No. 20-1019

IN THE

Supreme Court of the United States

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF THE FAIRNESS CENTER IN SUPPORT OF PETITIONER

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Amicus Curiae the Fairness Center

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QUESTIONS 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 is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. The court of appeals in this case concluded that compelled association regimes are "in direct conflict with the principles enunciated in *Janus*," Pet.App.3, but upheld Ohio's regime anyway because it considered itself bound to do so by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The questions presented are:

1. Whether it violates the First Amendment to designate a labor union to represent and speak for public-sector employees who object to its advocacy on their behalf.

2. Whether *Knight* should be overruled.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Fairness Center is a nonprofit, public interest law firm that provides free legal services to those hurt by public-sector union officials. The Fairness Center represents clients who have been injured and whose rights have been violated due to exclusive representation, and it desires to serve and further those clients' interests by supporting the Petition for Writ of Certiorari. The Fairness Center has represented, among other clients, a Pennsylvania homecare worker and his employer, whose muscular dystrophy rendered him quadriplegic. They jointly challenged an executive order issued by the Pennsylvania Governor allowing for imposition of an exclusive representative on over 20,000 homecare workers in Pennsylvania. This *amicus* brief thus seeks to offer some context from the Commonwealth of Pennsylvania for the benefit of this Court.

SUMMARY OF ARGUMENT

Homecare workers in at least ten states have seen exclusive representation interfere with their care of the disabled and elderly and violate their First Amendment rights. In Pennsylvania, exclusive representation was imposed on homecare workers via executive order, subject to change with the occupant of

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[1] Pursuant to this Court's Rule 37.2(a), Petitioner and Respondents have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the date of filing of the *Amicus Curiae*'s intention to file this brief.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amicus Curiae* made a monetary contribution to its preparation or submission.

the gubernatorial office. Unencumbered by the legislative process, this method of introducing exclusive representation is even easier for unions and supportive politicians to pursue, turning the rights of homecare workers into a political football and presenting a First Amendment problem that, left unchecked, will only grow. It is thus all the more important for this Court to clarify the constitutional limits on exclusive representation—if such a scheme is even constitutional.

REASONS FOR GRANTING THE PETITION

I. This Court Should Clarify the Scope of First Amendment Rights of Workers Who Oppose Exclusive Representation

The recent experience in Pennsylvania reveals why this Court needs to quell the sprawling applications of its *Knight* decision by clarifying the limits on subjecting nonconsenting employees to exclusive representation—if such a practice is constitutional at all. In Pennsylvania, workers who are not even employed by the state have been forced, by executive fiat, to accept a union as their exclusive representative.

A. Some Pennsylvanians Are Subjected to Forced Representation Even Outside the Employment Context

Homecare workers in Pennsylvania have long been vulnerable to attempts to force exclusive representation upon them by executive order. These workers function in an employment situation that is different than that of traditional public employees, yet courts have allowed both groups of employees to be forced into exclusive representation by unions. The most recent attempt through executive order in Pennsylvania

ultimately prevailed in subjecting over 20,000 homecare workers to exclusive representation.

1. Homecare Programs in Pennsylvania

Over the last 30 years, the trend in long-term caregiving has shifted from institutional care to more at-home care, with such care now comprising nearly 43 percent of Medicaid spending on long-term care. Janet O'Keeffe et al., U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home & Community Services: A Primer* 22 (2010), https://aspe.hhs.gov/system/files/pdf/76201/primer10.pdf. Established after Congress authorized the waiver of certain federal requirements in 1981, Medicaid waiver programs allow states to fund home- and community-based services for some Medicaid-eligible individuals. Legislative Budget & Fin. Comm., *Family Caregivers in Pennsylvania's Home and Community-Based Waiver Programs* S-1 (June 2015), http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf [hereinafter *Family Caregivers*]. Once a state waiver plan has been approved by the federal Centers for Medicare and Medicaid Services, states can receive federal matching funds to finance their waiver programs covering home health nursing services and personal care services, among others. *Id.* at 4.

In Pennsylvania, as in many other states, this homecare is commonly delivered by private-sector employees, either through agencies, which employ homecare workers, or directly to recipients (sometimes referred to as "participants" or "consumers"), who employ their own homecare workers.[2] Pennsylvania has ten

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[2] As one state court explained in summarizing Pennsylvania's participant model,

> Under the Participant Model, [homecare workers] are recruited, hired, and managed by a participant who

Medicaid waiver programs funding home-based care, plus one state-funded program, Pennsylvania's Attendant Care Services Act, 62 Pa. Stat. §§ 3051–58. According to Pennsylvania's Department of Human Services, Pennsylvania had 72,766 participants receiving care through its homecare waiver programs as of 2011. *Family Caregivers* at 23.

Caregivers employed by agencies have been exclusively represented under the National Labor Relations Act. But private workers who are employed by participants are explicitly excluded from unionization by the National Labor Relations Act. *See Harris*, 134 S. Ct. at 2640 (citing 29 U.S.C. § 152(3)). Likewise, many state labor laws governing private-sector workers exclude homecare workers from their coverage. *See, e.g.*, 43 Pa. Stat. § 211.3 (excluding, among other workers, "any individual employed . . . in the domestic service of any person in the home of such person").

> employs the [worker]. . . . As employers, participants have federal employer identification numbers, are subject to workers' compensation and unemployment requirements, and pay relevant employer taxes. Under Act 150, participants have the "right to make decisions about, direct the provision of and control . . . [home] care services." Section 2(3) of Act 150, 62 P.S. § 3052(3). Thus, participants' control over their care is unfettered other than compliance with home care service regulations.

Markham v. Wolf, 147 A.3d 1259, 1263 (Pa. Commw. Ct. 2016), *vacated*, 190 A.3d 1175 (Pa. 2018) (footnotes omitted).

2. Non-Public Employees as Targets for Exclusive Representation

Because federal and state law excluded workers in the participant model from exclusive representation, those who sought to unionize Pennsylvania homecare workers had to get creative.

Attempts to require exclusive representation of homecare workers first came under the administration of former Pennsylvania Governor Ed Rendell, who issued an executive order that imposed exclusive representation on participant-employed homecare workers. *See* Pa. Exec. Order No. 2010-04, *reprinted in* 40 Pa. Bull. 6071 (Oct. 23, 2010), 4 Pa. Code §§ 7a.21–.30 (2010), *rescinded by* Pa. Exec. Order No. 2010-10, *reprinted in* 40 Pa. Bull. 7333 (Dec. 25, 2010), 4 Pa. Code § 7a.31 (2010).[3] Similar executive orders unionizing homecare workers have been issued in at least four other states.[4] Childcare providers were similarly unionized by executive order in various states throughout the country.

Affected participants and providers challenged Governor Rendell's order as an invalid use of executive

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[3] Years earlier, Governor Rendell similarly unionized family childcare providers who worked in day cares operated out of a home. *See* Pa. Exec. Order No. 2007-06, *reprinted in* 40 Pa. Bull. 16 (Jan. 2, 2010), 4 Pa. Code §§ 7a.11–.18 (2010).

[4] *See, e.g.*, Conn. Exec. Order No. 10 (Sept. 21, 2011), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy--Executive-Order-No-10.pdf; Ill. Exec. Order No. 2003-8 (Mar. 4, 2003), https://www2.illinois.gov/Documents/ExecOrders/2003/execorder2003-8.pdf; Md. Exec. Order No. 01.01.2007.15 (Aug. 6, 2007), https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/013000/013206/unrestricted/20110024e.pdf; Ohio Exec. Order No. 2007-23S (July 17, 2007), *rescinded by* Ohio Exec. Order No. 2015-05K (May 22, 2015).

