No. 16-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Illinois is compelling individuals who are not government employees, namely home-based Medicaid and daycare providers, to accept an advocacy organization as their exclusive representative for speaking and contracting with the State over certain public policies. The questions presented are:

1. Can the government force individuals into an exclusive-representative relationship with an advocacy organization for any rational basis, or is this mandatory association permissible only if it satisfies heightened First Amendment scrutiny?

2. If exclusive representation is subject to First Amendment scrutiny, is it constitutional for the government to force individuals who are not full-fledged public employees to accept an exclusive representative for speaking and contracting with the government?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are: Rebecca Hill, Carrie Long, Jane McNames, Gaileen Roberts, Sherry Schumacher, Deborah Teixeira, and Jill Ann Wise. Ranette Kesteloot was a Plaintiff-Appellant in the court below but is not a Petitioner.

Respondents, who were Defendants-Appellees in the court below, are: Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas; Michael Hoffman, in his official capacity as the Director of the Illinois Department of Central Management Services; and James Dimas, in his official capacity as the Secretary of the Illinois Department of Human Services.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix (Pet.App.1), as is the reported opinion of the United States District Court for the Northern District of Illinois dismissing Petitioners' claim (Pet.App.9).

JURISDICTION

The Seventh Circuit entered judgment on March 9, 2017. (Pet.App.1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the Appendix (Pet.App.37).

STATEMENT

This case concerns whether the First Amendment allows the government to extend exclusive representation beyond employment relationships and designate mandatory representatives to speak for professions in their relations with the government.

A. Illinois Compels Personal Assistants and Daycare Providers to Accept and Subsidize a Representative for Lobbying the State over Policies That Affect Their Profession.

1. Petitioners are individuals who provide services to persons enrolled in one of two Illinois public-aid programs: the Home Services Program ("HSP"), 20 ILL. COMP. STAT. 2405/0.01–/17.1 (2016), and the Child Care Assistant Program ("CCAP"), 305 ILL. COMP. STAT. 5/9A-11 (2016); ILL. ADMIN. CODE tit. 89, § 50.101 et seq.

HSP is a Medicaid-waiver program that is partially funded by the federal government and pays for home-based care for persons with disabilities. *See Harris v. Quinn*, 134 S. Ct. 2618, 2623–24 (2014). Individuals enrolled in HSP can, among other things, use their subsidies to employ "personal assistants" to aid them with daily living activities. *Id.* Program enrollees are responsible for hiring, training, supervising, evaluating, and terminating their personal assistants, and HSP compensates the personal assistants for their services. *Id.* at 2624–25; 2634–35.

Approximately 25,000 personal assistants are employed by HSP enrollees each year. Am. Compl. ¶ 24 (Pet.App.20). Many are relatives of the enrollees, such as their parents or siblings. *Id.* ¶ 18 (Pet.App.19). Petitioners Rebecca Hill, Jane McNames, Gaileen Roberts, Deborah Teixeira, and Jill Ann Wise are personal assistants who provide care to a son or daughter enrolled in HSP. *Id.* ¶¶ 19–23 (Pet.App.20).

CCAP is a public assistance program that subsidizes the childcare expenses of qualified families with low incomes. *Id.* at ¶¶ 25–26 (Pet.App.20). Families enrolled in CCAP can elect to use the qualified daycare provider of their choice, which includes licensed "daycare homes" and "license-exempt providers" (collectively "daycare providers"). *Id.* at ¶ 27 (Pet.App.21).

A licensed daycare home is a private, residence-based business that sells childcare services to the

public. Am. Compl. ¶¶ 28–29 (Pet.App.21). Daycare homes can serve up to sixteen children, and may have one or more employees. *Id.* Some daycare homes serve customers who partially pay for their services with CCAP monies. *Id.* ¶ 33 (Pet.App.22). Petitioners Carrie Long and Sherry Schumacher operate daycare homes whose customers include families enrolled in CCAP. *Id.* ¶¶ 36–37 (Pet.App.23).

License-exempt providers include: (i) relative care providers who provide daycare services, either in their own home or in the child's home, to children to whom the providers are related; and (ii) individuals who provide daycare services in the child's home to no more than three children or to children from the same household; and (iii) daycare homes that either serve no more than three children or children from the same household. *Id.* ¶ 30 (Pet.App.21); *see* ILL. ADMIN. CODE tit. 89, § 50.410(e)–(h). Approximately 69.7% of license-exempt providers in fiscal year 2013 were relative care providers—i.e., were grandparents, aunts, or cousins caring for children to whom they are related. Am. Comp. ¶ 31 (Pet.App.22). Plaintiff Ranette Kesteloot was a relative care provider who provided care to her great-grandchildren who receive CCAP assistance. *Id.* ¶ 35 (Pet.App.23).

