No. 19-847

IN THE

Supreme Court of the United States

JONATHAN REISMAN,

Petitioner,

v.

ASSOCIATED FACULTIES OF THE UNIVERSITY OF MAINE, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF *AMICUS CURIAE* FREEDOM FOUNDATION IN SUPPORT OF PETITIONERS

JAMES G. ABERNATHY
Counsel of Record
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA, 98507
(360) 956-3482
JAbernathy@
FreedomFoundation.com

Counsel for Amicus Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amicus Freedom Foundation (the "Foundation") respectfully moves for leave of Court to file the accompanying brief in support of the petition for writ of certiorari in the above-captioned case. Due to an oversight, *amicus* provided notice to the parties six days before the filing deadline, rather than the 10 days specified in Supreme Court Rule 37.2. Petitioner and Respondent Associated Faculties of the Universities of Maine have consented to the filing of this brief. Respondent State of Maine has not responded to the Foundation's request for consent.

The principal purpose of this Court's 10-day notice requirement is to allow Respondents time to seek an extension of time for their brief in opposition should they want to review and respond to arguments made by *amici* supporting the petition. Here, all Respondents have submitted waivers of their right to respond to the Petitioner's cert petition and will have ample time to respond to the brief included herein if and when they are called upon by this Court to respond. Accordingly, *amicus* does not believe that Respondents have suffered any prejudice on account of the inadvertent delay in providing notice.

The Foundation focuses on public-sector union reform through litigation, legislation, education and community activation. The Foundation has worked to protect the rights of union-represented public and partial-public employees and regularly assists employees in understanding and exercising those rights. The Foundation has represented public and partial-public employees in litigation against unions and public employers who have violated employees' rights regarding union membership and dues payment. Specifically, the Foundation has assisted tens of thousands of partial-public

employee home caregivers and family child care providers on the West Coast in understanding and exercising their rights under *Harris v. Quinn*, 134 S. Ct. 2618 (2014), often working with them one-on-one as needed. As a result, the Foundation has unique insight into the abuses heaped on partial-public employees by their exclusive representatives. The Foundation submits this *amicus* brief because the decision below furthers the ability of public employers and unions to abuse the rights of both partial-public employees and full-fledged public employees.

Amicus respectfully moves this Court for leave to file the accompanying brief in support of Petitioner.

Respectfully submitted,

JAMES G. ABERNATHY
Counsel of Record
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA, 98507
(360) 956-3482
JAbernathy@
FreedomFoundation.com

Counsel for Amicus Curiae

February 5, 2020

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INTEREST OF *AMICI CURIAE*[1]

The Freedom Foundation ("Foundation") is a 501(c)(3) nonprofit, nonpartisan organization working to advance individual liberty, free enterprise, and limited, accountable government. Founded in 1991 and based in Olympia, Washington, the Foundation maintains additional offices in Salem, Oregon, Sacramento, California, Columbus, Ohio, and Harrisburg, Pennsylvania.

The Foundation focuses on public-sector union reform through litigation, legislation, education and community activation. The Foundation has worked to protect the rights of union-represented public and partial-public employees and regularly assists employees in understanding and exercising those rights. The Foundation has represented public and partial-public employees in litigation against unions and public employers who have violated employees' rights regarding union membership and dues payment. Specifically, the Foundation has assisted tens of thousands of partial-public employee home caregivers and family child care providers on the West Coast in understanding and exercising their rights under *Harris v. Quinn*, 134 S. Ct. 2618 (2014), often working with them one-on-one as needed. As a result, the Foundation has unique insight into the abuses heaped on partial-public employees by their exclusive representatives. The Foundation also filed the complaint with the Washington Public Disclosure Commission that ultimately led to a separate lawsuit, *Washington v. WEA*, which was

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[1] Pursuant to Rule 37.2, all parties received notice of the filing of this brief according to the facts discussed in the accompanying Motion for Leave to File *Amicus* Brief. Pursuant to Rule 37.6, amicus affirms that no party's counsel authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

consolidated with *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007), before this Court. The Foundation also filed amicus briefs supporting the petitioners in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016) and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