power and secured a preliminary injunction precluding its implementation. *See Markham*, 147 A.3d at 1276. A month later, Governor Rendell rescinded the homecare executive order. *See* 4 Pa. Code § 7a.31.[5]

Former Governor Tom Corbett was elected after Governor Rendell. He issued an executive order rejecting his predecessor's approach in favor of a "Long-Term Care Commission," a stakeholder forum that did not include any exclusive representative for homecare workers. *See* Pa. Exec. Order No. 2014-01, *reprinted in* 44 Pa. Bull. 1120 (Mar. 1, 2014); *see also Pennsylvania Long Term Care Commission Final Report* 3–4 (Dec. 2014), https://www.aging.pa.gov/organization/PennsylvaniaLongTermCareCouncil/Documents/Reports/PennsylvaniaIntraGovernmentalCouncilOnLTC/PaLongTermCareCommFinal%20ReportDec2014.pdf.

But in February 2015, following the election of Governor Tom Wolf, another executive order effectively unionized homecare workers. *See* Pa. Exec. Order No. 2015-05 (Feb. 27, 2015), *reprinted as amended in* 45 Pa. Bull. 1937 (Apr. 18, 2015), 4 Pa. Code §§ 7a.111–.117 (2015). Governor Wolf's executive order bore "striking similarities" to the one issued by Governor Rendell, *Markham*, 147 A.3d at 1276, also affecting homecare workers and recipients of services provided under the participant model. 4 Pa. Code § 7a.111. According to statistics from Pennsylvania's Department of Human Services, 26,885 homecare workers were providing services under those programs as of March 2015. *Family Caregivers* at 24.

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[5] Governor Rendell's order unionizing family childcare providers does not appear to have been likewise rescinded.

The order establishes a process for election of a "representative" for homecare workers and a requirement that, once elected, the representative "meet and confer" with administration officials to discuss enumerated matters, including terms and conditions of homecare workers' employment. 4 Pa. Code § 7a.113.

In 2015, the union currently representing homecare workers in Pennsylvania[6] became the representative for all covered homecare workers based on 2,663 votes, out of approximately 20,000 workers eligible to vote. *See Markham*, 147 A.3d at 1268.

The only recourse for homecare workers who do not wish to be represented by the employee organization is to seek its removal under terms set by the Executive Order, which specifically prohibits removal within the first year after the organization becomes the exclusive representative and requires reinitiating the election process for another representative. 4 Pa. Code § 7a.113.

Despite the imposition of such a representative, the order stipulates that "[n]othing in this Executive Order shall be interpreted to grant Direct Care Workers the status of Commonwealth employees." *Id.* § 7a.115. Indeed, both in fact and in law, the employer for covered homecare workers remains the individual receiving care. Yet the employer is not included in any negotiations between the representative and the government.

3. Challenges to Pennsylvania's Scheme

Shortly after the Executive Order issued, several homecare workers and the participants who employ

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[6] The United Home Care Workers of Pennsylvania is a joint project of the Service Employees International Union and the American Federation of State, County and Municipal Employees.

them brought two different lawsuits challenging the order. *See Markham*, 190 A.3d at 1179–80. Undersigned *amicus* represented two clients who opposed this imposition of a state-mandated exclusive representative into their long-running homecare setup. One client has provided homecare services to his employer, a quadriplegic adult with muscular dystrophy, for over 25 years. Until the Executive Order, the two had successfully and amicably negotiated the terms and conditions of the homecare worker's employment without the aid of a union, and the homecare worker opposed his exclusive representation by a labor organization. The two thus challenged the Executive Order in state court, arguing that it exceeded the Governor's power under the state constitution.

The challengers initially prevailed, securing an injunction of the Executive Order in Pennsylvania's Commonwealth Court. *Markham*, 147 A.3d at 1279; *Smith v. Wolf*, No. 177 M.D. 2015, 2016 WL 6069483, at *3 (Pa. Commw. Ct. Oct. 14, 2016), *vacated sub nom. Markham v. Wolf*, 190 A.3d 1175 (Pa. 2018). The Commonwealth Court held that the governor had exceeded his authority because the order was *de facto* legislation that, "[a]t its core . . . invades the relationship between a [direct care worker] and the employer participant who receives personal services in his or her home." *Markham*, 147 A.3d at 1278.

