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 a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

**Brief of the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Mackinac Center as *Amici Curiae* in Support of Petitioners**


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## QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments, compel home-based workers who are neither hired nor supervised by the state to associate with a labor union that advocates and lobbies in their name.

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## INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The National Federation of Independent Business 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 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 right of

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[1] Pursuant to Rule 37.2(a), all parties received at least 10 days' notice of the *amici curiae*'s intent to file, and letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

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. 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 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.

The instant 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.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners are personal assistants who provide in-home care to disabled family members and other disabled persons participating in Illinois's Home Services Program ("HSP") and home-based childcare providers who serve low-income families participating in Illinois's Child Care Assistance Program ("CCAP"). They are required by Illinois law to associate with Respondent SEIU Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU"), which has been designated their exclusive representative to speak and lobby on their behalf, in their names. Under Illinois law, the HSP participant, or "customer," is "the employer of the PA [personal assistant]" and "is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing…disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." 89 Ill. Admin. Code § 676.30(b); *see also* 20 Ill. Comp. Stat. 2405/3(f) (restating customers' rights). The same is true for CCAP customers, who hire, fire, supervise, and even independently pay childcare providers participating in the program. App. 20a–22a (citing relevant statutory provisions).

Nonetheless, while expressly preserving customers' rights to hire, supervise, and terminate these

home-based providers, the Illinois General Assembly designated them to be "public employees" of the State of Illinois "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act," 20 Ill. Comp. Stat. 2405/3(f) (HSP providers) and 305 Ill. Comp. Stat. 5/9A-11(c-5) (CCAP providers), which provides for collective bargaining. *See* 5 Ill. Comp. Stat. 315/3–/28. The state then designated SEIU as the providers' exclusive representative.

In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977), this Court upheld the constitutionality of assessing compulsory dues from public-sector workers to finance the expenditures of a labor union, reasoning that the "important" governmental interest in "labor peace" justified the impingement upon dissenting individuals' associational and expressive freedoms. *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 289 n.11 (1984), subsequently assumed that *Abood* validated government-compelled association with an exclusive representative, while upholding such schemes against claims that they impair workers' ability to speak directly to government.

The Seventh Circuit's decision carries *Abood* and *Knight* far beyond their holdings and logic, absolving Illinois of the burden of demonstrating any particular justification for the abrogation of the rights of workers who are not hired, maintained, or supervised by the state, who do not labor in state facilities, and whom the state does not consider to be its employees for any other purpose, such as benefits or

vicarious liability.[2] Ignoring this Court's admonition that *Abood*'s "clear boundaries" encompass only true "public employees," *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014), the Seventh Circuit supposed that Illinois's "interests in hearing the concerns of providers when deciding what employment terms to offer them, and in having efficient access to this information" "rational[ly]" justified compelling their association with a labor union. App. 8a. In this way, the opinion below provides a roadmap for lawmakers and labor leaders in the post-*Harris* world to circumvent the First Amendment's limitations on compelled association and speech and thereby bolster the ranks, and ultimately the finances, of organized labor.

Indeed, the Illinois law at issue here is at the leading edge of a nationwide movement over the past two decades to organize home-based care workers, including medical assistants and family child-care providers, and thereby to "reinvigorate organized labor." Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev.

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[2] The statute that deemed HSP providers "public employees" also provided, "The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." 20 Ill. Comp. Stat. 2405/3(f); *see also* 305 Ill. Comp. Stat. 5/9A-11(c-5) (same, for CCAP providers).

1390, 1390 (2008). Well over a dozen states have already implemented schemes like Illinois's—in which a state agency is designated as the employer of record for home workers and empowered to recognize a union representative on their behalf—through legislation or (particularly in the family child-care context) executive order. No limiting principle in the decision below prevents the similar misapplication of *Abood*'s rationale to curtail the First Amendment rights of any industry, profession, or direct or indirect recipient of government subsidies or fees, including doctors and nurses participating in state Medicaid programs, attorneys representing the indigent in state courts, foster parents, and employees of businesses receiving state tax credits.