SUMMARY OF ARGUMENT

The First Circuit's holding against the petitioner in *Reisman v. Associated Faculties of University of Maine, et. al*, 929 F.3d 409 (1st Cir. 2019) is grounded primarily in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). However, *Knight* primarily addressed whether public employees have a First Amendment free speech right to participate in a meet-and-confer process with the employer alongside the exclusive bargaining representative. *Knight* did not examine the implications of exclusive representation for employees' associational rights, nor the implications of allowing a labor union to speak for nonmember bargaining unit employees. Had this Court undertaken this examination, it would have discovered that exclusive representation imposes compelled speech and association on public employees which is difficult, if not impossible, for employees to escape and carries with it tangible negative consequences. These consequences fall exceptionally hard on the "partial-public employees" subject to *Harris v. Quinn*.

Exclusive representation enables unions to routinely claim in bargaining *and advocacy* to represent all employees in a bargaining unit, even if many or most are not union members or have previously taken affirmative steps to disassociate from the union. With no ability to categorically disassociate from an exclusive bargaining representative, employees must take even further affirmative action to attempt to distance

themselves from positions taken by the union with which they disagree. Regardless of such affirmative acts, however, exclusive representation enables unions to claim they speak on behalf of even employees who have sought to disassociate from them.

Exclusive representation also gives unions access to employees' personal information, thus violating employees' privacy and permitting unions to barrage employees with unsolicited speech. A union's status as exclusive representative also affords it access to the employer's payroll system for dues collection purposes, thus enabling a variety of coercive practices. Additionally, many partial-public employees are subjected to coercive captive-audience meetings with union representatives because unions have secured access to employee orientations and training through collective bargaining.

Finally, employees subjected to these practices often have little practical choice in determining whether to surrender their rights to an exclusive representative. Unions are often certified as exclusive representatives of partial-public employee bargaining units with the support of only a small minority of employees, if an election occurs at all. Once certified, it is difficult, if not impossible, for employees to change or decertify an unwanted representative – cementing a "democratically-elected" union's power for generations.

Put simply, exclusive representation saddles employees who did not seek to associate with a union with the burden of attempting to disassociate while, at the same time, limiting their ability to do so. It is a situation the First Amendment cannot tolerate. Not only is exclusive representation a substantial infringement on employee rights, it is also an enabling vehicle for the abuse of employees at the hands of their State-mandated exclusive representatives, as documented

below. Individual public and partial-public employees should not be subject to the speech and associational burdens of exclusive representation by a union without their affirmative consent.

ARGUMENT

Petitioner contends state law requiring him to accept the Associated Faculties of the University of Maine ("AFUM") as his exclusive bargaining representative violates his rights to freedom of speech and association as protected by the First Amendment.

In affirming the district court's holding that petitioner's rights were not violated by exclusive representation, the First Circuit relied heavily on *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

The First Circuit dismissed petitioner's contention that exclusive representation compels him to associate with and speak through AFUM in violation of the First Amendment by reference to *Knight*, which it stated "would appear to dispose of this contention rather clearly." *Reisman*, 929 F.3d at 414.

However, whereas the plaintiffs in *Knight* sought comparable access to the meet-and-confer process afforded to the exclusive representative, petitioner here simply wishes to be free from the speech and associational burdens placed upon him by having to accept AFUM as his exclusive representative. The Plaintiff here does not demand a seat at the bargaining table.

The Court in *Knight* focused primarily on whether members of the public, including public employees, have a constitutionally guaranteed right to compel the government to listen to them, concluding they do not.

See Knight, 465 U.S. at 283 ("Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education.").

Further, the Court observed,

> 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. Nor has the State attempted to suppress any ideas.

Id. at 288. Similarly, the Court dismissed any infringement of employees' associational rights in merely a few sentences, observing only that employees "are free to form whatever advocacy groups they like" and "are not required to become members" of the union. *Id*. at 289.

However, while the Court in *Knight* accurately noted that an exclusive representative's "unique status" serves to "[amplify] its voice in the policymaking process," it undertook no analysis of the burdens placed upon the speech and associational freedoms of public or partial-public employees under exclusive representation by a union. *Id*. at 288.

While the issue was not squarely before the court in *Janus*, it nonetheless correctly described state laws authorizing a union to act as the "exclusive bargaining agent" of public employees as "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. Moreover, exclusive representation "confers many benefits" on unions and "results in a tremendous increase in the power of the union" at the expense of public employees' First Amendment rights. *Id*. at 2467.

