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 IN OPPOSITION FOR RESPONDENTS MICHAEL HOFFMAN AND JAMES DIMAS

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QUESTION PRESENTED

1. Whether Petitioners' right to refrain from expressive association is infringed by exclusive representation laws that do not require them to join or support a union and that leave them free to publicly oppose the union and to form associations with whomever they please.

2. Whether the State's interest in efficiently obtaining accurate information about employees' concerns so that it can better negotiate the terms and conditions of their employment extends to the providers at issue here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

STATEMENT

1. Illinois created and administers the Home Services Program, which prevents the unnecessary institutionalization of people in need of longterm care by delivering home care services to them. 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(a), 676.30, 676.40(a), 682.100. Some of the program's services are provided by a "personal assistant." 89 Ill. Admin. Code §§ 676.30(p), 686.20. While the State pays the personal assistants, sets the requirements to qualify as a personal assistant, and helps recipients and their guardians use the program's services, *see* 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 677.40(d), 684.20, 686.10, 686.30, recipients have been given control over the other aspects of their relationships with the personal assistants, *see* 20 ILCS 2405/3(f); 89 Ill. Admin. Code §§ 676.10(c), 676.30(c)(3), 677.40(d), 684.20(b). Petitioners Rebecca Hill, Jane McNames, Gaileen Roberts, Deborah Teixeira, and Jill Ann Wise are personal assistants who provide services under the Home Services Program. Pet. App. 20a.

Illinois also operates the Child Care Assistance Program, which provides child care services to low-income families. 305 ILCS 5/9A-11. Under that program, the State pays qualified providers to deliver child care services to eligible recipients. 305 ILCS 5/9A-11(c); 89 Ill. Admin. Code Part 50. Petitioners Ranette Kesteloot, Carrie Long, and Sherry Schumacher are qualified child care providers in the Child Care Assistance Program. Pet. App. 23a.

2. Illinois, like many other States, has chosen to manage labor relations between public employers

and employees through a collective bargaining framework in which a majority of employees in a bargaining unit may select an exclusive representative to bargain over wages, hours, and other terms and conditions of employment. The Illinois Public Labor Relations Act (Act), 5 ILCS 315/1 *et seq.*, which sets out this framework, is designed to establish peaceful and orderly procedures to prevent labor strife and protect public health and safety while protecting public employees' freedom to associate, self-organize, and designate the labor representatives of their choice. 5 ILCS 315/2. The Act guarantees that an employee may form, join, or assist a labor organization, or engage in other concerted activities for the purposes of collective bargaining free from interference, restraint, and coercion, and protects an employee's right to refrain from participating in such activities. 5 ILCS 315/6(a).[1]

Personal assistants who provide services under the Home Services Program and child care providers who participate in the Child Care Assistance Program qualify as "public employees" of the State within the meaning of the Act. 5 ILCS 315/3(n–o); 20 ILCS 2405/3(f); 305 ILCS 5/9A-11(c-5). The State must therefore bargain with the exclusive representatives chosen by personal assistants and child care providers over the terms and conditions of employment that are within the State's control. 5

[1] A "labor organization" need not be a pre-established labor union, as it is defined as "any organization in which public employees participate and that exists for the purpose, in whole or in part, of dealing with a public employer concerning wages, hours, and other terms and conditions of employment." 5 ILCS 315/3(i).

ILCS 315/7; 20 ILCS 2405/3(f); 305 ILCS 5/9A-11(c-5).

The exclusive representative has a state-law duty to fairly represent the interests of all employees in the bargaining unit regardless of whether they are members of the representative organization. 5 ILCS 315/6(d). Personal assistants and child care providers are not required to join that organization, *see* 5 ILCS 315/6(a) (protecting right to refrain from participating in concerted activities), or to support it in any way, *see* Dist. Ct. Docs. 32-1, 32-2 (eliminating fair-share fee provisions in relevant collective bargaining agreements following *Harris v. Quinn*, 134 S. Ct. 2618 (2014)).

3. A majority of personal assistants and child care providers have chosen Respondent Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU"), as their units' exclusive representative for purposes of collective bargaining. Pet. App. 24a–26a. SEIU and the State have since negotiated and entered into collective bargaining agreements that cover personal assistants and child care providers and address issues such as pay rates, the State's contributions to a health insurance fund administered by SEIU, health and safety, training, payroll/withholding, and grievance procedures. Dist. Ct. Docs. 1-2, 1-3, 32-1, 32-2.