Like personal assistants, these daycare providers are not employed by the State of Illinois. Rather, they either are operators of a private business whose customers includes families who partially pay for rendered services with public monies, or are relatives

who receive public monies for caring for children to whom they are related. *Id.* ¶ 38 (Pet.App.23).

2. Although providers[1] are not Illinois employees, former Illinois Governor Rod Blagojevich issued executive orders in 2003 ("EO 2003-08") and 2005 ("EO 2005-01") that called for the State to recognize "exclusive representative[s]" of personal assistants and daycare providers for bargaining with the State over aspects of HSP and CCAP. Pet.App.45,48. Governor Blagojevich's justification was that it "is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services," and personal assistants purportedly "cannot effectively voice their concerns" about HSP without a representative. Ill. Exec. Order No. 2003-08 (Pet.App.46); *see* Ill. Exec. Order No. 2005-01 (Pet.App.49) (similar). Shortly after issuance of each executive order, the State designated Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU") to be the personal assistants' and daycare providers' "exclusive representative" for dealing with the State. Am. Compl. ¶¶ 42–45 (Pet.App.25–26).

Governor Blagojevich's executive orders were later codified.[2] Under Illinois law, providers are consid-

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[1] The Petition will use the term "providers" to collectively refer to personal assistants, license-exempt providers, and operators of family daycare homes.

[2] 20 ILL. COMP. STAT. 2405/3(f) (codifying EO 2003-08); 5 ILL. COMP. STAT. 315/3–/28 (codifying EO 2005-01).

ered "public employees" solely for purposes of Illinois Public Labor Relations Act ("IPLRA"), but for no other purposes, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." 5 ILL. COMP. STAT. 315/3(n) (Pet.App.37–38). The IPLRA deems SEIU the providers' exclusive representative, *id*. at 315/3(f), which grants the advocacy group legal authority to act as the providers' agent for speaking and contracting with the State over certain HSP and CCAP policies, irrespective of whether individual providers approve. *See id*. at 315/6(c)–(d) (Pet.App.39–40); Am. Compl. ¶ 50 (Pet.App.28).

SEIU exercised its authority to speak for providers by meeting and speaking with state policymakers for the purpose of influencing HSP and CCAP policies. Am. Compl. ¶ 61 (Pet.App.31). SEIU also conducted public demonstrations and protests, ran television, radio, and print advertising campaigns, and engaged in other forms of advocacy as the providers' exclusive representative. *Id*. ¶¶ 62–63 (Pet.App.31). For example, SEIU aired television commercials on June 29, 2015, to pressure Illinois Governor Bruce Rauner and other policymakers to accede to SEIU's demands concerning the HSP and CCAP. *Id*.

SEIU also used its authority to contract for providers by entering into successive agreements with the State as the providers' proxy. *Id*. ¶ 50 (Pet.App.28). The most recent contracts, which expired on June 30, 2015, will be referred to as the "HSP Contract" and

the "CCAP Contract."[3] The contracts called for the State to increase its HSP and CCAP payment rates. *Id*. ¶¶ 55–56 (Pet.App.29–30). Actual payment rates, however, are based on legislative appropriations, available federal funding, and federal regulations requiring the rates to be based on prevailing market rates and the program enrollees' needs. *Id*.[4]

The contracts also required the State to assist SEIU with recruiting members, by means such as mailing SEIU membership materials to new providers and compelling providers to attend thirty minute SEIU recruitment meetings as part of their orientation and/or trainings, and with collecting SEIU membership dues from providers. *Id*. ¶ 52 (Pet.App.28). SEIU also had the State seize compulsory fees from all providers who decided not to join SEIU, until the Court held the practice unconstitutional in *Harris*, 134 S. Ct. 2618. *Id*. ¶ 53 (Pet.App.28). Between fiscal years 2009 and 2013,

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[3] The HSP and CCAP Contracts are available, respectively, in the circuit court appendix on pages 25–52 and 53–76. Appellants' App., Am. Compl. Exs. A & B, ECF Nos. 9-1 & 9-2.

[4] *See* 42 U.S.C. § 1396a(a)(30)(A) (requiring that payment rates be "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"); 45 C.F.R. § 98.43 (requiring childcare rates to be based on a biennial market rate survey and to be at amounts sufficient to ensure subsidized children have access to childcare services equal to unsubsidized children).

SEIU seized more than $30 million in compulsory fees from HSP payments made to personal assistants, and more than $44 million in membership dues and compulsory fees from CCAP payments made to daycare providers. *Id.*

B. The Lower Courts Hold Exclusive Representation Is Not Subject to First Amendment Scrutiny.

Petitioners oppose being forced to associate with SEIU and its advocacy. In their Amended Complaint, they allege that the First Amendment prohibits the State and SEIU from forcing them to accept SEIU as their mandatory agent for speaking and contracting with the State over public policies that affect their professions. Am. Compl. ¶¶ 72–73 (Pet.App.33–34).

The district court dismissed the Amended Complaint on the grounds that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), required it to answer "no" to the question of whether exclusive "representation itself infringe[s] or impinge[s] associational rights." Pet.App.13. The court concluded that *Knight's* rejection of an associational argument made in that case "necessarily included the full breadth of associational rights," even though "*Knight* did not expressly discuss the right not to associate." *Id.*

The Seventh Circuit affirmed, holding that, under *Knight*, exclusive representation is "not subject to heightened scrutiny," Pet.App.4, but only "rational-basis scrutiny," Pet.App.8. With that decision, the

Seventh Circuit joined the First Circuit in concluding that the First Amendment is no barrier to the government granting an organization the power to exclusively represent individuals in their relations with the government. *See D'Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016).

REASONS FOR GRANTING THE PETITION

The first question presented is one of profound importance: can the government force individuals to accept an advocacy group as their exclusive representative for dealing with the government for any rational basis? The First and Seventh Circuits erroneously interpreted *Knight* to give the government free rein to appoint exclusive representatives to speak for individuals. In doing so, the courts have defied this Court's holdings that mandatory associations only are constitutional if they satisfy exacting First Amendment scrutiny. *E.g., Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). The Court should take the first question to establish that the government may dictate who speaks for citizens in their relations with the government only when doing so is justified by compelling interests.

The Court should take the second question to resolve whether states have a compelling interest in extending exclusive representation to individuals who are not public employees. In *Harris*, this Court held Illinois could not extend compulsory union fee requirements beyond "full-fledged state employees" to personal assistants because, among other reasons,

the State's interest in workplace labor peace did not extend that far. 134 S. Ct. at 2738–41. Exclusive representation should be confined to employment relationships for the same reason, and not be allowed to spread to citizens' relationship with their sovereign.

Finally, the Court should grant the petition if it grants review in *Janus v. AFSCME, Council 31*, 16-__ (U.S. June 6, 2017), which addresses whether Illinois constitutionally can compel state employees to subsidize an exclusive representative. The petitions present several common legal issues that should be resolved together. Alternatively, the petition should be held pending disposition of *Janus*.

I. First Question: Exclusive Representation Should Be Subject to Exacting First Amendment Scrutiny.

A. The First and Seventh Circuits' Holdings That Exclusive Representation Is Subject Only to Rational Basis Review Gives the Government Free Rein to Appoint Mandatory Advocates to Speak for Citizens in Their Relations with the Government.

1. The constitutional importance of this case is made evident simply by describing what Illinois has done. The State has granted an advocacy group (SEIU) statutory authority to speak and contract for everyone in two professions (personal assistants and daycare providers) regarding certain state policies that affect their respective professions (aspects of the HSP and CCAP programs). Simply put, Illinois is

forcing certain citizens to accept a government-appointed lobbyist, as SEIU's function as an exclusive representative is quintessential lobbying: meeting and speaking with public officials, as an agent of regulated parties, to influence government policies that affect those parties. *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (stating "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group").

An example proves the point. If a professional association representing other Medicaid providers, such as doctors, met and spoke with State officials to advocate for higher Medicaid rates, or if a trade association of daycare centers petitioned state policymakers to increase CCAP rates, those actions certainly would constitute "lobbying." SEIU's function as an exclusive representative is indistinguishable from either activity, except SEIU is not a voluntary lobbying association, but a compulsory one appointed by the government.

If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for individuals in their relations with the government. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). This protection applies with particular force to advocacy concerning public affairs because "expression on

public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Consequently, a citizen's right to choose which organization, if any, lobbies the government on his or her behalf is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981).

2. The Seventh Circuit here, like the First Circuit in *D'Agostino*, has given government officials carte blanche to trample on this liberty by holding that the government, *for any rational basis*, can certify exclusive representatives to speak and contract for individuals in their relations with the government. Pet.App.8; *D'Agostino*, 812 F.3d at 243–44.[5] The implications of these decisions are staggering.

Illinois's conduct represents not the top of a slippery slope, but the bottom. Illinois has imposed an exclusive representative on: (1) parents who provide care to their disabled sons or daughters in their own homes, Am. Compl. ¶¶ 18–23 (Pet.App.19–20); (2) grandparents who provide daycare to their grandchildren in their own homes, *id.* ¶¶ 30–31

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[5] The Second Circuit reached a similar conclusion in an unpublished order in *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, __ U.S. __, 137 S. Ct. 1204 (Feb. 27, 2017). That non-precedential order does not constitute that circuit's law.

