with the Clerk. All parties were given notice of this brief more than 10 days prior to filing.

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.

tions for Free Speech, Assembly, and Petition all argue against the constitutionality of an arrangement designating a private association as "exclusive representative" of a segment of the citizenry with privileged status to lobby elected legislative and executive officials, purportedly on behalf of the citizens forced into the bargaining unit. Although cast in terms of "collective bargaining," the citizens forced into these associations are not true employees of the State. *Harris*, 134 S. Ct. at 2638. There is no "bargaining." There is only naked political lobbying for more of the State's limited resources. Designation of the union as "exclusive representative" grants it a privileged status for lobbying legislative and executive officials not enjoyed by other members of the voting public. Under state law, the State of Illinois is required to "bargain in good faith" with the union over the provisions of the state budget and state law.

This lobbying activity involves the quintessential political task of allocating scarce government resources. Under a system of republican self-governance, there is no basis for designating a private organization as "exclusive representative" over some portion of the citizenry on a matter of interest to all citizens of the State.

ARGUMENT

I. The First Amendment protects against compelled political association.

The "bargaining unit" law at issue in this case forces home-based personal care and daycare providers into an "exclusive bargaining unit" designating the respondent unions as the "exclusive representative" for the unit. The providers are *not* state employees as that term is traditionally understood. *Harris v.*

Quinn, 134 S. Ct. at 2638. Instead, the care workers are hired by the Medicaid recipient and their pay is determined by state statute.

Because those who are forced into the "bargaining units" are not employees, there is no true "collective bargaining." Instead, the exclusive representative merely lobbies legislative and executive officials for changes in State law setting a higher reimbursement rate for personal care assistants and private daycare companies. *See Harris*, 134 S. Ct. at 2642-43. In this, the union is merely one special interest lobbying group among many seeking to have their voices heard on the allocation of the State's scarce resources. *See id*. The law at issue here, however, privileges the voice of already powerful labor unions on this critical issue of state budgets and deficits. *See Knox v. SEIU*, 567 U.S. at 303; *Harris*, 134 S. Ct. at 2643. This law compels the state to "bargain in good faith" with the union over the allocation of the State's financial resources. Petition for Writ of Certiorari, Appendix D at 42a. The law compels the State to meet with this special interest lobbyist (and *only* this special interest lobbyist) to hear and resolve its concerns over the state budget.

This Court has yet to consider the constitutionality of this unusual arrangement.[2] In *Abood v. Detroit*

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[2] One of the questions raised in *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1234 (2015), was whether the law under consideration in that case violated Due Process by granting a "for-profit corporation regulatory authority over its own industry." Justice Thomas phrased the question as the constitutionality of a law that appoints "a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law." *Id*. at 1240 (Thomas, J. concurring in the judgment). The Court

Board of Education, 431 U.S. 209, 224 (1977), the Court brushed aside concerns about the arrangement and ruled that the law there was justified by the State's interest in "labor peace." "Labor peace" means that the State does not have to listen to competing organizations claiming to represent the interest of the personal care workers in Illinois. *See Harris*, 134 S. Ct. at 2631. This Court in *Harris* noted that there were significant problems in importing this "labor peace" rationale into the public employee setting. *Id*. at 2633. That rationale completely disappears, however, when the State compels personal care workers into a "bargaining unit." *Id*. at 2640. As this Court noted in *Harris*, these individuals do not work together in "a common state facility." Instead, they work in the private homes of their actual employers. *Id*.

Instead of "labor peace," Illinois legislative and executive officials merely seek to shield themselves from the voices of citizens who support different budget priorities. This the state may not do. Citizens assembling to make their sometimes raucous and loud, but peaceful, voices heard may not create a tranquil atmosphere for elected representatives. But that assembly, petition, and association are protected by the First Amendment. Citizens, including those compelled into the "bargaining unit," are free to contest the union's public policy choices for the state budget. Far from constituting labor unrest, these activities

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noted that the issue should be left to the consideration of the Court of Appeals on remand. *Id*. at 1234. Similarly, this Court declined to consider a compelled association claim in *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (declining to address claim of freedom form compelled association because that claim was not addressed by the state court below).

"reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 335 (1963).

This Court has long recognized Freedom of Association as a constitutionally protected liberty. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peacefully for consultation in respect to public affairs." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). That right is embedded in the "fundamental principles of liberty and justice" protected by the Fourteenth Amendment. *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937); *Healy v. James*, 408 U.S. 169, 181 (1972).

This Freedom of Association is a fundamental liberty. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963); *NAACP v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). These are rights that need "breathing space" if they are to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963). For that reason, the Court tests even "subtle government interference" to see if it stifles Freedom of Association. *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *Gibson*, 372 U.S. at 544.

The compelled association at issue in this case is more than mere "subtle interference." By compelling private citizens to be part of a "bargaining unit" whose only purpose is to give a union privileged status to lobby executive and legislative officials, Illinois has created a false political dynamic. Petitioners are now compelled to lend their name to a political cause with which they disagree (or may disagree). Further, by designating the union as the "exclusive" lobbying representative for petitioners on matters concerning the

state budget, the state has put its thumb on the scale – favoring some viewpoints over others. This it may not do. *See Moore v. Ogilvie*, 394 U.S. 814, 819 (1969); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

The very nature of our system of self-government protects a right to Freedom of Association. This Court should grant review to determine whether states may compel association for the purpose of political lobbying.

II. Compelling personal care workers into a bargaining unit and granting a powerful union the status of exclusive lobbying representative on quintessentially political issues is contrary to the original understanding of the First Amendment.

Illinois is stifling the rights of care workers. First, the law compels petitioners into an association – the so-called "bargaining unit." Second, the law designates the union as the exclusive agent for the care workers to petition the Illinois government for the redress of grievances as care workers. The petitioners are denied the right to form their own competing association to exercise the right of petition. Yet the text of the First Amendment protects these rights. The very form of our government compels protection of the rights of petition and association. Joseph Story, COMMENTARIES ON THE CONSTITUTION, 3: §§1887-88 (1883) (reprinted in 5 THE FOUNDERS CONSTITUTION 207). *See also* St. George Tucker, BLACKSTONE'S COMMENTARIES, 1:App 299-300 (1803) (reprinted in 5 THE FOUNDERS CONSTITUTION 207); William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, 124 (1829) (reprinted in 5 THE FOUNDERS CONSTITUTION 207).

In his first inaugural address, President Thomas Jefferson stated that his goal was "representative government" — a government responsive to the force of public opinion. Thomas Jefferson, First Inaugural Address (1801) (reprinted in 5 THE FOUNDERS CONSTITUTION 152); Thomas Jefferson Letter to Edward Carrington (1787) (reprinted in 5 THE FOUNDERS CONSTITUTION 122) (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). James Madison also noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison, and the process for the formation of that opinion is important. James Madison, Public Opinion (1791), in 2 The Founders Constitution at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id.* The concern was that "real opinion" would be "counterfeited." *Id.*

Madison's concern for "counterfeited" opinion comes to life in the Illinois law at issue. State law grants the union the presumption that it represents the voices of the personal care workers whom the State has forced into its ranks as it lobbies the Legislature to divert more of the state budget toward the union's preferred policy goals. That law designates the union as the *exclusive* representative of the care workers for purposes of petitioning the Illinois state government for redress of grievances as care workers – and as citizens concerned for the ongoing fiscal viability of the state. By depriving the care workers of

the right to freedom of association, the law strikes at the foundations of self-government

The First Amendment protects our constitutional structure by protecting freedom of conscience and the right to choose one's own political associations. This right lies at the core of Jefferson's and Madison's arguments that have influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting) ("The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.")), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few.

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There, Justice Jackson, writing for the Court, observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Nor should public opinion be counterfeited by compelled political association. Self-government requires that Illinois leave its citizens free to join the political associations of their own choosing.

CONCLUSION

The Court should grant review to resolve the important issue of whether the First Amendment protects against compelled political association.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, California 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae