No. 18-719

IN THE
Supreme Court of the United States

KATHLEEN URADNIK,

Petitioner,

v.

INTER FACULTY ORGANIZATION, ST. CLOUD STATE UNIVERSITY, AND BOARD OF TRUSTEES OF THE MINNESOTA STATE COLLEGES AND UNIVERSITIES,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Three times in recent years, this Court has recognized that schemes compelling public-sector employees to associate with labor unions impose a "significant impingement" on those employees' First Amendment rights. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–11 (2012); *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2483 (2018). The most recent of those decisions, *Janus*, likewise recognized that a state's appointment of a labor union to speak for its employees as their exclusive representative was "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. The lower courts, however, have refused to subject exclusive representation schemes to any degree of constitutional scrutiny, on the mistaken view that this Court approved such arrangements in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The question presented is therefore:

Whether it violates the First Amendment to appoint a labor union to represent and speak for public-sector employees who have declined to join the union.

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INTEREST OF THE AMICUS CURIAE[1]

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements. Foundation attorneys have represented individuals in almost all of the compulsory union fee cases that have come before this Court. *E.g.*, *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018); *Harris v. Quinn,* 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000,* 567 U.S. 298 (2012).

Foundation attorneys also represent or have represented independent Medicaid and childcare providers in cases challenging the constitutionality of the government imposing exclusive representatives on individuals who are not government employees. The lower courts, however, have so far rejected these challenges based on the misapprehension that *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984) held exclusive representation is not subject to First Amendment scrutiny, but only rational basis review. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill v. SEIU*, 850 F.3d 861,

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and have consented to the filing of this brief. The Petitioner and two Respondents filed a blanket consent letter with this Court on December 12, 2018, while the third Respondent (the Inter Faculty Organization) provided consent by a separate communication, which has been lodged with the Clerk. No party's counsel authored any part of the brief and no one other than *amicus* funded its preparation or filing.

864 (7th Cir. 2017); *D'Agostino v. Baker*, 812 F.3d 240, 242-43 (1st Cir. 2016); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (unpublished, per curiam order). The Eighth Circuit's opinion in *Bierman* was the basis for the adverse ruling against the Petitioner here, *see* Pet. 8-9, and is currently before this Court on a petition for certiorari, *Bierman v. Dayton*, No. 18-766 (U.S. Dec. 13, 2018).

SUMMARY OF THE ARGUMENT

This brief underscores why it is important that the Court clarify that the government must satisfy heightened First Amendment scrutiny, and not a mere rational basis review, to compel individuals to accept an exclusive representative for speaking with the government.

The impact that exclusive representation has on public employees' speech rights is readily apparent. In 2017, over 7.9 million public employees were required, as a condition of their employment, to accept a union as their representative for dealing with the government.[2] The Court recognized in *Janus* that, "[i]n addition to affecting how public money is spent, union speech in collective bargaining addresses many . . . important matters," such as "education, child welfare, healthcare, and minority rights, to name a few." 138 S. Ct. at 2476.

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[2] U.S. Dep't of Labor, Bureau of Labor Statistics, *Econ. News Release*, tbl. 3 (Jan. 19, 2018) (https://www.bls.gov/news.release/union2.t03.htm).

The issue in this case, however, affects more than just public employees. Also at stake is whether there is any constitutional limit on the government's ability to dictate who speaks for individuals in their relations with the government. The lower courts have held that exclusive representation is subject only to *rational basis review*. *See* Pet.App. 6-7; *supra* at 1-2 (citing cases). That level of scrutiny gives government officials untrammeled authority to appoint exclusive representatives to speak for any profession, industry, or group of citizens with common interests.

The government will exercise that authority if it remains unchecked. Since the early 2000s, several states have extended exclusive representation beyond their employees to: (1) independent Medicaid providers, many of whom are parents who care for their own children in their own homes; (2) individuals who operate home-based childcare businesses, and (3) individuals who operate adult foster homes for persons with disabilities. This disturbing trend continues to grow.