4. Petitioners filed an amended complaint against SEIU, the Director of the Illinois Department of Central Management Services, and the Secretary of the Illinois Department of Human Services, alleging that the laws qualifying them as public employees forced them to "associate" with SEIU in violation of

the First and Fourteenth Amendments.[2] Pet. App. 16a–36a. They did not dispute the State's ability to adopt a uniform policy governing compensation and work conditions applicable to all persons providing the services paid for by the State. Nor did they dispute that the State is free to choose what persons it listens to in deciding what policy to adopt. They did dispute SEIU's right to be the exclusive entity the State listens to, and they sought an injunction "prohibiting the [home-services and child-care program] bargaining units from choosing bargaining representatives." Pet. App. 3a.

Respondents moved to dismiss, contending that Petitioners' claim was foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), in which this Court upheld a nearly identical system of public-sector exclusive representation against First Amendment challenge. Dist. Ct. Docs. 30, 32. As in *Knight*, the laws at issue here neither required Petitioners to join or support SEIU nor restricted their ability to express themselves or form associations with whomever they pleased. *Ibid.*

5. The district court dismissed Petitioners' action, concluding that exclusive representation, by itself, did not impair Petitioners' right of expressive association in light of this Court's decision to that effect in *Knight*. Pet. App. 9a–15a. The court also explained that *Knight*'s holding was not undermined by the later decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), because *Harris* considered only the issue of fair-share fees, and that those two decisions

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[2] Those State offices are currently held by Respondents Michael Hoffman and James Dimas.

"stand together for the proposition that the First Amendment prohibits some compulsory fees but does not prohibit exclusive representation." *Id.* at 14a.

The Seventh Circuit affirmed, holding that *Knight* was controlling because Petitioners were not required to support SEIU in any way and were free "to form their own groups, oppose the SEIU, and present their complaints to the State." *Id.* at 1a–8a. The Court of Appeals explained that *Harris* was inapplicable because it addressed fair-share fees, not exclusive representation. The court also noted that all other courts to consider the issue had reached the same conclusion. *Id.* at 6a–7a; *see also D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016); *Jarvis v. Cuomo*, 660 Fed. Appx. 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Bierman v. Dayton*, 227 F.Supp.3d 1022 (D. Minn. 2017), *appeal docketed*, No. 17-1244 (8th Cir. Feb. 2, 2017); *Mentele v. Inslee*, 2016 WL 3017713 (W.D. Wash. 2016), *appeal docketed*, No. 16-35939 (9th Cir. Nov. 14, 2016). Finally, the court reasoned that exclusive representation was justified by the State's "legitimate interests in hearing the concerns of providers when deciding what employment terms to offer them, and in having efficient access to this information." Pet. App. 8.

REASONS FOR DENYING THE PETITION

The Constitution protects an individual's freedom to associate with others to exercise First Amendment rights collectively, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984), as well as the corresponding freedom to refrain from expressive association, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). In *Minnesota Board for Community Colleges v. Knight*, 465 U.S.

271 (1984), this Court upheld the constitutionality of a law that allowed bargaining units of public employees to choose an exclusive representative to meet, negotiate, and confer with their employers about employment-related matters. This Court held that this system did not impair the associational rights of employees who were not members of the exclusive representative because it did not restrain their freedom to speak "or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288–90.

The Seventh Circuit held that Petitioners' action was foreclosed by *Knight*. Pet. App. 1a–8a. The court concluded that, as in *Knight*, the challenged laws did not impair Petitioners' freedom not to associate with SEIU for expressive purposes because they did not require Petitioners to join SEIU or support it in any way, nor did the laws restrain Petitioners' freedom to express their own views or form their own expressive associations. *Id.* at 4a–5a. Petitioners do not ask this Court to revisit *Knight*; instead, they argue that the Seventh Circuit misapplied that precedent and ask this Court to correct the asserted error.

Petitioners have not identified any basis to grant certiorari. The Seventh Circuit's decision does not conflict with that of any other circuit. On the contrary, every court that has considered the issue has recognized that *Knight* is controlling and agreed that exclusive representation, by itself, does not impair an employee's associational rights. The Seventh Circuit's decision faithfully applies this Court's precedent because its conclusion that exclusive representation does not compel expressive

association flows from *Knight*'s clear holding. Finally, *Janus v. American Federation of State, County & Municipal Employees, Council 31*, No. 16-1466 (cert. granted, September 28, 2017), has no bearing here because the two cases ask distinct and legally independent questions.