(Pet.App.21–22); and (3) individuals who operate home-based daycare businesses, *id.* ¶¶ 28–29 (Pet.App.21). Illinois's appetite for this mandatory association did not end there. The State recently extended exclusive representation to nurses and therapists who provide home-based care to Medicaid enrollees. *See* 2012 Ill. Legis. Serv. P.A. 97-1158 (West).[6]

Illinois' conduct is not anomalous, but is part of a troubling trend that began in the early 2000s. Since that time, fourteen states have authorized mandatory representation for Medicaid providers,[7] eighteen

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[6] This Act extended the IPLRA to "individual maintenance home health workers," 5 ILL. COMP. STAT. 315/3(n), who are nurses and therapists who provide home-based care, ILL. ADMIN. CODE tit. 89, § 676.40(d). In the HSP Contract, the State agreed to "voluntarily recognize the [SEIU] as the exclusive collective bargaining representative of such persons." HSP Contract 17.

[7] CAL. WELF. & INST. CODE § 12301.6(c)(1) (West, Westlaw through Ch. 9 of 2017 Reg. Sess.); CONN. GEN. STAT. § 17b-706b (West, Westlaw through Public Acts enrolled & approved on or before May 31, 2017); 20 ILL. COMP. STAT. 2405/3(f); MD. CODE ANN., HEALTH-GEN. § 15-901 (West, Westlaw through leg. eff. May 27, 2017); MASS. GEN. LAWS ch. 118E, § 73 (West, Westlaw through Chapter 9 of the 2017 1st Annual Sess.); MINN. STAT. § 179A.54 (West, Westlaw through 2017 Reg. Sess.); MO. REV. STAT. § 208.862(3) (West, Westlaw through emerg. leg. approved through Mar. 30, 2017 of 2017 1st Reg. Sess.); OR. REV. STAT. § 410.612 (West, Westlaw through 2017 Reg. Sess. leg. eff. through May 18, 2017); VT. STAT. ANN. tit. 21, § 1640(c) (West, Westlaw through Law No. 28 of 2017–18 1st Sess.); WASH. REV. CODE § 74.39A.270 (West, Westlaw through Ch. 129 of 2017 Reg. Sess.); Ohio H.B. 1, §§ 741.01–.06 (July 17, 2009)

states have authorized mandatory representation for home daycare businesses,[8] and two states have authorized mandatory representatives for individuals who operate foster homes for persons with disabilities.[9] In January 2016, the City of Seattle went even further by enacting a first of its kind ordinance calling for the certification of an exclusive representative to speak and contract for independent-contractor drivers in their relations with both the city and ride-sharing technology companies (such as Uber and Lyft). SEATTLE, WASH., CODE § 6.310.735 (2016).

(expired); Exec. Budget Act, 2009 Wis. Act 28, § 2241 (repealed 2011); Pa. Exec. Order No. 2015-05 (Feb. 27, 2015); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

[8] CONN. GEN. STAT. § 17b-705; 5 ILL. COMP. STAT. 315/3(n); MASS. GEN. LAWS ch. 15D, § 17; ME. REV. STAT. ANN. tit. 22, § 8308(2)(C) (repealed 2011); MD. CODE ANN., EDUC. § 9.5-705; MINN. STAT. § 179A.54; N.M. STAT. ANN. § 50-4-33 (West, Westlaw through emerg. leg. through Ch. 137 of the 1st Reg. Sess., 53rd Legislature); N.Y. LAB. LAW § 695-a et seq. (West, Westlaw through L.2017, chs. 1–23, 25, 26, 50–58); OR. REV. STAT. § 329A.430; R.I. GEN. LAWS § 40-6.6-1 et seq. (West, Westlaw through Ch. 2 of Jan. 2017 Sess.); WASH. REV. CODE § 41.56.028; Ohio H.B. 1, §§ 741.01–.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed); Iowa Exec. Order No. 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order No. 07-21 (July 18, 2007) (rescinded); N.J. Exec. Order No. 23 (Aug. 2, 2006); Pa. Exec. Order No. 2007-06 (June 14, 2007) (rescinded); Interlocal Agreement Between Mich. Dep't of Human Servs. & Mott Cmty. Coll. (July 27, 2006) (rescinded).

[9] OR. REV. STAT. § 443.733; WASH. REV. CODE § 41.56.029.