The Court cannot permit the government to choose, on any rational basis, which organization speaks for individuals vis-à-vis the government. The First Amendment reserves this choice to each individual. It is therefore of the utmost importance that the Court hold that regimes of exclusive representation, like other mandatory expressive associations, are subject to heightened First Amendment scrutiny.

ARGUMENT

A. An Exclusive Representative Is a Mandatory Expressive Association.

1. The Court held in *Janus* that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights," 138 S. Ct. at 2469, and inflicts a "significant impingement on associational freedoms," *id.* at 2478. This conclusion was well founded. The designation creates a mandatory agency relationship between the union and the individuals. *See ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991). The union gains the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 138 S. Ct. at 2467, as well as the right to contract for them, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This includes individuals who oppose the union's advocacy and agreements. *Id.*

An exclusive representative's rights are "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. 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." *Allis-Chalmers*, 388 U.S. at 180.

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v.*

Terry, 494 U.S. 558, 567 (1990), exclusive representatives can engage in advocacy that represented individuals oppose. *See Knox*, 567 U.S. at 310. They also can enter into binding contracts that harm their principals' interests. *See Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 349-40 (1953). For example, an exclusive representative can waive unconsenting individuals' rights to bring discrimination claims in court. *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Given an exclusive representative's authority to speak and contract for unconsenting individuals, the Court has long recognized that this mandatory association restricts individual liberties. *See Vaca v. Sipes*, U.S. 171, 182 (1967) (exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"); *14 Penn Plaza,* 556 U.S. at 271 (exclusive representatives can waive individuals' legal rights because "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands.").

The Eleventh Circuit reached the same conclusion in *Mulhall v. Unite Here Local 355*, holding that an employee had "a cognizable associational interest

under the First Amendment" in whether he is subjected to a union's exclusive representation. 618 F.3d 1279, 1286-87 (11th Cir. 2010). That court recognized that the union's "status as his exclusive representative plainly affects his associational rights" because the employee would be "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. *Id.* at 1287.

2. Exclusive representation is thus subject to heightened First Amendment scrutiny, because it inflicts a "significant impingement on associational freedoms," *Janus*, 138 S. Ct. at 2478. The Court has long required that impingements on the "right to associate for expressive purposes" be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984) (citing earlier cases); *see,* e.g., *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658-59 (2000); *Rutan v. Republican Party,* 497 U.S. 62, 74 (1990).

The lower courts' conclusions that exclusive representation is subject only to rational basis review cannot be reconciled with *Janus*, those other precedents, or with the extraordinary authority these mandatory agents possess. *Knight* does not support a contrary conclusion for the reasons stated in the Petition at 10-13. Indeed, it is inconceivable that this Court, when deciding in 1984 the narrow question of whether a college can exclude faculty members from union "meet and confer" sessions, intended to rule

that the First Amendment is no barrier whatsoever to states forcing individuals to accept a representative for speaking and contracting with the state.

Yet, that is how broadly the First, Seventh, and Eighth Circuits have interpreted *Knight*. *See D'Agostino,* 812 F.3d at 243-44; *Hill,* 850 F.3d at 864; *Bierman*, 900 F.3d at 574. That interpretation has significant implications not only for unionized public employees, but for other citizens as well.

B. The Government Will Have Free Rein to Appoint Mandatory Agents to Speak for Citizens If Exclusive Representation Is Subject Only to Rational Basis Review.

1. The implications of the lower courts' decisions here and in *Bierman*, *Hill*, and *D'Agostino* are staggering. These decisions permit the government to appoint, for any rational basis, an exclusive representative to speak and contract for professions, industries, or other discrete groups of citizens in their relations with the government.

The Seventh and Eight Circuits held, respectively, that Illinois and Minnesota were constitutionally free to extend exclusive representation beyond their employees to certain Medicaid providers. *See Hill,* 850 F.3d at 864; *Bierman*, 900 F.3d at 574. Those providers are employed not by states, but by persons with disabilities or their guardians to assist with activities of daily living. *See,* e.g., *Harris*, 134 S. Ct. at

2623-25 (discussing Illinois' program).[3] Many of those personal care providers are the beneficiary's parent, sibling, or other family member. *See id*. at 2624-25. For example, in California's In-Home Supportive Services Program, which is among the nation's largest, 47% of personal care providers are family members and 25% are friends or neighbors.[4]

Even though those caregivers are not public employees—they merely receive Medicaid payments for their services—fifteen (15) states have imposed exclusive representatives on them. *See* Maxford Nelsen, *Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity* (Freedom Found. 2018) (https://www.freedomfoundation.com/labor/getting-organized-at-home/).[5]

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[3] *See generally* Robert Wood Johnson Found., *Developing and Implementing Self-Direction Programs and Policies: A Handbook* 1-5 to 1-10 (May 4, 2010) (https://www.bc.edu/content/dam/files/schools/gssw_sites/nrcpds/cc-full.pdf); Dept. of Health & Human Servs. *Understanding Medicaid Home & Comty. Servs.: A Primer*, 177-80 (2010) (https://aspe.hhs.gov/system/files/pdf/76201/primer10.pdf);

[4] Pamela Doty et al., *In-Home Support Services for the Elderly & Disabled: A Comparison of Client-Directed and Professional Management Models of Service Delivery* 20, 48 Tbl. 5 (U.S. Dep't of Health & Human Servs. 1999) (http://aspe.hhs.gov/daltcp/reports/1999/ihss.pdf).

[5] *See* Cal. Welf. & Inst. Code § 12301.6(c)(1) (West, Westlaw through Ch. 106 of 2018 Reg. Sess.); Conn. Gen. Stat. § 17b-706b (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp.

Three states, New Jersey, Oregon, and Washington, have also compelled proprietors of adult foster homes—which provide care to the disabled and elderly in residential settings[6]—to accept exclusive representatives to bargain with those states over Medicaid reimbursement rates for their services. *See* Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029; N.J. Exec. Order No. 97 (Mar. 5, 2008).

The First and Seventh Circuits, and the Second Circuit in an unpublished order, similarly held the First Amendment to be no impediment to states designating exclusive representatives for home-based

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Stat. 315/3(n) (2016) (West, Westlaw through 2018 Reg. Sess.); Md. Code Ann., Health-Gen. § 15-901 (West, Westlaw through 2018 Reg. Sess.); Mass. Gen. Laws ch. 118E, § 73 (West, Westlaw through Ch. 315 of 2018 2d); Minn. Stat. § 179A.54 (West, Westlaw through 2018 Reg. Sess.); Mo. Rev. Stat. § 208.862(3) (West, Westlaw through 2018 2d Reg. Sess.); Or. Rev. Stat. § 410.612 (West, Westlaw through 2018 Reg. Sess.); Vt. Stat. Ann. tit. 21, § 1640(c) (West, Westlaw through Law 2017-18 Sess.); Wash. Rev. Code § 74.39A.270 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, § 741.01-06 (July 17, 2009) (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) (expired).

[6] *See* Janet O'Keeffe et al., U.S. Dep't of Health & Human Servs., *Using Medicaid to Cover Services for Elderly Persons in Residential Care Settings* (Dec. 2003) (https://aspe.hhs.gov/report/using-medicaid-cover-services-elderly-persons-residential-care-settings-state-policy-maker-and-stakeholder-views-six-states).

childcare providers. *See Hill*, 850 F.3d at 864; *D'Agostino*, 812 F.3d at 243-44; *Jarvis,* 660 F. App'x at 72-73 (per curiam).

Most states operate programs that subsidize the childcare expenses of low-income families pursuant to the federal Child Care and Development Fund Act, 42 U.S.C. § 9857 et seq.[7] Families enrolled in these programs can generally use their subsidy to pay the childcare provider of their choice, including: (1) home-based "family child care" businesses; and (2) "relative care providers" who, as the name implies, are family members who care for related children in their own homes. *See* 45 C.F.R. § 98.2 (defining "eligible child care provider" and "family child care provider").

Beginning in 2005, states began imposing exclusive representatives on these childcare providers for petitioning the states over their childcare regulations and/or their subsidy rates for indigent children. To date, eighteen (18) states have authorized mandatory representation for home-based childcare providers, though several of these laws or executive orders have expired or were later rescinded.[8]

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[7] *See* U.S. Gov't Accountability Office, GAO-04-786, *Child Care: State Efforts to Enforce Safety & Health Requirements* 4-6 (2004).

