No. 16-1480

IN THE
Supreme Court of the United States

REBECCA HILL, CARRIE LONG, JANE MCNAMES, GAILEEN ROBERTS, SHERRY SCHUMACHER, DEBORAH TEIXEIRA, AND JILL ANN WISE,

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

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Mandatory associations are supposed to be "exceedingly rare" and permissible "only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU, Local 1000,* 567 U.S. 298, 309 (2012) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Yet, neither Illinois nor SEIU suggest any limiting principle for exclusive representation. Neither disputes that the Seventh and First Circuits's decisions give the government unbridled authority to compel any profession or industry to accept an exclusive representative for dealing with the government. *See* Pet. 9–15. Both embrace the boundless proposition that exclusive representation for that purpose requires only a "rational basis." Pet. App. 8.

Respondents argue that First Amendment scrutiny is unwarranted because Illinois does not compel providers to subsidize SEIU, does not prohibit them from speaking, and is free to choose to whom it listens under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *See* State Br. 9–12; SEIU Br. 8–9. These assertions miss the point, which is that Illinois compels nonconsenting providers to associate with SEIU and its speech by giving that advocacy group authority to speak and contract for those individuals.

The Court cannot allow states a free hand to dictate who speaks for citizens in their relations with the government. The writ should be granted to make clear that regimes of exclusive representation must satisfy exacting First Amendment scrutiny, and that no compelling state interest justifies forcing nonemployee personal care and daycare providers into

this mandatory association under *Harris v. Quinn*, U.S. __, 134 S. Ct. 2618 (2014).

These questions should be resolved contemporaneously with *Janus v. AFSCME Council 31*, No. 16-1466, 2017 WL 2483128 (U.S. Sept. 28, 2017), in which the Court will consider whether it is constitutional for Illinois to force public employees to subsidize an exclusive representative. Alternatively, this petition should be held pending resolution of *Janus*.

I. First Question: An Exclusive Representative Is a Mandatory Association Subject to Exacting Scrutiny.

1. Respondents do not contest the expressive and political nature of SEIU's advocacy as an exclusive representative of providers. Pet. 16–19. Rather, they argue that providers are not sufficiently associated with SEIU to trigger First Amendment scrutiny.

That argument is belied by the very definition of a "representative," which is "[s]omeone who stands for or acts on behalf of another." Black's Law Dictionary (10th ed. 2014). SEIU cannot stand and act for providers, and yet not have its actions attributed to providers. That is as oxymoronic as claiming that an agent's conduct is not attributed to its principals.

SEIU's statutory authority to petition and contract with the State for all providers necessarily associates nonconsenting providers with SEIU and its advocacy. Pet. 21–26. That, in turn, infringes on the First Amendment rights of those providers who do not

want that advocacy group speaking and contracting with the government for them. *Id.* 9–11.

2. The State and SEIU attempt to obscure this dispositive point with arguments that either are inapposite or support the Petitioners's position.

First, Respondents say that Illinois no longer forces providers to join or subsidize SEIU. State Br. 11; SEIU Br. 15. That does not change the fact that forcing the providers into an unwanted agency relationship with SEIU infringes on their associational rights. As the Eleventh Circuit reasoned in *Mulhall v. Unite Here Local 355*, "regardless of whether [an individual] can avoid contributing financial support to or becoming a member of the union, . . . its status as his exclusive representative plainly affects his associational rights" because the individual is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he or she disagrees. 618 F.3d 1279, 1287 (11th Cir. 2010).

That *Mulhall* concerned a question of standing does not render the decision any less persuasive or any less in conflict with the Seventh Circuit's decision here. *Mulhall* held that exclusive representation "amounts to 'compulsory association,'" but that this "compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' based on a legislative judgment that collective bargaining is crucial to labor peace." *Id.* (quoting *Acevedo–Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002)). That holding is directly at odds with the Seventh

Circuit's holding that exclusive representation does not impinge on associational rights and requires no compelling justification. Pet. App. 8.

Second, SEIU claims that Illinois's Public Labor Relations Act ("PLRA") does not associate providers with their exclusive representative because it "places a legal duty only on the PLRA representative—not on the individual providers." SEIU Br. 18. But SEIU's fiduciary duty to providers only proves the associational link. An exclusive representative owes that duty because the "'exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.'" *ALPA v. O'Neill*, 499 U.S. 65, 74 (1991) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944)). SEIU's power to act for providers is why those providers are associated with SEIU and its expressive actions.

Third, SEIU asserts that it "does not act as the personal agent of any individual provider but as bargaining representative of the unit as a whole." SEIU Br. 17–18. That is illogical. SEIU cannot speak for everyone in a bargaining unit, but none of them individually. The greater includes the lesser.