These government actions alone demonstrate the importance of the first question presented, as the above-mentioned schemes affect hundreds of thousands of individuals. These actions, however, will be the narrow end of the wedge if government officials can appoint exclusive representatives to speak for individuals for any rational basis. Under this level of scrutiny, state officials could politically collectivize any profession or industry under the aegis of a state-favored interest group. For example, under the Seventh Circuit's ruling, Illinois could mandate that other healthcare professionals (such as doctors or dentists) or businesses (such as hospitals or insurers) accept state-designated organizations as their exclusive representative for petitioning the State over its regulation of that profession or industry.

3. These ramifications are intolerable. "The First Amendment mandates that [courts] 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). "It is for the speaker, not the government, to choose the best means of expressing a message." *Hill v. Colorado*, 530 U.S. 703, 781 (2000) (Kennedy, J., dissenting). Consequently, "citizens, subject to rare exceptions, must be able to discuss issues, great or small, through the means of expression they deem best suited to their purpose." *Id*.

The government cannot be allowed to dictate, for any rational basis, which advocacy organization will speak for citizens in their relations with the govern-

ment. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Riley,* 487 U.S. at 791. Indeed, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

An unbounded government authority to appoint mandatory representatives to speak for citizens threatens not only individual liberties, but also the political process the First Amendment protects. These organizations will be government-created "factions:" similarly-situated individuals forced together into an association to pursue self-interested policy objectives (here, seeking higher Medicaid and CCAP payment rates). The problems caused by *voluntary* factions have been recognized since the nation's founding. *See The Federalist No. 10* (J. Madison). Far worse will be the problems caused by *mandatory*, government-created factions. An advocacy group that citizens are conscripted to accept, and that has special privileges in dealing with the government that no others enjoy, will have political influence far exceeding citizens' actual support for that group's agenda. Allowing the government to create such artificially powerful advocacy organizations will skew the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the

First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

It is for good reason that this Court is reluctant to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or to "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" *Harris*, 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id.*

The First and Seventh Circuits' opinions give government carte blanche to regiment citizens into mandatory advocacy groups. As a consequence, the opinion below cannot be allowed to stand. The Court should grant the writ and, as discussed below, hold that exclusive representation only is constitutional when it satisfies exacting scrutiny.

B. The First and Seventh Circuits' Opinions Conflict with This Court's Holdings That Mandatory Associations Must Satisfy Exacting Constitutional Scrutiny.

In *Knox*, this Court reiterated that mandatory associations are "exceedingly rare because . . . [they] are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). The Court

has required, in a variety of contexts, that mandatory associations satisfy this level of constitutional scrutiny. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *Roberts*, 468 U.S. at 623; *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion); *see also Roberts*, 468 U.S. at 623 (citing earlier cases).

The First and Seventh Circuits' decisions defy these precedents by allowing states to force individuals into an exclusive-representative relationship with an advocacy group for any rational basis. If there is any mandatory association that should have to pass constitutional muster, it is this one, as providers are being forced to accept a mandatory agent for lobbying the State over matters of public policy.

The same level of scrutiny should apply here as applies when the government compels individuals to associate with political organizations to receive public monies, which is exacting scrutiny, *see Elrod*, 427 U.S. at 362–63; *O'Hare Truck*, 518 U.S. at 714–15. Even when representing government employees, a "public sector union is indistinguishable from the traditional political party in this country." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 256 (1977) (Powell, J. concurring in judgment). The two types of organizations share similar goals, for "[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership." *Id.*; *accord id.* at 242–44

(Rehnquist, J., concurring). The organizations also engage in similar expressive activities, for "[i]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and concern policies that are "important political issues." *Harris*, 134 S. Ct. 2632–33.

An organization that represents individuals who are not public employees in their relations with the government is not just akin to a political organization: *it is* a political advocacy organization. *See supra* pp. 9–10. SEIU's conduct as an exclusive representative proves the point. SEIU has not only met and spoken behind closed doors with Illinois policymakers concerning HSP and CCAP policies—a classic lobbying activity—but it also has "conducted public demonstrations and protests; conducted television, radio, and print advertising campaigns; and engaged in other forms of political advocacy to influence state policymakers and the public to support [SEIU's] positions concerning HSP and CCAP policies and funding." Am. Compl. ¶¶ 61–62 (Pet.App.31). SEIU's "expressive activities concerning HSP and CCAP policies often address other public policies that SEIU[ ] supports, such as increasing taxes, raising the minimum wage, and making changes to immigration policy." *Id.* ¶ 66 (Pet.App.32). Even as a general matter, SEIU is viewed as, and characterizes itself as, a progressive advocacy group. *Id.* ¶ 67 (Pet.App.32). SEIU is a "political" organization in any meaningful sense of that word.