On a consolidated appeal by Governor Wolf, however, the Pennsylvania Supreme Court upheld the Executive Order as a permissible exercise of the governor's power. *See Markham*, 190 A.3d at 1185–89. The court concluded that, unlike the process set forth by existing labor law, "the entire process set forth in the Order is

voluntary, non-binding, non-exclusive, and unenforceable." *Id.* at 1184–85.[7]

B. Forced Representation of Homecare Workers in Pennsylvania Reveals a Growing Constitutional Threat

The foregoing history in Pennsylvania underscores the particular vulnerability of homecare workers to forced unionization attempts by states and the need for this Court to clarify the application of the First Amendment and this Court's case law in ever-widening contexts.

Forced unionization presents a significant threat to homecare workers' First Amendment rights. Under the system in Pennsylvania, for example, a representative is elected by a majority of votes cast, with an election held if an employee organization has the support of only ten percent of workers. The homecare representative can win an election with a bare majority of those voting in the election, even if it is a small percentage of the entire bargaining unit. Upon winning the election, the representative then becomes the speaker for over 20,000 homecare workers on employment topics with the Commonwealth. *See Markham*, 147 A.3d at 1267–68.

This arrangement effectively replaces the previous setup where the homecare worker was free to negotiate his own conditions of employment directly with his employer. Instead, the order requires Pennsylvania officials to meet with the exclusive representative at

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[7] While the Pennsylvania Supreme Court may have opined that representation was non-exclusive, the Executive Order made clear that "[t]here shall only be one Direct Care Worker Representative recognized at any time." 4 Pa. Code § 7a.113(b)(2).

least monthly to discuss, among other topics, "[s]tandards for compensating Direct Care Workers," "Commonwealth payment procedures," "[t]raining and professional development opportunities," and "[v]oluntary payroll deductions." 4 Pa. Code § 7a.113. The representative's speech on these topics—previously discussed and resolved between homecare workers and the disabled or elderly individuals for whom they care—is presumed to represent the interests of homecare workers and takes place on a platform before high-ranking government officials.

The threat to First Amendment rights is especially egregious here, where the representation takes place outside of the employment context. In Pennsylvania, the Executive Order not only forces on homecare workers an exclusive representative—the equivalent of a union—and requires the government to recognize and engage with the representative, but also mandates that this discussion happen with no involvement from homecare workers' actual employers, the recipients.

Perhaps equally harmful is the fact that homecare workers are without the protections historically afforded to those forced into a fiduciary relationship with an exclusive representative. For example, while upholding Governor Wolf's Executive Order, the Pennsylvania Supreme Court noted that such representation would be unaccompanied by any obligation to bargain in good faith, any resort for homecare workers to a state labor relations board, or an enforceable agreement between homecare workers and their employers. *See Markham*, 190 A.3d at 1188–89. And while the representative collects significant dues from homecare workers, it is not allowed to strike or submit disputes to interest arbitration when the government is unwilling to come to an agreement. *Id.* at 1188.

Pennsylvania's experience highlights the potential for growing and unchecked abuse of First Amendment rights. In Pennsylvania, exclusive representation of homecare workers is a game of political football: attempted during one governor's administration, partly enjoined and rescinded, then abandoned and replaced during the term of the next governor—and then accomplished when yet another governor was elected. These workers' rights were ultimately sacrificed on the order of a single politician, the governor, without input by the legislature or any other political check.

The doctrinal world created by this Court's *Knight* decision, and lower courts' subsequent applications of it, made Pennsylvania's imposition of exclusive representation on homecare workers possible. And while homecare workers are the most recent political pawns, this unchecked power threatens other workers whose rights could be sacrificed by politicians seeking to curry political favor with public unions. Homecare organizers have articulated no principle that would limit unionization to the homecare or childcare context; literally any individual somehow connected to government funds could be targeted for exclusive representation.