In sum, this case presents a question of great and recurring importance that the Court will inevitably be compelled to address. In light of states' increasing use of sham employment relationships to circumvent First Amendment protections and the ongoing injury to Petitioners and others similarly situated, the Court should act now to protect workers' associational and expressive rights before this phenomenon takes greater root in labor law and practice and becomes more costly and difficult to dislodge.

## ARGUMENT

### I. The Decision Below Permits States To Circumvent Limitations On Forced Association Recognized By This Court

The Seventh Circuit improperly relieved Illinois of the burden of demonstrating a compelling interest justifying its infringement of home-based providers' First Amendment rights by holding that workers who provide a service that is subsidized by government may be forced to associate with a labor union that speaks in their name.

#### A. *Knight* and *Abood* Do Not Exempt Compelled Association with an Exclusive Representative from Exacting Scrutiny

The Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234–35). That freedom 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." *Id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the state's interest on the other." *Boy Scouts*, 530 U.S. at 658–59.

And, consistently, even compelling state interests—eradicating discrimination, assuring equal access to places of public accommodation—have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts*, 530 U.S. at 659.

The Seventh Circuit erred in assuming that *Knight* (and, by extension, *Abood*) overrides the application of exacting scrutiny in these circumstances. App. 8a. To begin with, *Knight* never answered that question, instead considering only whether a law limiting bargaining over "policy questions relating to employment" to an exclusive representative, and thereby excluding employees from such bargaining, "violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative." 465 U.S. at 273. *Knight* found no impairment of associational rights because the employees were not required to become members of the exclusive representative and remained "free to form whatever advocacy groups they like." *Id.* at 289. Without ruling on the point—because it was not raised—*Knight* assumed that *Abood* generally validated compelled association with a labor union. *Id.* at 289 n.11, 291 n.13.

But the Court has since clarified that *Abood* does not extend so far. *Harris* explains that *Abood*'s rationale in sanctioning compelled association with a labor union, whatever the ultimate constitutional

validity of that holding, "is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law." 134 S. Ct. at 2636. It follows, then, that "*Abood* itself has clear boundaries; it applies to public employees" and does not "encompass partial-public employees, quasi-public employees, or simply private employees." *Id.* at 2638. Lest there be any doubt, *Harris* expressly "confine[d] *Abood*'s reach to full-fledged state employees." *Id.*

In the Seventh Circuit's view, however, *Harris*'s logic is limited precisely to the impingement that was before the Court, mandatory-fee provisions, and does not speak to related means of forced association like exclusive-representation requirements. App. 5a–6a. The First Circuit has held the same. *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016).

Regardless of whether *Harris* controls, Illinois cannot satisfy the *Abood* standard. Assuming that standard is applicable, neither of the two interests that *Abood* held may justify workers' forced association with a labor union as a collective-bargaining representative—"labor peace" and avoiding "free riders"—prevail here.

First, Illinois has no interest in maintaining "labor peace" among household workers or family members merely because they provide services to individuals who participate in a state program or because they are subject to state regulation. "Labor peace" is not an empty semantic vessel that the state may fill merely by asserting that it is an employer. Rather,

its contents were set at a time when Congress's Commerce Clause power was considered less robust than today, and the "labor peace" doctrine reflects its roots, referring to the pacification of those types of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the National Labor Relations Act was passed to address "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–43 (1937); *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 233 (1956); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

*Abood* expressly adopted this "familiar doctrine[]" as a justification for compelled speech and association in limited circumstances. 431 U.S. at 220; *id.* at 224 (explaining that a Michigan agency-shop provision was justified by the same "evils that the exclusivity rule in the Railway Labor Act was designed to avoid"). It described that doctrine thus:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectiviza-

> tion. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

*Id.* at 220–21. *Ellis*, following *Abood*, explained that a union can charge non-members only for "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v. Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 448 (1984); *see also id.* at 456 (citing *Abood*, *Hanson*, and *Street*).