A requirement that citizens accept SEIU's representation to receive HSP or CCAP payments for their services should be subject to the same constitutional scrutiny as would requiring citizens to accept any other political organization's representation to receive public monies. The Court should grant review to clearly establish that exclusive representation, like any other mandatory association, constitutionally is permissible only when it is the least restrictive means for achieving a compelling state interest.

C. The Court Should Grant Certiorari to Clarify That *Knight* Does Not Exempt Exclusive Representation from First Amendment Scrutiny.

The First and Seventh Circuits failed to apply the proper level of scrutiny primarily because they misconstrued *Knight* to hold that exclusive representation is not a mandatory association subject to heightened scrutiny. Pet.App.4–5; *D'Agostino*, 812 F.3d at 244. The *Knight* Court made no such ruling, as that case "involve[d] no claim that anyone is being compelled to support [union] activities." 465 U.S. at 291 n.13. *Knight* only addressed an issue that is not present here: whether *excluding* employees from union bargaining sessions infringed on their ostensible constitutional right to participate in those sessions. *Id.* at 273.

This Court framed the issue before it as precisely that: "[t]he question presented . . . is whether this restriction on participation in the nonmandatory-

subject exchange process violates the constitutional rights of professional employees." *Id.* The "appellees' principal claim is that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. This Court disagreed, finding that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.[10] The Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied *an opportunity to participate* in their public employer's making of policy." *Id.* at 292 (emphasis added).

Knight has no bearing on this case because Petitioners do not allege that Illinois wrongfully excludes them from its meetings with SEIU. Nor do they assert a "constitutional right to force the government to listen to their views." *Id.* at 283. Rather, the providers here assert their constitutional right not to be forced to associate with an exclusive representative and its speech. Their claim that exclusive representation *compels* association is different from the alleged *restriction* on speech addressed in *Knight*.

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[10] The associational argument *Knight* addressed likewise only concerned whether excluding employees from union bargaining sessions impinged on their associational rights by indirectly pressuring them to join the union. *Id.* at 288 (holding that "Appellees' speech and associational rights . . . have not been infringed by Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative" (emphasis added)).

Knight's holding that government officials constitutionally are free to choose to whom they *listen* does not mean those officials are free to dictate who *speaks* for individuals in their relations with the government. *Knight* does not support the lower court's holding in this case.

More generally, it is inconceivable that this Court, when deciding in 1984 the narrow issue of whether a college can exclude faculty members from union bargaining sessions, intended to rule that the First Amendment does not bar states from forcing in-home healthcare and daycare providers to accept an exclusive representative. Such schemes did not even exist at that time. Yet, that is how broadly the First and Seventh Circuits have interpreted *Knight*.

Knight cannot bear the incredible weight the lower courts place upon it. The Court should grant certiorari to eliminate the lower courts' misapprehension of *Knight*, and establish that *Knight* does not exempt exclusive representation from First Amendment scrutiny.

D. The First and Seventh Circuits' Opinions Are Inconsistent with This Court's and the Eleventh Circuit's Precedents Concerning Exclusive Representation.

The First and Seventh Circuits not only misread *Knight*, but ignored this Court's precedents concerning exclusive representation of employees. The Court has long recognized that an exclusive representative's power to speak and contract for all employees

in a bargaining unit, whether they approve or not, impinges on their individual liberties.

Exclusive representatives are often referred to as "exclusive bargaining *agents*." *Harris*, 134 S. Ct. at 2640 (emphasis added). This is for good reason: "By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). The Court has found this mandatory agency relationship analogous to that between trustee and beneficiary, and akin to "the relationship . . . between attorney and client." *ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991).

Unlike other agency relationships, however, "an individual employee lacks direct control over a union's actions." *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990). That is because exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Those "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

As a result, exclusive representatives can, and often do, pursue agendas and enter into agreements that the represented individuals oppose and that

harm their interests. *See Knox*, 132 S. Ct. at 2289; *Abood*, 431 U.S. at 222. A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Specifically here, SEIU is empowered to speak, or "bargain[ ]," with the State on behalf of all providers, *see* 5 ILL. COMP. STAT. 315/6(c), irrespective of whether they approve of SEIU's advocacy. Many providers likely did not approve given that SEIU's advocacy concerned matters of public controversy, Am. Compl. ¶¶ 64–66 (Pet.App.32), and was often self-interested to boot, *id.* ¶¶ 52–53 (Pet.App.28). SEIU is also empowered to enter into binding contracts as the providers' proxy, irrespective of whether the providers approve of the contractual terms. *Id.* ¶ 51 (Pet.App.28). Many providers did not approve of prior contracts, which forced nonconsenting providers to pay compulsory fees to SEIU and attend recruitment meetings with SEIU organizers. *Id.* ¶¶ 52–53 (Pet.App.28).