A fuller analysis of how unions use their "unique status" as exclusive bargaining representatives of classes of employees governed by state law to compel speech and infringe on associational freedoms is sorely needed. The Court should accept Petitioner's request for review and perform such an analysis, which will indicate exclusive representation burdens employees' associational freedoms in practical ways that cannot be escaped by forming alternate advocacy groups or resigning union membership. This is particularly true regarding partial-public employees, such as those at issue in *Harris*.

I. Exclusive representation allows a union to presume the support of all represented employees in its speech and advocacy, placing the burden on employees who disagree with the union to affirmatively express their disagreement.

Unions routinely rely on their "unique status" as exclusive representative to claim they represent and speak on behalf of all employees in a bargaining unit, leaving those who oppose the union in the position of having to take affirmative action to express their disagreement. This can happen both in the context of collective bargaining *and lobbying*. An employee may vote against exclusive representation by a union, may decline union membership and object to the subsidization of the union's speech through union dues, may never join a union as a member, or may not even be aware of a union's existence or views but is nonetheless *still* presumed by the law in each case to support the union's inherently political positions in bargaining and lobbying.

This association by default occurs in few, if any, other contexts. For example, this Court has already deemed such "opt-out schemes" illegal in the context

of union dues payments. *Janus*, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."). Other kinds of membership organizations may only speak on behalf of members who have taken affirmative action to join and associate. It is commonly understood, for instance, that trade associations engaged in lobbying represent only those businesses that join the association as members, not the whole industry.

A particularly striking example occurred in 2018, when the Washington State Legislature passed Senate Bill 6199, a bill which would allegedly privatize tens of thousands of partial-public "individual provider" home caregivers ("IPs").

Backed by Service Employees International Union Local 775 ("SEIU 775"), the exclusive representative of IPs in Washington, as a measure to bypass this Court's decision in *Harris*, *supra*, SB 6199 directed Washington Department of Social and Health Services ("DSHS") to contract with a private company to take over administrative functions previously performed by the state and become, allegedly, caregivers' legal employer. As "employees" of a private company under the jurisdiction of the National Labor Relations Act instead of state law, SEIU 775 believes it will be free to compel thousands of nonmember IPs to once again pay agency fees as a condition of employment.[2] The union

[2] Washington is one of 22 states that has not outlawed the enforcement of "agreements requiring membership in a labor organization as a condition of employment," as is its right under 29 U.S.C. § 164(b). Accordingly, private-sector employees in Washington may be required to pay agency fees under the terms of a CBA.

has already declared its intention to do just that, explicitly defying this Court's decision in *Harris*.[3]

In testimony on SB 6199 before the Senate Ways and Means Committee, SEIU 775's lobbyist claimed she was "here representing SEIU 775 and its over 35,000 individual caregivers across Washington state speaking in support of Senate Bill 6199."[4] In subsequent testimony before the House Appropriations Committee, the union's lobbyist claimed to speak in support of SB 6199 "on behalf of SEIU 775 and the individual providers we've been talking about – 35,000 individual providers across this state."[5]

She made no mention of the fact that, at the time, over 4,000 of the 35,000 IPs SEIU 775 "represented" had successfully resigned their membership in the union.[6] Instead, exclusive representation enabled the

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[3] Adam Glickman, secretary-treasurer of SEIU 775, told *The Olympian* shortly after SB 6199's passage that, "the possibility of a union in which workers can't opt out of collective bargaining costs without religious objection would be 'a good thing' that would make SEIU a 'stronger union.' . . . 'I don't think there's anything wrong with states legislating their values even if those values conflict with Supreme Court decisions,' he said." Walker Orenstein. "Inslee signs controversial union bill despite calls for a veto." *The Olympian*. March 27, 2018. https://www.theolympian.com/news/politics-government/article206839864.html

[4] Lani Todd. Testimony before the Washington State Senate Ways and Means Committee. February 5, 2018. https://player.invintus.com?clientID=9375922947&eventID=2018021088&startStreamAt=21193&stopStreamAt=21205&autoStartStream=true

[5] Lani Todd. Testimony before the Washington State House Appropriations Committee. February 24, 2018. https://player.invintus.com?clientID=9375922947&eventID=2018021320&startStreamAt=17834&stopStreamAt=17849&autoStartStream=true

[6] Jeff Rhodes. "Democrats and Governor Inslee push bill that would force newly freed caregivers back into union." Freedom

union to proudly proclaim that all represented IPs supported its position on the legislation. Essentially, exclusive representation means the presence of SEIU 775's lobbyist equated to the presence of every one of the 35,000 IPs, even those who took affirmative steps to disassociate from SEIU 775 and its political speech.

In reality, many IPs strongly opposed SEIU 775's attempt to again force them into paying agency fees. These IPs had to mount a deliberate and difficult effort to express their opposition to the position of their exclusive representative. Some traveled to the state capital to testify against the legislation in committee hearings.[7] Others contacted their legislators via phone or emails.[8] Some voiced their opposition to the press and local TV news stations.[9] One IP, a mother caring for her disabled daughter, lamented the situation to King 5 News: "They're so huge. They're so big. We're

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Foundation. February 8, 2018. https://www.freedomfoundation.com/labor/democrats-governor-inslee-push-bill-force-newly-freed-caregivers-back-union/

[7] Maxford Nelsen. "House committee shuts off debate on controversial SEIU proposal." Freedom Foundation. February 20, 2018. https://www.freedomfoundation.com/press-release/house-committee-shuts-off-debate-controversial-seiu-proposal/

[8] As one lawmaker observed during the debate on SB 6199: "I probably got three or four hundred emails on this bill, and they weren't the cut and paste ones . . . They actually took the time to write them themselves. And there wasn't a single one that was supportive of this legislation." Rep. Matt Manweller. House Appropriations Committee hearing on SB 6199. February 24, 2018. https://player.invintus.com/?clientID=9375922947&eventID=2018021320&startStreamAt=17689&stopStreamAt=17717&autoStartStream=true

[9] Maxford Nelsen. "Caregiver takes on SEIU on King 5." Freedom Foundation. February 22, 2018. https://www.freedomfoundation.com/labor/caregiver-takes-on-seiu-on-king-5/

little; we're at home. We're weak. What are we going to do? How are we going to go up against a giant like [SEIU]?"[10] More than 1,000 IPs signed a petition urging the governor, unsuccessfully, to veto the legislation.[11]

In effect, SEIU 775's status as their exclusive representative required these IPs to affirmatively exercise their First Amendment free speech rights to combat the violation of their First Amendment free association rights wrought by their forced association with the union. Other IPs were likely entirely unaware of the union's support for legislation to strip them of their constitutional rights on a technicality and would have opposed it had they known. These caregivers were damaged by the union's claims that it spoke for them in supporting SB 6199.

Just as the Supreme Court recognized in *Janus* that making union deductions from a public employee's wages violates the First Amendment's free speech protections "unless the employee affirmatively consents to pay," *Janus*, 138 S. Ct. at 2486, a union claiming to speak on behalf of a public employee violates the First Amendment's free speech and association protections unless the employee first affirmatively consents to the union's representation.

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[10] Natalie Brand. "Home caregiver mom fighting union backed bill." *King 5 News*. February 21, 2018. https://www.king5.com/article/news/politics/home-caregiver-mom-fighting-union-backed-bill/281-521882870

[11] Maxford Nelsen. "Nearly 900 caregivers petition Inslee to veto SEIU bill." Freedom Foundation. March 8, 2018. https://www.freedomfoundation.com/labor/nearly-900-caregivers-petition-inslee-veto-seiu-bill/

II. Exclusive representation harms employees who do not wish to associate with the recognized union.

A. Exclusive representation permits unions to violate employees' privacy.

Collective bargaining agreements ("CBAs") negotiated by exclusive representatives of partial-public employee bargaining units often obligate the employer to provide employees' personal information to the union, regardless of whether a bargaining unit employee is a union member.

For example, IPs in Washington serving Medicaid clients are considered public employees for collective bargaining purposes only and, as "partial-public employees," are subject to *Harris'* protections against compelled union payments.[12] SEIU 775 is the exclusive representative of the statewide bargaining unit of IPs.