But labor-management issues are necessarily absent here. For example, Illinois does not manage the personal assistants who provide services to HSP Program participants and exercises no control over labor conditions. As described above, Illinois law provides that program participants—not the state—are "responsible for controlling all aspects of the employment relationship between the customer and the PA." 89 Ill. Admin. Code 676.30(b); 20 Ill. Comp. Stat. 2405/3(f). Indeed, the collective-bargaining agreement provides for a union-administered "grievance procedure," but that procedure does not apply to "any action taken by the Customer" or, for that

matter, the hiring, firing, or reduction in hours of a personal assistant. HSP CBA, art. XI.[3] Further, the confusion, rivalries, and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or state-provided workplace at all, personal assistants carry out their duties in private homes, and union activities are expressly barred in those workplaces. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added).

Because the state does not manage personal assistants or childcare providers and takes no responsibility for their labor conditions, it lacks the power to bargain with SEIU over the terms of employment that implicate labor peace.

Moreover, because the scope of bargaining under these programs is so narrow, there can be no serious claim that the union's exclusive representation of workers in this activity has freed the state from any great burden due to "conflicting demands" by home-based personal assistants and childcare providers. Surely the state faces more numerous and diverse

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[3] Agreement Between the State of Illinois, Departments of Central Management Services and Human Services, and the Service Employees International Union, Healthcare Illinois & Indiana, ECF No. 1-2, art. XI, *Hill v. SEIU*, No. 15-10175 (N.D. Ill. filed Nov. 10, 2015).

demands by HSP and CCAP beneficiaries seeking additional benefits—groups that it has yet to attempt to organize coercively—and other recipients and would-be recipients of state benefits. Petitioners have no greater or qualitatively different relationships with the state than do other indirect recipients of state benefits, such as doctors serving Medicaid beneficiaries, and are, if anything, further attenuated from the state's actions than direct beneficiaries, such as the HSP and CCAP participants whom they serve.

Federal and state labor laws reflect the judgment that the organization of household workers such as Petitioners does not further the interest of labor peace. The National Labor Relations Act specifically excludes "any individual employed…in the domestic service of any family or person at his home" from coverage. 29 U.S.C. § 152(3). The Ninth Circuit, interpreting the NLRA shortly after its passage, described Congress's logic: "[T]here never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940). For similar reasons, until this past decade, states generally excluded such workers from coverage under their collective-bargaining statutes. *See* Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

Nor may Illinois rely on its interest in preventing "free riders" from taking advantage of the benefits of union representation, given that the Court has already rejected the proposition that home-based providers may be compelled by government to subsidize a labor union's speech. *Harris*, 134 S. Ct. at 2644. Whether or not *Harris* controls the legal question here, as a practical matter it takes the free-rider interest off the table.

The Seventh Circuit's decision presses far beyond *Abood* and *Knight* to present a roadmap for states to compel independent workers or contractors to associate with a union for no other purpose than to bolster the ranks of organized labor and promote speech favored by the state and its union allies. For good reason, this Court has never upheld compelled association detached from "some broader regulatory scheme," apart from the speech itself. *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001). "Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *Id.* The Court should act to avoid that very result here.

### B. Illinois's Exclusive-Representation Scheme Flunks Exacting Scrutiny Because It Compels Association for No Purpose Other Than Speech

There can be no question but that Illinois's scheme to compel personal assistants' and childcare providers' association with labor unions flunks traditional First Amendment scrutiny. As in *United Foods*, Illi-

nois has instituted a system of compelled association with "speech in the context of a program where the principal object is speech itself." 533 U.S. at 415.

This is so because, as a matter of law, the state and union lack the traditional labor-management relationship that might be the basis for any broader regulatory activity. As to the HSP, federal law specifies the basic requirements for a Medicaid waiver program, including that the state provide "payment for part or all of the cost of home or community-based services…which are provided pursuant to a written plan of care." 42 U.S.C. § 1396n(c)(1).[4] State law, in turn, lays out specific and objective requirements for personal assistants, 89 Ill. Admin. Code § 686.10, and their duties, which are limited to household tasks and contained in "service plans" approved by the customer's physician, §§ 686.20, 684.10. Crucially, state law is explicit that the customer—not the state or any other party—"is responsible for controlling all aspects of the employment relationship between the customer and the PA," from hiring to evaluation and termination. § 676.30(b). This is reflected in the SEIU's collective bargaining agreement with the state, which provides that customers, not the state or the union, "have the sole and undisputed right" to hire, fire, and "direct services" rendered by providers. HSP CBA art. VI.