Given an exclusive representative's power to speak and contract for individuals against their will, this Court has long recognized that exclusive representation restricts individual liberties. In *14 Penn Plaza LLC v. Pyett,* the Court held that exclusive representatives can waive unconsenting individuals' rights to bring discrimination claims in court because, among other reasons, "[i]t was Congress' verdict that the benefits of organized labor outweigh *the sacrifice of individual liberty that this system necessarily demands*." 556 U.S. 247, 271 (2009) (emphasis

added). In *Vaca v. Sipes*, the Court held that exclusive representatives owe a fiduciary duty to represented individuals based, in part, on the fact that "the congressional grant of power to a union to act as exclusive collective bargaining representative" results in a "corresponding reduction in the individual rights of the employees so represented." 386 U.S. 171, 182 (1967). And in *American Communications Ass'n v. Douds*, the Court held it constitutional to require union officials to pledge not to be communists because of the power that exclusive representation grants a union over employees. 339 U.S. 382, 401–02 (1950). The Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them," and "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Id*. at 401.

The Eleventh Circuit in *Mulhall v. Unite Here Local* 355 similarly recognized that exclusive representation impinges on associational rights. 618 F.3d 1279, 1286–87 (11th Cir. 2010). *Mulhall* addressed whether exclusive representation by a union (Unite) threatened an employee (Mulhall) with associational injury, even though he could not be required to join the union under Florida's Right to Work law. *Id*. The court held that "[i]f Unite is certified as the majority representative of . . . employees, Mulhall will have been thrust unwillingly into an agency relationship[.]" *Id*. at 1287. Thus, "regardless of whether

Mulhall can avoid contributing financial support to or becoming a member of the union . . . [Unite's] status as his exclusive representative plainly affects his associational rights." *Id.*[11]

The Seventh Circuit's conclusion that an exclusive representative is not a mandatory association cannot be squared with these precedents, or with the extraordinary authority these government-appointed agents possess. The court's conclusion is not even logical. It requires two pairs of contradictory premises to be true: that providers are represented by SEIU, but not associated with SEIU; and that SEIU speaks and contracts for providers, but providers are not associated with SEIU's speech and contracts. These propositions are incongruous, and equivalent to saying that a principal is not associated with his own agent or his agent's actions.

SEIU's authority to speak and contract for providers necessarily associates them with SEIU, its speech, and its contracts. Indeed, that is the point of the exclusive-representative designation: to establish

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[11] *Mulhall* further found that, while exclusive representation "amounts to 'compulsory association,' . . . that 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)). This labor peace interest, however, does not justify unionizing non-employee providers. *Harris*, 134 S. Ct. at 2640; pp. 26–28 *infra*.

that the union speaks and contracts for *all* individuals in a unit, and not just its members. *Cf.* S*zabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). An exclusive representative plainly is a mandatory expressive association. As such, it is subject to exacting constitutional scrutiny.

II. Second Question: The Government Cannot Extend Exclusive Representation Beyond Public Employees Because, under *Harris*, the Government's Interest in Workplace Labor Peace Does Not Extend That Far.

If the Court takes the first question to resolve whether exclusive representation is subject to exacting scrutiny, it should also take the second question to resolve whether Illinois's extension of exclusive representation to individuals who are not public employees survives that scrutiny. The Court should find that it does not because, under *Harris*, Illinois's labor peace does not extend that far. 134 S. Ct. at 2640.

In *Abood,* exclusive representation of public employees was deemed to be justified by a public employer's interest in "labor peace." 431 U.S. at 220–21, 224; *see Harris*, 134 S. Ct. at 2631. According to *Abood*, that is an interest in avoiding workplace disruptions that could be caused by conflicting and competing demands from multiple unions. 431 U.S. at 220–21, 224. *Abood* borrowed the interest from cases construing federal labor laws, *id.* at 220–21,

and transferred it to the public sector without any analysis, *id.* at 224. That lack of analysis was criticized at the time. *Id.* at 259–61 (Powell, J., concurring in judgment); *accord id.* at 242–44 (Rehnquist, J., concurring). Justice Powell, for instance, remarked that he "would have thought that 'conflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id.* at 261.