Article 5.1 of the CBA between the State of Washington and SEIU 775 requires the state to regularly provide the union with employee lists including, among other things, IPs' full name, home address and mailing address, home phone and personal cell phone numbers, email address, date of birth, Social Security number, gender, marital status, language preference and relationship of the caregiver to their client(s).[13]

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[12] See RCW 74.39A.270.

[13] "Collective bargaining agreement, the State of Washington and Service Employees International Union Local 775, 2019-2021." https://ofm.wa.gov/sites/default/files/public/labor/agreements/19-21/nse_homecare.pdf

CBAs governing caregivers in Oregon, Illinois and Massachusetts permit unions access to similar personal information.[14]

Thus, without any authorization and often over their objections, employees' sensitive personal information is handed over to a union purely because of its "unique status" as exclusive representative. Worse, objecting employees may not avoid disclosure of their information to the union by resigning union membership.

B. Excusive representation subjects employees to unwanted, coercive union speech and dues deductions.

One prominent use of employees' personal information by unions is to bombard employees with membership solicitations via email, phone calls, postal mail and home visits by union organizers. The tactics of union organizers are often coercive, deceptive and harassing, but employees can do little to stop the unwanted solicitations.

In a complaint filed with the Washington Attorney General's Office, a husband recounted how an "adversarial" union organizer came to his home demanding to know why his wife, an IP, was not a member of SEIU 775. The complainant described the visit as "harassment" and "extremely threatening." Another IP filed a similar complaint outlining how the union's

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[14] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

frequent phone calls made her feel like she was "being stalked."[15]

Additionally, exclusive representatives may utilize the employer's payroll system to deduct union dues from members' wages.[16]

In 2017, exclusive representatives of bargaining units of partial-public employee home caregivers for Medicaid clients collected almost $150 million in dues from the wages of about 350,000 caregivers.[17] Caregivers' lack of control over the dues payment process facilitates abuse as union organizers employ any means necessary to secure an employee's signature on a dues deduction authorization form or obtain an employee's oral consent to dues deductions.

IP Cindy Ochoa filed a federal lawsuit against SEIU 775 in 2018 after a union organizer forged her signature on a union membership form, triggering unauthorized and irrevocable union dues deductions from her wages.[18] *Ochoa v. SEIU Local 775, et al*., No. 2:18-CV-297-TOR (E.D. Wash.) Similar federal

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[15] The complaints were filed with the Consumer Protection Division of the Washington Attorney General's Office on January 27, 2015 and July 21, 2011, respectively. https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf

[16] See, for example, RCW 41.56.113.

[17] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

[18] Sydney Phillips. "Three Years Later, SEIU 775 Finally Pays for Its Fraud." The Freedom Foundation. April 2, 2019. https://www.freedomfoundation.com/litigation/three-years-later-seiu-775-finally-pays-for-its-fraud/

litigation is pending in California. *See Quezambra v. United Domestic Workers of America AFSCME Local 3930*, Case 8:19-cv-00927-JLS (C.D. Cal. May 16, 2019) Caregivers in Minnesota have also reported similar forgeries.[19] SEIU 775 staff have anonymously reported being directed by supervisors to "solicit and lie" to secure dues deduction authorizations from caregivers telephonically.[20]

Public employers often facilitate additional forms of union access to employees. For example, Article 2.6 of SEIU 775's CBA obligates the state to distribute union membership forms at IP orientations, Article 2.7 obligates the state to include union material in caregivers' pay envelopes, and Article 2.8(B) requires the state's payroll website to display union messages when caregivers login.[21]

Since *Harris*, many unions representing partial-public employees have secured the ability, through collective bargaining or statute, to solicit newly-hired employees for union membership in person at state-mandated orientation or training sessions.

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[19] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

[20] Maxford Nelsen. "Six Ways SEIU 775 Is Getting Around *Harris v. Quinn*." Freedom Foundation. May 18, 2016. https://www.freedomfoundation.com/labor/six-ways-seiu-775-is-getting-around-harris-v-quinn/

[21] "Collective bargaining agreement, the State of Washington and Service Employees International Union Local 775, 2019-2021." https://ofm.wa.gov/sites/default/files/public/labor/agreements/19-21/nse_homecare.pdf

In Washington state, Article 2.3(B) of the CBA governing caregivers guarantees SEIU 775 30 minutes with new IPs "in non-public areas" during their contracting appointment.[22] In addition, Article 15.15(A) gives the union 30 minutes with caregivers taking state required basic training.[23]