[4] Further requirements are provided by federal regulation. *See* 42 C.F.R. § 440.180 (requirements for home- or community-based services), § 441.301 (waiver requirements).

The same is true of CCAP provider relationships. CCAP CBA art. VI.[5]

Under both programs, union representatives are prohibited from conducting union business in customers' homes—i.e., the providers' workplaces—and even from contacting providers at customers' homes. HSP CBA art. VI, § 3; CCAP CBA art. VI, § 3. And while both CBAs provide for grievance procedures involving the union, those provisions specifically exclude disputes over any action taken by customers, including the hiring, firing, and direction of providers. HSP CBA art. XI, § 1.A; CCAP CBA art. X, § 1.A.

It is therefore the customer alone—and not the state—who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation. The state has obligated itself only to pay for care provided by personal assistants to HSP participants "at the hourly rate set by law." 89 Ill. Admin. Code § 686.40. And CCAP providers receive subsidies—which may not amount to the full payment they demand from customers—at rates set by regulation, subject to appropriations. 305 Ill. Comp. Stat. 5/9A-11(f).

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[5] Agreement Between the State of Illinois, Departments of Central Management Services and Human Services, and the Service Employees International Union, Healthcare Illinois & Indiana, ECF No. 1-3, art. VI, *Hill v. SEIU*, No. 15-10175 (N.D. Ill. filed Nov. 10, 2015).

Accordingly, the labor union here can fulfill no role besides lobbying the state for higher wages or more generous benefits—that is, advocacy on behalf of its members. Indeed, Illinois's initial authorization of exclusive representation for personal assistants, which relied solely on the purpose of "receiv[ing] feedback" from workers it deemed unable to "effectively voice their concerns about the organization of the [program], their role in the program, or the terms and conditions of their employment…without representation." Ill. Exec. Order 2003-08; *see also* Ill. Exec. Order No. 2005-01 (similar, for CCAP providers).

But Illinois has *no* legitimate interest, let alone a "substantial" one, in compelling home-based personal assistants and childcare providers to join in a third party's "feedback" to the state for their own good. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988). A state "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor may it "sacrifice speech for efficiency." *Id.* at 795. And if the state has no legitimate interest in compelling speech, it certainly has no "vital" interest in compelling association for the sole purpose of facilitating that speech.

Even if compelling "feedback" were a legitimate state interest, the means selected by Illinois are far too blunt. "If the State has open to it a less drastic

way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Elrod*, 427 U.S. at 363. In particular, a state may override the freedom of expressive association only where its interests "cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. If the state's genuine purpose is to seek feedback from personal assistants and childcare providers, it might survey or interview them or undertake any of a number of far "less drastic" alternatives. It therefore may not command them to assemble for *the very purpose* of expressive association.

Whether viewed as a burden on associational or expressive rights, Illinois's scheme to compel the organization and speech of personal assistants who service HSP participants and childcare providers who service CCAP participants cannot survive traditional First Amendment scrutiny, reflecting the serious injury that the decision below works on the rights of Petitioners and those similarly situated.

## II. The Petition Presents Questions Of Great And Recurring Importance

The Court's decision in *Harris* brought to the fore states' imposition of exclusive representatives on home-based workers who receive government subsidies. *Harris* having curtailed their right to agency fees, labor unions have contrived new ways to leverage exclusive representation to increase their own membership, dues collections, and power. More than

a dozen states have, like Illinois here, established legally fictitious employer relationships for the purpose of facilitating the compelled organization of home-care workers and home-based childcare providers. The Seventh Circuit's decision sanctions these efforts, while encouraging other states to accede to campaigns by labor unions to do the same, at the expense of their citizens' right to be free from compelled association.