Whatever its merits in an employment relationship, the labor peace interest has no application outside of one. *Harris* "confine[d] *Abood*'s reach to full-fledged state employees." 134 S. Ct. at 2638. *Harris* similarly confined the reach of the labor peace interest, *id.* at 2641, on the basis that: (1) "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes"; (2) "[f]ederal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace"; (3) "the specter of conflicting demands by personal assistants is lessened" given SEIU's limited authorities; and (4) "State officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Id.* The last point especially is salient. Neither Illinois nor any other state has any legitimate interest in using exclusive representation to quell conflicting demands from diverse associations of citizens, as such demands are the essence of the democratic pluralism the First Amendment protects.

Under *Harris*, no constitutionally sufficient state interest justifies imposing an exclusive representative on individuals who are not full-fledged public employees.[12] Consequently, it is unconstitutional for states to extend these regimes of mandatory representation beyond government workplaces.

It is important that the Court grant the writ to issue such a holding because, absent this limiting principle, states could force a host of professions into exclusive-representative relationships with advocacy groups. *See supra* pp. 11–14. Just as *Harris* confined compulsory fees to full-fledged public employees because otherwise "it would be hard to see just where to draw the line," 134 S. Ct. 2638, so too should exclusive representation be confined to such employees.

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[12] The rational basis that the Seventh Circuit found for extending exclusive representation to providers, namely that it is a rational means to "hear[ ] the concerns of providers" and allows "efficient access to this information" (Pet.App.8), is insufficient to satisfy exacting scrutiny. It is not a compelling interest, as association cannot be compelled for the very purpose of generating speech. *United States v. United Foods*, 533 U.S. 405, 415 (2001). Exclusive representation is also not the least restrictive means to hear providers' concerns, as Illinois can solicit their views through a variety of voluntary means, such as by requesting providers' comments in rulemaking, holding public meetings, and conducting surveys. Illinois does not need to force providers to accept SEIU representation, against their will, to obtain policy recommendations from them.

III. The Court Should Resolve This Petition in the Same Term As *Janus,* or Hold It in Abeyance Pending *Janus.*

On June 6, 2017, an Illinois state employee filed a petition for a writ of certiorari that presents the question of whether "*Abood* [should] be overruled and public-sector agency fees arrangements declared unconstitutional under the First Amendment." Pet. (i), *Janus v. AFSCME, Council 31*, 16-___ (U.S. June 6, 2017) ("*Janus* Pet."). Although "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked," in the sense that the former is not dependent on the latter, *Harris*, 134 S. Ct. at 2640, this petition and *Janus* nevertheless present overlapping issues.

This case and *Janus* involve the same statute—the IPLRA—and turn, in large part, on an exclusive representative's power and nature in the public sector. An exclusive representative's power to speak and contract for unconsenting individuals, and thus to engage in advocacy they may oppose, is why compelling those individuals to accept or subsidize an exclusive representative infringes on their First Amendment rights. *See supra* pp. 22–26; *Janus* Pet. 9–11. The political nature of bargaining with the government is why these infringements implicate core First Amendment concerns. *See Harris*, 134 S. Ct. at 2632–33. The extraordinary powers that come with being an exclusive representative also are a reason why agency fees fail constitutional scrutiny: the fees are unnecessary because these privileges more than

adequately compensate unions that choose to accept that mantle. *See Janus* Pet. 22–25.

The answer to the first question in this case—whether an exclusive representative is a mandatory association subject to exacting scrutiny—affects whether fees to support an exclusive representative are constitutional. If regimes of exclusive representation compel association, then forcing individuals to also subsidize those regimes exacerbates that First Amendment injury. *See Janus* Pet. 25–27. Alternatively, if an exclusive representative is not a mandatory association, then individuals cannot be forced to support it, for "compulsory subsidies for private speech . . . cannot be sustained" unless there exists "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy." *Knox*, 132 S. Ct. at 2289 (quoting *United States v. United Foods*, 533 U.S. 405 (2001)).

Given these common issues, this case and *Janus* should be decided in the same term. Doing so will allow the Court to issue consistent jurisprudence concerning if and when the government can compel individuals to either accept or subsidize an exclusive representative for dealing with the government.

Alternatively, this petition should be held pending *Janus*. If the Court grants review in *Janus*, its subsequent decision will likely reach issues that affect the resolution of the important questions presented in this case. The Court should thus determine, after deciding *Janus*, whether to take this case, or wheth-

er to vacate and remand the Seventh Circuit's decision for further consideration in light of *Janus*.

CONCLUSION

The government cannot be allowed to dictate, for any rational basis, which organization speaks for individuals in their relations with the government. The First Amendment reserves that choice to each individual. The Court should take this case to hold that states need a compelling interest to force individuals into an exclusive-representation relationship, and that no such interest justifies extending exclusive representation to individuals who are not full-fledged public employees. The writ of certiorari should be granted on both questions.

Respectfully submitted,

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