In public records obtained by the Foundation, employees of the DSHS describe SEIU 775's abuse of caregivers during these captive-audience meetings. One employee described how the union complained to the state after a DSHS employee "not only stayed during the [union] presentation but spoke up in response to IPs who were looking at her for help when they were being pushed into signing up [for union membership]."[24]

In other documents, DSHS staff describe union organizers as "aggressive," "forceful," "incredibly rude," "unprofessional," "coercive," "demanding," and "bullying." State workers further report that caregivers feel "pressured," "misled," "tricked," "coerced," "intimidated" and "forced" into signing dues deduction authorization forms. In one case, DSHS staff reported a caregiver was reduced to tears by the high-pressure tactics of two SEIU 775 organizers.[25]

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[22] *Id.*

[23] *Id.*

[24] Maxford Nelsen. "DSHS Aiding SEIU Misinformation of Home Care Workers." Freedom Foundation. February 8, 2017. https://www.freedomfoundation.com/labor/dshs-aiding-seiu-misinformation-of-home-care-workers/

[25] Maxford Nelsen. "DSHS allowing SEIU to continue exploiting caregivers." Freedom Foundation. January 29, 2018. https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-

In an email, one DSHS employee explained how a caregiver had called to explain "how she was poorly treated by the Union" and "bullied." The employee noted:

> Now, I'd heard horror stories from [redacted] at ODA about her IP's running out of the room when the Union reps were trying to 'force them to sign up to have extra money taken out of their checks and or donate'. But now, I am starting to have some people complaining, hence the letter you took from one of my IP's and now this IP.

(Errors in original.)[26] Another employee described how the union's captive audience meetings with caregivers disrupted the orientation process:

> Our staff have voiced concerns about what information SEIU reps have communicated to IPs, including concerns that IPs express feelings of being pressured to sign the union card right away and lack of full disclosure . . .
>
> Staff have also commented that after receiving the SEIU presentation it is not unusual for IPs to express frustration, confusion and sometimes anger at the contracting process, etc. which is then often directed at our staff. Staff have indicated concerns about what SEIU reps may be communicating to IPs that frequently results in IPs responding in a

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exploiting-caregivers/

[26] Maxford Nelsen. "Records show continued SEIU harassment of caregivers." Freedom Foundation. July 5, 2018. https://www.freedomfoundation.com/labor/records-show-continued-seiu-harassment-of-caregivers/

> hostile or negative way and in turn makes the contracting process more challenging.

(Errors in original.)[27] Despite these accounts and pleas for direction from DSHS staff, management informed employees that, "As a best practice, staff should not be present during union presentation that way they don't feel compelled to ask questions or provide clarification."[28]

In addition to Washington, exclusive representatives of bargaining units of partial-public employee home caregivers arranged for similar captive-audience meetings in Oregon, California, Illinois, Ohio, Massachusetts, Connecticut and Minnesota. Similar stories of caregivers being harassed by union organizers in these settings have emerged from these states as well.[29]

Participation in involuntary captive audience sales pitches in other contexts is, to put it mildly, difficult to arrange and, if implemented, would probably result in swift legal action. Yet incoming, nonmember caregivers are subjected to these coercive meetings solely

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[27] Maxford Nelsen. "DSHS allowing SEIU to continue exploiting caregivers." Freedom Foundation. January 29, 2018. https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-exploiting-caregivers/

[28] Maxford Nelsen. "DSHS Aiding SEIU Misinformation of Home Care Workers." Freedom Foundation. February 8, 2017. https://www.freedomfoundation.com/labor/dshs-aiding-seiu-misinformation-of-home-care-workers/

[29] Maxford Nelsen. "Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity." The Freedom Foundation. July 2018. https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf

because of the union's "unique status" as exclusive bargaining representative.

III. Most partial-public employees are not permitted a meaningful choice about whether to be subject to exclusive representation by a union.

According to *Knight*, an exclusive representative "has its unique status by virtue of majority support within the bargaining unit . . ." 465 U. S. at 273-74. However, while unions organizing partial-public employees under state laws must generally prove some level of support before being formally recognized as the exclusive bargaining representative, "majority support" for many such unions is questionable at best.