Fourth, SEIU claims that "reasonable outsiders would understand that not every individual in the bargaining unit necessarily *agrees* with the views of a majority-chosen bargaining representative." SEIU Br. 15 (emphasis added). But that many providers disagree with SEIU's views only proves the constitu-

tional injury, as the First Amendment prohibits the government from forcing individuals to associate with messages with which they disagree. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 651–52 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573–74 (1995); *Wooley v. Maynard,* 430 U.S. 705 (1977).

Consequently, the First Circuit in *D'Agostino v. Baker* turned the law on its head when it concluded that daycare providers were not associated with their representative's speech because

> the relationship is one *that is clearly imposed by law*, not by any choice on a dissenter's part, and when an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will *probably disagree* with some positions taken by the agent answerable to the majority.

812 F.3d 240, 244 (1st Cir. 2016) (emphasis added).

That only proves a First Amendment violation. Forced associations are, by definition, "imposed by law," and "not by any choice on a dissenter's part." *Id*. That these individuals "disagree with some positions taken by [their] agent," *id*., shows that they are being associated with advocacy they oppose. *D'Agostino* inverted reality by relying on the very factors that proved a state was compelling association in violation of the First Amendment to reach the opposite conclusion.

Fifth, Respondents claim SEIU's representation does not preclude providers from speaking or petitioning the State. State Br. 7, 11; SEIU Br. 16. That is immaterial even if true. The government is not free to compel citizens to associate with advocacy groups so long as those citizens are otherwise free to speak. In compelled association cases in which the Court found constitutional violations, the victims almost always were otherwise free to speak. In *Boy Scouts of America,* the Boy Scouts were free to speak against the positions of the activists with whom they were compelled to associate. 530 U.S. 640. In *Wooley*, motorists were free to express messages different from the motto inscribed on the license plates they were required to display. 430 U.S. 705. In *United States v. United Foods*, mushroom producers were free to express messages different from the advertising they were compelled to subsidize. 533 U.S. 405 (2001). And, in *Miami Herald Publishing Co. v. Tornillo*, "the statute in question . . . [did] not prevent[ ] the Miami Herald from saying anything it wished" in addition to the articles it was compelled to publish. 418 U.S. 241, 256 (1974). Yet, this Court held each instance of compelled association or speech unconstitutional.

Finally, Respondents argue that the State is free to choose to whom it listens and deals with under *Knight*, 465 U.S. 271. State Br. 5-7; SEIU Br. 9–11. But that Illinois can choose to whom it *listens* does not mean that the State is free to dictate who *speaks* for individuals vis-à-vis the State.

An example proves the point. If Illinois's Governor decided to listen only to the American Medical Association ("AMA") concerning Medicaid policies affecting physicians, that would not violate anyone's constitutional rights. The Governor constitutionally is free to listen to whatever advocacy group he desires. But, if the Governor signed a law granting AMA legal authority to lobby and contract with the State for all Illinois physicians over its Medicaid policies, that would impinge on unconsenting physicians's First Amendment right to choose who speaks for them in their relations with the State. The same principle applies to daycare and personal care providers.

3. *Knight* is inapposite for the same reason. *Knight* addressed only the narrow issue of whether the First Amendment allows a public employer to choose to *exclude* employees from union-only meetings. *See* Pet. 19–21. *Knight* says as much at both its beginning and its end. 465 U.S. at 273 ("The question presented in this case is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees . . . who are not members . . . ."); *id.* at 292 ("The District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy."). *Knight* did not address the compelled speech and association claim presented here.

Respondents try to create a different impression by repeatedly quoting, without context, a snippet of language from *Knight* stating that Minnesota has "'in no

way restrained [employees'] freedom to associate or not to associate with whom they please, including the exclusive representative.'" State Br. 10 (quoting *Knight*, 465 U.S. at 288); *see also* SEIU Br. 10, 17 n.5 (same). The full passage, however, makes clear that the Court was addressing only whether excluding employees from bargaining meetings unlawfully pressured them to join the union:

> Appellees' speech and associational rights, however, have not been infringed by Minnesota's *restriction of participation in "meet and confer" sessions to the faculty's exclusive representative*. The 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.

Knight, 465 U.S. at 288 (emphasis added).

Knight did not consider whether, much less hold that, the government constitutionally can impose exclusive representatives on home daycare businesses, Medicaid providers, and other parties for any rational basis. Pet. 19–21. Yet, that is how broadly the Seventh and First Circuits read *Knight*. If for no other reason, the writ should be granted to correct the lower courts's misapprehension that *Knight* exempts

this type of mandatory association from constitutional scrutiny.[1]

II. Second Question: Under *Harris*, No Compelling State Interest Justifies Imposing an Exclusive Representative on Personal Care and Family Daycare Providers.