I. The Seventh Circuit's decision does not conflict with that of any other circuit.

The Seventh Circuit has joined every other court that has considered the issue in holding that exclusive representation, by itself, does not impair an employee's freedom to refrain from expressive association with the representative. In *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), the First Circuit, in an opinion written by Justice Souter sitting by designation, unanimously held that exclusive representation did not infringe on the associational freedom of non-union child care providers because, as in *Knight*, those plaintiffs "could speak out publicly on any subject and were free to associate themselves together outside the union however they might desire." In *Jarvis v. Cuomo*, 660 Fed. App'x 72 (2d Cir. 2016), a panel of the Second Circuit unanimously agreed. This Court denied certiorari in both cases. *D'Agostino v. Baker*, 136 S. Ct. 2473 (2016); *Jarvis v. Cuomo*, 137 S. Ct. 1204 (2017). The district court for the District of Minnesota has followed suit, explaining that "[s]imply because the State has chosen to listen to SEIU on issues that are related to Plaintiffs' employment does not mean that Plaintiffs are being forced to associate with SEIU." *Bierman v. Dayton*, 227 F.Supp. 3d 1022, 1029–31 (D. Minn. 2017). And the Western District of Washington has held the same. *Mentele v. Inslee*, 2016 WL 3017713 (W.D. Wash. 2016). Those cases

are now fully briefed on appeal in the Eighth and Ninth Circuits. *Bierman*, No. 17-1244 (8th Cir. Feb. 2, 2017); *Mentele*, No. 16-35939 (9th Cir. Nov. 14, 2016). The decisions that have addressed the issue thus unanimously hold that exclusive representation, by itself, does not impair an employee's freedom not to form an expressive association with the representative.

To the extent Petitioners argue that those decisions conflict with *Mulhall v. UNITE HERE, Local 355*, 618 F.3d 1279 (11th Cir. 2010), Pet. 24–25, their attempt to create a split in authority is unavailing. In *Mulhall*, an employee sought to enjoin enforcement of an agreement whereby a union agreed to spend money in support of an employer's application for a gaming license in exchange for the employer's support of the union's organizing efforts. 618 F.3d at 1283–85. As the Seventh Circuit noted, *Mulhall* is distinguishable because the Eleventh Circuit decided only that the plaintiff had standing to bring a claim under section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Pet. App. 7a; *see also D'Agostino*, 812 F.3d at 244–45 (distinguishing *Mulhall*); *Bierman*, 227 F.Supp.3d at 1030 (same). *Mulhall* never even mentioned *Knight*, much less addressed its applicability, and never reached the merits of the plaintiff's claim. And this Court denied certiorari in *D'Agostino* and *Jarvis* even though both petitions asserted that those decisions created a conflict with *Mulhall*. Petition for Writ of Certiorari, *D'Agostino v. Baker*, 136 S. Ct. 2473 (2016), 2016 WL 2605061 at *16–18; Petition for Writ of Certiorari, *Jarvis v. Cuomo*, 137 S. Ct. 1204 (2017), 2016 WL 7190381 at *23–24.

Because every court to address the issue has unanimously held that a system of exclusive representation like the one at issue here does not impair the associational freedom of any employee, Petitioners cannot identify a conflict in circuit authority and are left to object to an asserted misapplication of settled law.

II. The Seventh Circuit's decision does not conflict with this Court's precedent.

There is no misapplication of settled law. The Seventh Circuit rejected Petitioners' claim that exclusive representation creates a mandatory expressive association subject to heightened scrutiny. Pet. App. 4a–8a. That conclusion was dictated by *Knight*'s clear holding and is consistent with this Court's later precedents concerning compelled association.

In *Knight*, a group of community college instructors who were not members of the exclusive representative argued that a law that allowed a bargaining unit to choose an exclusive representative to meet, negotiate, and confer with the employer over employment-related matters violated their First Amendment speech and association rights. 465 U.S. at 273–78. This Court first concluded that the law did not impair the instructors' freedom to speak because they were not prevented from speaking on employment-related matters and because their right to free speech did not include a right to force the State to listen or respond to their speech. *Id.* at 275, 283–88. The Court then held that the law did not impair the instructors' associational freedom because they were not required to join or support the exclusive representative, aside from paying fees that

they were not challenging, and were free to form whatever advocacy groups they liked. *Id.* at 288–90. Consequently, the Court held that "[t]he state has in no way restrained appellees' 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.

Petitioners argue that this Court should grant certiorari to "clarify" *Knight*. Pet. 19–21. But there is nothing to clarify. *Knight* squarely addressed whether the challenged law impaired the instructors' First Amendment rights "both to speak and to associate" and, in the course of devoting an entire section of its opinion to the issue, concluded that it did not. 465 U.S. at 288–90. As just noted, *Knight* explicitly held that exclusive representation does not restrain employees' freedom "to associate *or not to associate* with whom they please, *including the exclusive representative*." *Id.* at 288 (emphases added). Given *Knight*'s clear holding, this Court would need to overrule that decision, not "clarify" it, to hold that exclusive representation impairs an employee's freedom not to associate with the representative. This petition does not present that issue.