In the 12 cases in which a secret ballot vote regarding certification of an exclusive bargaining representative for partial-public employee home caregivers occurred and the results are publicly accessible, participation averaged merely 27 percent.[30] On average, 80 percent of voting participants supported the union, meaning the exclusive bargaining representative on average earned the support of only one-in-five caregivers in the bargaining unit.[31] Several elections were plagued by irregularities. For instance, when administering the union certification election for the statewide bargaining unit of IPs, the Washington Public Employment Relations Commission ("PERC") abandoned many standard protocols, such as mailing an election notice before the ballots, verifying mailing addresses and

[30] *Id.*

[31] *Id.*

providing caregivers an opportunity to request ballots in their own language.[32]

In three additional cases, an election allegedly took place but records showing the results are not publicly accessible. Lastly, in at least two cases, a union was certified as the exclusive representative of a home caregiver bargaining unit without a secret ballot election.[33]

Once certified, an exclusive bargaining representative need not ever again seek the bargaining unit's approval.[34] There is no dispute that annual turnover in the home care industry is exceptionally high; as much as 66 percent.[35] At this rate, it is likely that few caregivers who participated in the original vote remain employed in the bargaining unit even a few years later. Most caregivers simply inherit their exclusive representative.

An exclusive representative generally retains its "unique status" even if only a small minority of the bargaining unit joins as members. Since the *Harris* decision, for instance, partial-public employee family child care providers in Washington state[36] represented

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[32] *Id.*

[33] *Id.*

[34] While Wisconsin, Iowa and Florida recently began requiring unions representing certain classes of public employees to stand for regular certification elections, these are the exception to the rule. No exclusive representative of partial-public employees currently falls under such a requirement.

[35] Amy Baxter. "Median home care turnover hit 66.7% in 2017." Home Health Care News. April 19, 2018. https://homehealthcarenews.com/2018/04/median-home-care-turnover-hit-66-7-in-2017/

[36] RCW 41.56.028(1) provides: "Solely for the purposes of collective bargaining and as expressly limited under subsections (2) and (3) of this section, the governor is the public employer

by SEIU 925 have resigned their union membership in significant numbers. Payroll data from the Department of Children, Youth and Families indicates that, as of November 2018, a mere 36 percent of the state's 6,000 providers had union dues withheld from their wages.[37] Nonetheless, SEIU 925 maintains its position as providers' exclusive representative despite its lack of majority status. The union even continues to claim in public statements that it speaks for the entire bargaining unit, claiming that, "In Washington state, SEIU Local 925 unites over 12,000 family child care providers," significantly more than the number of caregivers who are actual union members.[38]

Home caregivers, family child care providers and other partial-public employees similarly situated in statewide bargaining units who wish to categorically disassociate themselves from an exclusive bargaining representative by decertifying it or electing an alternative bear the heavy burden of initiating and navigating a difficult, if not impossible, legal process.

State laws generally require employees to gather a "showing of interest" requesting an election from 30 percent of the bargaining unit. A petition for an election can generally be filed only during a 30-day period prior to the expiration of the existing CBA,

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of family child care providers who, solely for the purposes of collective bargaining, are public employees."

[37] Payroll data provided to the Foundation by the Washington Department of Children, Youth and Families in response to a request for public records. https://www.freedomfoundation.com/wp-content/uploads/2019/01/Public-Disclosure-request-201812-PRR-653-Response.pdf

[38] SEIU 925. "Early Learning." Accessed January 30, 2019. http://www.seiu925.org/early-learning-3/

which could have a term of several years.[39] If these hurdles are overcome, a representation election will be held in which employees can vote to retain, decertify or replace an exclusive representative.

The process is stacked against employees from the start. Employees must first research what steps to take and/or hire legal counsel for the task. Employees may have to wait a year or more to begin gathering a showing of interest due to timeliness restrictions. Bargaining units can consist of tens of thousands across a state. As independent, home-based providers of home or child care, employees share no common workplace or means of communication, making it virtually impossible to identify bargaining unit members and gather a sufficient showing of interest. The time and expense of collecting so many signatures fall squarely on the employees wishing to disassociate, even though they generally had little or no say about being associated with the exclusive representative to begin with. If enough signatures are gathered, employees must successfully navigate an administrative process while being opposed by experienced union attorneys. If an election is triggered, employees will generally be unable to compete with the incumbent union's ability to communicate campaign messages to the bargaining unit.