Although to date these campaigns have focused on personal assistants and home childcare providers like Petitioners, no legal principle limits the application of this technique to those fields. Unless reversed by this Court, the decision below leaves all recipients of state funds, whether direct or indirect, vulnerable to compelled association with a labor union.

### A. Home-Based Workers Across the Country Are Being Denied Their First Amendment Rights

Though a recent phenomenon, the use of sham employment relationships to support mandatory union representation has spread rapidly across the nation. In less than two decades since SEIU waged a "massive campaign to pressure [] policymakers" in Los Angeles to authorize union bargaining for homecare workers,[6] home-based care workers "have

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[6] *See generally* Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1, 11 (2002).

become darlings of the labor movement" and "helped to reinvigorate organized labor." Smith, *Publicization of Home-Based Care Work*, at 1390. From around zero in 1999, now well more than six hundred thousand home workers are represented by SEIU alone.[7]

This quick growth is the result of a concerted campaign by national unions, particularly SEIU, to boost sagging labor-union membership through the organization of individuals who provide home-based services to Medicaid recipients. Since SEIU's Los Angeles victory in 1999, labor unions have undertaken successful campaigns to establish nominal employers for homecare workers in Oregon (2000), Washington (2001), Illinois (2003), Michigan (2004), Wisconsin (2005), Iowa (2005), Massachusetts (2006), Ohio (2009), Pennsylvania (2010), Maryland (2011), Connecticut (2012),[8] Minnesota (2013),[9] and Vermont (2013).[10] (Four states—Michigan, Ohio, Pennsylvania, and Wisconsin—subsequently repealed this au-

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[7] Kris Maher, *Minnesota Home-Care Workers Say Yes to Union: SEIU Adds 27,000 Home-Health Aides to 600,000 Others in About 20 States*, Wall St. J., Aug. 26, 2014.

[8] Smith, *Publicization of Home-Based Care Work*, at 1404.

[9] Maher, *supra.*

[10] Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn *and the Contradictions of Compelled Speech,* 48 Loy. L.A. L. Rev. 439, 446 n.20 (2015).

thority.) These campaigns have "been hailed as labor's biggest victory in over sixty years."[11]

This model spread quickly beyond homecare providers. Over the past decade, unions directed their efforts to organizing home-based childcare providers, including childcare provided by family members who receive public support or subsidies. *See generally* Helen Blank, et al., *Getting Organized: Unionizing Home-Based Child Care Providers* (2013). By February 2007, seven states had recognized unions as the exclusive representative of home-based child care providers; over the next three years, an additional seven followed suit. *Id.* at 5. The number is now fourteen. *See* Pet. at 12–13 n.7. In at least five of these states, collective bargaining was instituted by executive order, not legislation, reflecting the controversial nature of this project. Blank, supra, at 5. Two states, so far, have mandated some foster parents to support an exclusive representative. Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029. And Illinois has recently extended exclusive representation to nurses and therapists who participate in certain Medicare programs. *See* 2012 Ill. Legis. Serv. P.A. 97-1158.

While campaigns to organize home-based workers can be exceptionally expensive, owing to the changes

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[11] Patrice M. Mareschal, *Agitation and Control: A Tactical Analysis of the Campaign Against New Jersey's Quality Home Care Act* 14 (2005), *available at* http://depts.washington.edu/pcls/caringlaborconference/Mareschalpaper.pdf.

to state law that are required, the representation of these workers can be quite lucrative for unions, which may explain the rapid spread of this phenomenon. The approximately 25,000 personal assistants who provide care to HSP participants paid SEIU over $30 million in compulsory fees between 2009 and 2013 to support the union's activities. App. 28a–29a. During that same period, CCAP childcare providers paid out $44 million to SEIU in the form of compulsory fees and membership dues. *Id.* at 29a. Although the union is no longer able to extract compulsory fees from home-based workers, it has leveraged its power as exclusive representative to aid its member-recruiting efforts, including through recruitment meetings for providers and the state's distribution of membership materials to providers. *See* App. 28a. Unions also take advantage of onerous opt-out requirements to push more workers into membership and drive up dues collections. *See Seidemann v. Bowen*, 499 F.3d 119, 125–26 (2d Cir. 2007) (conceding as much). *Cf. Knox v. SEIU, Local 1000*, 567 U.S. 298, 321 (2012). Notwithstanding *Harris*, exclusive representation of home-based workers remains a lucrative enterprise.