Illinois makes only one argument for why its imposition of exclusive representation on providers survives exacting First Amendment scrutiny. Pet. 26–28. And it is not the "labor peace" rationale for exclusive representation of employees. The State disclaims reliance on that interest, State Br. 12, likely because *Harris* held it inapplicable to providers, 134 S. Ct. at 2640–41; *see* Pet. 26–28. The State, instead, avers that "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." State Br. 12 (quoting Pet. App. 8).

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[1] Respondents briefly discuss *Rumsfeld v. Forum for Academic and Institutional Rights*, which held that requiring that military recruiters have access to school property did not associate the schools with the recruiters's message. 547 U.S. 47 (2006); *see* State Br. 11–12; SEIU Br. 14–15. That case has no bearing here. A requirement that a school merely allow individuals to use its property is nothing like a state making an interest group its citizens's *agent* for lobbying that state over public policies.

This justification fails for the reasons stated at Petition 28, footnote 12. The government cannot compel association for the very purpose of generating speech about public affairs. *United Foods*, 533 U.S. at 415. If it could, states could force anyone to accept a mandatory advocate for petitioning the state. Illinois's belief that this boundless rationale could justify a mandatory expressive association only demonstrates the need for this Court's review.

III. The Court Should Either Take This Case to Resolve the Questions Presented in the Same Term as *Janus* or Hold the Petition Pending *Janus*.

1. The State, after moving for dismissal of the complaint without seeking to make a more extensive record, Pet. App. 10, now belatedly asserts the complaint is an insufficient record on which to decide the case, State Br. 13. That is not so. The complaint provides a more than sufficient record on which to decide the legal questions presented. Moreover, if any fact-finding is necessary, it should occur after this Court establishes what level of First Amendment scrutiny the State must satisfy to constitutionally appoint an exclusive representative to speak and contract for certain of its citizens.

The Court should not wait for another case raising these questions, as SEIU suggests, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

(plurality opinion). Hundreds of thousands of Medicaid and daycare providers already are forced to accept exclusive representatives for lobbying states over policies that affect their professions. Pet. 11–14. Many more professions face the same risk. *Id.* For example, during the short pendency of this petition alone, a district court gave the City of Seattle the constitutional green light to impose an exclusive representative on independent Uber and Lyft drivers for dealing with both those companies and city regulators. *See* Order Granting Defs.' Mot. to Dismiss, *Clark v. City of Seattle*, No. 2:17-cv-0382-RSL (W.D. Wash. Aug. 24, 2017), ECF No. 47.

It is therefore imperative that the Court establish that this type of mandatory association only is permissible when justified by a compelling state interest. For without that limiting constitutional principle, state and local governments will continue to run roughshod over individuals's First Amendment right to choose who speaks for them in their relations with government.

2. The Court's decision to grant review in *Janus* supports granting review here, or at least holding the petition, because the cases present several overlapping legal issues. Pet. 29–30. Respondents ignore these common issues when tersely claiming, without real analysis, that the cases have no bearing on one another. State Br. 13–14; SEIU Br. 20. That cannot be correct. The nature of an exclusive representative under Illinois law—including its legal powers and expressive functions—plainly impacts the constitu-

tionality of forcing individuals to subsidize that representative. *See* Pet. 29–30.

Most pertinently, the first question presented here—whether exclusive representation is a mandatory association—is an *element* of the two-part test agency fees must satisfy to pass exacting scrutiny under *Knox*, 567 U.S. at 309, and *United Foods*, 533 U.S. at 414. *Knox* held:

> [C]ompulsory subsidies for private speech . . . cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "*mandated association*" among those who are required to pay the subsidy. [*United Foods*, 567 U.S.] at 414. Such situations are exceedingly rare because . . . mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, [468 U.S.]at 623. Second, *even in the rare case where a mandatory association can be justified*, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association."

Knox, 567 U.S. at 310 (third alteration in original) (emphasis added) (quoting *United Foods*, 567 U.S. at 414).

The Court may apply its *Knox/United Foods* test to Illinois's agency fee requirement for public employ-

ees in *Janus* because the Court applied that test to Illinois's agency fee requirement for personal assistants in *Harris*, 134 S. Ct. at 2639. The test is also one of two that the petitioner in *Janus* argues should govern the case. Pet. 13–16, 21, *Janus v. AFSCME Council 31*, 16-1466 (U.S. June 6, 2017). Given that the existence of a mandatory association is the first element of that test, this case presents a legal question that could be dispositive in *Janus* (and vice versa). The cases should thus be adjudicated at the same time, or, alternatively, the petition should be held pending resolution of *Janus*.

CONCLUSION

The petition for a writ of certiorari should be granted on both questions.

Respectfully submitted,

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