Once recognized, an exclusive representative may take steps to cement it's "unique status." In Washington state, the unions representing home caregivers (SEIU 775) and family child care providers (SEIU 925) successfully passed Initiative 1501 ("I-1501"), a 2016 ballot measure which exempted from disclosure employ-

[39] See, for example, RCW 41.56.070.

ees' names and contact information to nongovernmental entities other than the exclusive representative.[40]

SEIU 775 and SEIU 925 dishonestly promoted I-1501 as a way to protect seniors and the vulnerable from identity theft and fraud. Newspaper editorial boards and other observers roundly denounced the deception, with the *Seattle Times* describing I-1501 as a "Trojan horse" that "manipulates voters, using fears and sympathy to make a records act change rejected by courts and lawmakers."[41]

While the unions' primary motivation was preventing the Foundation from using lists of employees obtained from the state to distribute material informing employees of their right to refrain from union dues payments under *Harris*,[42] the measure's passage also foreclosed any possibility of providers collecting a showing of interest sufficient to call a decertification election. Even a well-organized decertification effort is now impossible.

With assistance from the Foundation, a group of family child care providers launched an attempt in early 2017 to replace SEIU 925 with an alternate organization, the Pacific Northwest Child Care Asso-

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[40] Maxford Nelsen. "Initiative 1501: Protecting Seniors or Special Interests?" Freedom Foundation. September 27, 2016. https://www.freedomfoundation.com/labor/initiative-1501-protecting-seniors-or-special-interests/

[41] Seattle Times editorial board. "Reject I-1501 and urge lawmakers to address identity theft." October 4, 2016. https://www.seattletimes.com/opinion/editorials/reject-i-1501-and-urge-lawmakers-to-address-identity-theft/

[42] Jim Brunner. "Behind Washington I-1501 lies union's feud with conservative think tank." *Seattle Times*. October 27, 2016. https://www.seattletimes.com/seattle-news/politics/behind-washington-1-501-lies-unions-feud-with-conservative-think-tank/

ciation ("PNWCCA"), as the bargaining unit's exclusive representative. Utilizing outdated lists obtained from the state prior to I-1501's passage allowed the providers to distribute showing of interest forms to part of the high-turnover bargaining unit, but they only collected about half of the showing of interest necessary for an election, despite high interest from those bargaining unit members that could be reached and the fact that 64 percent of the represented providers had already declined union membership. *See supra* at n. 36.

PNWCCA nonetheless turned in nearly 900 signatures and requested PERC conduct an election, explaining why "[r]ecent events, current law and the composition of the bargaining unit mean it is currently logistically impossible for family child care providers to gather enough signatures to meet the showing of interest threshold . . ."[43]

Nevertheless, PERC denied the providers' request for an election for failure to gather a sufficient showing of interest. *State – Family Child Care Providers*, Decision 12746-B (PECB, 2017). Without access to a current list of providers, any such future efforts are doomed before they begin, *leaving Washington's family child care providers no means of ever decertifying SEIU 925.*

The state's bargaining unit of IPs – now numbering about 40,000 – faces even more dismal odds of ever being able to change or remove SEIU 775 as its

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[43] PNWCCA Response to PERC Deficiency Notice. State - Family Child Care Providers, Case 128937-E-17. June 1, 2016. https://www.freedomfoundation.com/wp-content/uploads/2019/01/PNWCCA-response-to-PERC-deficiency-notice.pdf

exclusive representative, even if caregivers desired to do so unanimously.

CONCLUSION

Exclusive representation of public employees by definition imposes certain burdens on employees' First Amendment rights, requiring employees who do not agree with union speech to take affirmative steps to express their disagreement. At the same time, exclusive representation makes it difficult for employees to disassociate from an unwanted union and enables additional abuses of employees. This Court should grant the petitioner's request for review and reverse the First Circuit's decision on the grounds that exclusive representation in the public-sector violates employees' First Amendment rights to freedom of speech and association.

Respectfully submitted,

JAMES G. ABERNATHY
Counsel of Record
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA, 98507
(360) 956-3482
JAbernathy@
FreedomFoundation.com

Counsel for Amicus Curiae

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