And homecare workers in Pennsylvania are not alone in facing this threat to their First Amendment rights. Rather, the rights of other non-public employees throughout the country, including other homecare

workers[8] and childcare providers,[9] among others, have been similarly sacrificed for political gain.

This expansion in the wielding of the power of exclusive representation demonstrates how the toleration of exclusive representation has grown since *Knight*. There, this Court considered the exclusion of public employees from speaking with their public employer on certain topics. *See Knight*, 465 U.S. at 273 ("[T]he question presented in this case is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views"). The Pennsylvania experience, extending exclusive representation to those who are not public employees, came by a governor's order without the protections of the legislative process and over workers' objections to forced association with the representative and to the exclusion of their actual employer. This is a far different context than the one at issue in *Knight*.

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[8] *See, e.g.*, Cal. Welf. & Inst. Code § 12301.6(c)(1) (West 2019); Conn. Gen. Stat. § 17b-706b (2019); 5 Ill. Comp. Stat. 315/3(n) (2016); Md. Code Ann., Health-Gen. § 15-901 (West 2019); Mass. Gen. Laws ch. 118E, § 73 (2019); Mo. Rev. Stat. § 208.862(3) (2019); Or. Rev. Stat. § 410.612 (2018); Vt. Stat. Ann. tit. 21, § 1640(c) (West 2019); Wash. Rev. Code § 74.39A.270 (2020); 4 Pa. Code §§ 7a.111–.117; Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

[9] *See, e.g.*, Conn. Gen. Stat. § 17b-705 (2019); 5 Ill. Comp. Stat. 315/3(n); Mass. Gen. Laws ch. 15D, § 17 (2019); Md. Code Ann., Educ. § 9.5-705 (West 2019); N.M. Stat. Ann. § 50-4-33 (2019); N.Y. Lab. Law § 695-a *et seq.* (McKinney 2019); Or. Rev. Stat. § 329A.430 (2018); R.I. Gen. Laws Ann. § 40-6.6-1 *et seq.* (West 2019); Wash. Rev. Code § 41.56.028 (2020); *see also* Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed 2011); Minn. Stat. § 179A.52 (expired).

Yet it is *Knight* that courts have repeatedly held to authorize expansion of exclusive representation into this area far beyond the context *Knight* involved. *See, e.g.*, *Mentele v. Inslee*, 916 F.3d 783, 788 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 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). Courts have done so even though this expansion into "organization of household workers . . . does not further the interest of labor peace," *Harris*, 134 S. Ct. at 2640, and despite the acknowledgment in *Janus* that exclusive representation is "a significant impingement on associational freedoms." *Janus*, 138 S. Ct. at 2478.

While courts of appeals have continued to rely on *Knight* to authorize exclusive representation in this context since *Janus*, they now acknowledge some difficulty or tension in reconciling *Knight* with this Court's recent case law. *See* Pet.App.3; *Mentele*, 916 F.3d at 783 (concluding that "*Knight* is a closer fit" for this context despite the "differences" between its rationale and the rationale of *Janus*); *Bierman*, 900 F.3d at 574 (acknowledging that the *Janus* decision "arguably undermines some of" the reasoning in *Knight*, but concluding that the holdings in *Janus* and *Harris* "do not supersede *Knight*").

Forced exclusive representation even of non-public employees is thus the result of a world that *Knight* created. As the history in Pennsylvania makes clear, exclusive representation threatens the constitutional rights of a growing universe of workers, even in contexts that differ greatly from the one the Court considered in *Knight*. This Court should grant *certiorari* to consider the vitality of *Knight* in light of this Court's

recent case law and courts' reliance on *Knight* to authorize exclusive representation in widening contexts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Amicus Curiae the Fairness Center

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