The absence of any conflicting interpretations of *Knight* in the lower courts confirms that there is no confusion to resolve. While Petitioners attempt to distinguish their claim from the one this Court rejected in *Knight*, Pet. 19–21, every court to consider that argument has found it unpersuasive, *see* Pet. App. 4a–5a (*Knight* forecloses claim that exclusive representation impairs associational rights); Pet. App. 13a–14a (same); *D'Agostino*, 812

F.3d at 243 (same); *Jarvis*, 660 Fed. Appx. at 74 (same); *Bierman*, 227 F.Supp.3d at 1029 (same); *Mentele*, 2016 WL 3017713 at *3–4 (same).[3]

In addition to being dictated by *Knight*, the Seventh Circuit's decision is consistent with this Court's subsequent caselaw addressing compelled expressive association. This Court has held that the First Amendment requires heightened scrutiny when a person is forced to subsidize another's speech, *see Knox v. Serv. Empls. Int'l Union*, 132 S. Ct. 2277, 2288–89 (2012), or to host or accommodate another's message such that "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate," *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Neither of those concerns is present here. It is undisputed that Petitioners are not required to pay fees to the union or financially support it in any way. And no reasonable observer could impute SEIU's statements to *non*-members in the bargaining unit when they remain "free to form their own groups, oppose the SEIU, and present their complaints to the State." Pet. App. 5a. As Justice Souter wrote for the First Circuit in *D'Agostino*, providers such as Petitioners "are not compelled to act as public bearers of an ideological message they disagree with[,] … accept an undesired member of any association they may belong to, … [or] modify the expressive message of any public conduct they may

[3] Petitioners cite a footnote in *Knight* in an attempt to distinguish that precedent, *see* Pet. 19, but their effort falls flat. Far from disavowing the Court's rejection of the plaintiffs' compelled association claim, the footnote merely observed that *Knight* did not involve any challenge to mandatory union fees. *See Knight*, 465 U.S. at 291 n.13.

choose to engage in." 812 F.3d at 244 (internal citations omitted). Petitioners' rights of expressive association have not been infringed.

III. The Court should deny review of the second question presented.

This Court should not grant review of the second question presented for three reasons. *First*, Petitioners concede that the second question should be addressed only if the Court takes the first one. Pet. 26. Petitioners do not offer any independent basis for the Court's consideration of the second question. They do not even attempt to identify a split in the courts of appeals on the application of *Knight* to providers such as Petitioners, and there is none. Because, as explained above, the first question does not warrant certiorari, neither does the second.

Second, petitioners rest this question on a false premise. They claim that, "under *Harris*, Illinois's [interest in] labor peace does not extend" to individuals "who are not public employees." Pet. 26. But as the Seventh Circuit explained, the justification for extending exclusive representation to these service providers is that it allows the State to hear the providers' concerns "when deciding what employment terms to offer them," and to efficiently access this information when negotiating terms of employment. Pet. App. 8. This interest has nothing to do with labor peace, and it exists regardless of whether the service providers are "full-fledged public employees" within the meaning of *Harris*. In a footnote, Petitioners suggest that the State can solicit the providers' views on these subjects through "comments in rulemaking, holding public meetings, and conducting surveys." Pet. 28 n. 12. But this

ignores context. At the end of the day, the State is negotiating terms of employment; comment periods, public meetings, and surveys are not reasonable ways of conducting such negotiations. Petitioners' focus on whether service providers are "full-fledged public employees" is thus beside the point, and the question they frame does not warrant consideration.

Third, this question is not suitable for resolution on this factual record. If the Court were to determine that exclusive representation raised First Amendment issues, it would need to balance the justifications for the law with the availability of other means of negotiating employment terms. This would require a developed factual record concerning the terms that are subject to negotiation and the efficacy of other methods of setting such terms. Such a record is entirely lacking in this case, which was dismissed on the pleadings.

IV. *Janus* has no bearing on this petition.

The petitioner in *Janus v. AFSCME, Council 31*, No. 16-1466 (cert. granted, September 28, 2017), asks this Court to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of a state law allowing exclusive representatives to collect a fee from bargaining unit members to pay their share of the costs of collective bargaining. While the *Abood* Court recognized that the collection of fees impaired employees' freedom not to subsidize speech with which they disagreed, it concluded that the impairment was justified by the State's interests in maintaining labor peace and preventing free-riding. *Id.* at 228–36. The question here, by contrast, is whether exclusive representation, without more, compels expressive

association in violation of the First Amendment. As this Court pointed out in *Harris*, 134 S. Ct. at 2640, the issues of exclusive representation and fees "are not inextricably linked." Hence, even if the Court were to rule in favor of the petitioner in *Janus*, its decision would have no bearing on the legally distinct question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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