[8] Conn. Gen. Stat. § 17b-705 (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp. Stat. 315/3(n); Mass. Gen. Laws ch. 15D, § 17 (West, Westlaw through Ch. 9 of 2017 1st Annual Sess.); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed 2011);

These home-based childcare providers are not government employees. In fact, family childcare providers are not employees at all, but rather are proprietors of small daycare businesses who sometimes employ their own employees. *See,* e.g., *Parrish v. Dayton*, 761 F.3d 873 (8th Cir. 2014). A family child care providers' only connection to the state, besides being regulated by it, is that one or more of their customers may partially pay for their daycare services with public aid-monies.

2. These schemes targeting personal care and childcare providers alone affect hundreds of thousands of individuals. *See* Nelsen, *supra* at 8 (estimating that 358,037 personal care providers were subject to union dues exactions in 2017). But these schemes will be only the beginning if government officials are allowed to appoint exclusive representatives to speak

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Md. Code Ann., Educ. § 9.5-705 (West, Westlaw through 2018 Reg. Sess.); Minn. Stat. § 179A.52 (expired); N.M. Stat. Ann. § 50-4-33 (West, Westlaw through 2d Reg. Sess. 53rd Legis.); N.Y. Lab. Law § 695-a et seq. (West, Westlaw through L.2018, ch. 356); Or. Rev. Stat. § 329A.430 (West, Westlaw through 2018 Reg. Sess.); R.I. Gen. Laws § 40-6.6-1 et seq. (West, Westlaw through Ch. 353 of Jan. 2018 Sess.); Wash. Rev. Code § 41.56.028 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, § 741.01-.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed 2011); 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).

for individuals on any rational basis. Under that low level of scrutiny, government officials could politically collectivize any profession or industry under the aegis of a state-favored interest group.

Simply consider persons or entities similar to personal care or childcare providers. If the government can constitutionally appoint an exclusive representative to speak for personal care providers who receive Medicaid payments for their services, then the government can do the same to other medical professions (doctors or nurses) or industries (hospitals or insurers) that receive Medicaid and Medicare payments. And if the government can appoint a mandatory agent to represent home-based childcare businesses in their relations with state regulators, then the government can do the same to other types of businesses that receive public monies. That includes, for example, government contractors or landlords who accept Section 8 housing vouchers.

Worse, nothing in the lower courts' opinions limit the reach of exclusive representation to only those who accept government monies. The New York law upheld in *Jarvis* imposed an exclusive representative on family childcare providers who did *not* accept public monies. N.Y. Lab. Law § 695-c(2-3). The law broadly empowered this representative to bargain with state regulators over "the stability, funding and operation of child care programs, expansion of quality child care, improvement of working conditions, salaries and benefits and payment for child care providers." *Id*. at § 695-f(1). New York, in effect, ap-

pointed a mandatory lobbyist to represent an entire profession.

C. Exclusive Representation Must Be Subject to Heightened First Amendment Scrutiny, Not Rational Basis Review.

The Court should disabuse the lower courts of the notion that the government enjoys broad discretion to designate exclusive representatives for its citizens. If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government. This form of compelled speech and association not only infringes on individual liberties, but distorts the political process the First Amendment protects.

"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). Consequently, a citizen's right to choose which organization, if any, petitions the government for him or her 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).

The government tramples on this liberty when it chooses which organization shall be an individual's advocate in dealing with the government. "[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 v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 790-91 (1988).

Allowing the government to create artificially powerful interest groups 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. Exclusive representatives are government imposed "factions": similarly-situated individuals forced together into an association to pursue self-interested policy objectives. 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 factions into which citizens are conscripted, and that have special privileges in dealing with the government that no others enjoy. "To 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).

The Court cannot "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose.'" *Harris*, 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). The lower courts have approved such a device by holding that states can compel individuals to accept an exclusive representative on any rational basis. It is imperative that the Court correct

this error and make clear that this type of mandatory expressive association is subject to heightened First Amendment scrutiny.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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