Given the vast sums of money and numbers of workers involved, as well as the gravity of the infringement of those workers' rights, it is natural that the issues raised by the petition have arisen in other litigation challenging similar arrangements. *E.g.*, *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016);

*Mentele v. Inslee*, 2016 U.S. Dist. Lexis 69429 (W.D. Wash. 2016); *Bierman v. Dayton*, 2017 WL 29661 (D. Minn. 2017).

If the Court does not act on the instant petition, it will inevitably confront these issues in a future case.

### B. No Limiting Principle Prevents the Seventh Circuit's Reasoning from Reaching Doctors, Nurses, Lawyers, and Government Contractors

Future cases, however, may not concern only home-based workers, but professional workers who, whether directly or indirectly, receive state funds. This is a result of the lower courts' misunderstanding and misapplication of this Court's decision in *Knight*, which (as interpreted by those courts) cannot logically be limited to personal assistants and childcare providers.

In the Seventh Circuit's view, a state's imposition of an exclusive representative to speak for its citizens is subject only to rational basis scrutiny. App. 8a. A state, it recognized, certainly has "legitimate interests in hearing the concerns of providers" receiving state subsidies and "in having efficient access to this information." *Id.* And so it is sufficient that appointing an exclusive representative to speak for providers "seems a rational means of serving these interests." *Id.*

But when would these things ever not hold true? By the Seventh Circuit's reasoning, a state may appoint an exclusive representative to speak in the

name of any more or less any group of citizens, particularly those who are recipients of state funds. And it makes no difference that (as in the instant case) the state's control over their work is minimal or non-existent, its interest in quelling disruptive labor disputes is non-existent, and there is no meaningful free-rider problem in sight. Illinois, for example, imposes numerous conditions on medical providers, such as doctors, seeking to participate in its Medicaid program. *See* 89 Ill. Admin. Code § 140.11 *et seq*. Approved providers are paid by the state for care that they provide to beneficiaries, according to state regulation and at rates set by the state. § 140.23(a). The state even reserves the right to impose prior approval requirements on all services, § 140.40, as well as the right to conduct an audit of all services, § 140.30. As the state exercises far greater control over Medicaid providers than personal assistants or childcare providers, the decision below would allow Illinois to force doctors, dentists, or nurses who provide services to Illinois Medicaid beneficiaries to accept a mandatory representative to speak for them and "bargain" over the terms of their participation in the program.

Attorneys also may be swept up under this standard. Illinois law, for example, provides for the appointment of counsel on appeal to indigent defendants convicted of felonies and directs the state court to review the services rendered and approve payment. 725 Ill. Comp. Stat. 5/121-13(b). Again, the state specifies the attorney's duties and provides for

her payment. She may therefore be made to associate with a union—despite that, as a practical matter, the state exercises no control over the discharge of her duties and that its interest in her representation by a labor union is commensurately minimal. The same would be true for any state contractor, recipient of state benefits, farmer receiving subsidies, and potentially even employees of businesses receiving state tax credits or other incentives to create jobs within the state.

In short, the decision below brooks no limiting principle as to when government may impose a representative on citizens to speak and lobby on their behalf, in their names. It runs roughshod over the principle that the First Amendment safeguards a freedom of association that "plainly presupposes a freedom not to associate," *Roberts*, 468 U.S. at 623, and a freedom of speech that bars government from acting to "compel the endorsement of ideas that it approves," *Knox*, 567 U.S. at 309.

## CONCLUSION

The decision below upholds a state law designed to achieve no purpose other than to circumvent Petitioners' First Amendment rights to be free of compelled association and expression. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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