No. 16-753

IN THE
Supreme Court of the United States

MARY JARVIS, *et al.*,
Petitioners,

v.

ANDREW M. CUOMO, GOVERNOR OF NEW YORK, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000 AFSCME, AFL-CIO

DAREN J. RYLEWICZ
Civil Service
Employees Ass'n, Inc.
143 Washington Avenue
P.O. Box 7125, Capitol Station
Albany, NY 12223
(518) 257-1443
daren.rylewicz@cseainc.org

JOHN M. WEST
(*Counsel of Record*)
JAMES GRAHAM LAKE
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com
glake@bredhoff.com

Counsel for Respondent
Civil Service Employees Association

Mosaic - (301) 927-3800 - Cheverly MD

QUESTIONS PRESENTED

1. Whether, as the lower courts have unanimously held, a state may—consistent with the First Amendment—agree to recognize and bargain exclusively with a majority-selected representative of state-compensated child-care or home-care providers over terms and conditions of the providers' service, rather than fixing those terms unilaterally.

2. Whether, as this Court has suggested on multiple occasions and numerous lower-court decisions have unanimously held, a nongovernmental defendant sued under 42 U.S.C. § 1983 can invoke a good-faith defense to liability for damages where the defendant acted in reliance on a presumptively valid statute prior to a judicial determination of its unconstitutionality.

CORPORATE DISCLOSURE STATEMENT

Respondent Civil Service Employees Association ("CSEA") is organized as a nonprofit corporation. CSEA has no parent corporation, and no corporation or other entity owns any stock in CSEA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

The Petition for Certiorari ("Pet.") raises two issues related to the representation by respondent Civil Service Employees Association ("CSEA") of a unit of child-care providers who are compensated by the State of New York for services they provide to low-income families at the State's behest. The first is the constitutionality, under the First Amendment, of the State's agreement to negotiate exclusively with a representative selected by a majority of the providers over their compensation and other terms of service that the State otherwise would set unilaterally, without any requirement that providers join or otherwise financially support the union. The second issue is whether CSEA could assert a good-faith defense in response to petitioners' § 1983 claim for damages in the form of repayment of agency fees assessed and collected in reliance on New York law before this Court's ruling, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that requiring such mandatory service fees violated the First Amendment rights of nonmember providers. The district court dismissed both counts of petitioners' complaint for failure to state a claim, and the Second Circuit affirmed on both points in a summary disposition.

The Petition for Certiorari should be denied in its entirety. As to neither question is there any conflict among the lower courts, and the Second Circuit's resolution of both issues is fully consistent with this Court's jurisprudence.

STATEMENT

A. Like many other states, New York offers free or subsidized child care to certain low-income families. Eligible families can choose a child-care provider,

and the State pays the provider's bill in full or in part. For families receiving public assistance, no family contribution is required, while other families with incomes below the federal poverty line pay no more than one dollar per week. N.Y. Comp. Codes R. & Regs. tit. 18, §§ 415.2 to 415.4. New York's Office of Children and Family Services ("OCFS") administers the program, fixing the overall compensation structure and specific compensation rates by county, *id.*, § 415.9, setting certain requirements for state-compensated providers, *id.*, § 415.12, and establishing "minimum quality program requirements for licensed and registered child day care homes, programs and facilities," N.Y. Soc. Serv. Law § 390(2-a)(a).

New York generally grants its public employees "the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder." N.Y. Civ. Serv. Law § 203. This public-sector labor relations act, known as the "Taylor Law," does not apply directly to state-compensated providers of child care, whom it did not define as "public employees." *Id.*, § 201(7)(a). Thus, prior to 2007, these child-care providers did not have a statutory right to bargain collectively with the State over their compensation and other terms of their working conditions set by it.

Like more than a third of the states, however,[1] New York made the judgment that it could improve the availability of quality child care for low-income families by

---

[1] *See* Pet. at 12 n.3 (citing 18 states that authorize, or previously authorized, collective bargaining by state-compensated child-care providers).

permitting the child-care providers, even if they were not "employees" of the State in the common-law sense of that term, to bargain collectively with the State through a democratically selected representative over their compensation and other terms of their working conditions that the State controls, rather than the State setting those terms unilaterally. Initially adopted through an Executive Order issued in May 2007 by Governor Spitzer, the policy of permitting child-care providers to organize and bargain collectively was codified by the legislature in 2010. *See* N.Y. Lab. Law art. 19-C, §§ 695-a to 695-g (the "Act") (Pet. App. 36a-41a).

In enacting this law, the legislature found it "in the best interest of New York state to maintain a child care delivery system that fosters quality child care options and compensation, and benefits and working conditions for child care providers commensurate with the value of the work they perform." *Id.*, § 695-a. The Act accordingly established a framework for the collective representation of child-care providers by creating four distinct bargaining units—including the one at issue here, which comprises all registered and licensed providers outside of New York City. *Id.*, § 695-c. In a process overseen by the Public Employment Relations Board ("PERB"), child-care providers in each unit are permitted to designate by majority action a representative of the bargaining unit. *Id.*, § 695-d(1). If a representative is chosen and certified through that process, the OCFS, and other state agencies as appropriate, are required to "meet with the designated representative . . . for the purpose of entering into a written agreement," which may address "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.*, § 695-f(1). The Act also provides specifically that nothing therein would "[i]nterfere with any ability of child care providers or child care provider representatives to meet or correspond with any state agency with regard to any matter of relevance." *Id.*, § 695-g(5).

Following the submission of authorization cards from a majority of the members of the bargaining unit, the PERB officially certified in July 2007 that these providers had chosen to be represented by CSEA. CSEA and OCFS thereafter entered into negotiations and concluded an initial collective bargaining agreement, effective through September 2013 (subsequently extended until the negotiation of a successor agreement was completed in the spring of 2015), governing various terms and conditions of the providers' service that the State controlled.

In July 2010, the State enacted further legislation authorizing any PERB-certified representative of child-care providers to assess an "agency fee" (or "fair-share" fee), so that members of the bargaining unit who chose not to become dues-paying members of the union that represented them could be required to pay their "fair share" of the costs of collective bargaining. *See* 2010 N.Y. Laws ch. 58, pt. H, § 1. Consistent with this statutory authorization, as well as a corresponding provision of the collective bargaining agreement, deductions of agency fees (as well as union dues) from providers' paychecks began in January 2012.

On June 30, 2014, however, this Court decided in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that the First Amendment precluded Illinois from requiring state-compensated home-care providers to pay agency

fees. The Court distinguished those providers from what it called "full-fledged" public employees, holding that its approval of an agency fee requirement in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), extended only to the latter. 134 S. Ct. at 2634-38. In light of *Harris*, CSEA asked OCFS to take the measures necessary to stop withholding agency fees from the paychecks of providers who were not union members. Once OCFS was able to do so, CSEA mailed checks to all nonmembers refunding, with interest, any agency fees that had been deducted from their paychecks subsequent to July 1, 2014. At the same time, CSEA and OCFS completed negotiation of a new collective bargaining agreement, which expressly terminated the provision for agency fees.

B. Petitioners, ten child-care providers in Onondaga County, New York, who are members of the bargaining unit represented by CSEA, filed this two-count lawsuit in December 2014 against the Governor, the OCFS Commissioner, and CSEA. Count I asserted that the State's recognition of an exclusive bargaining representative for purposes of negotiating compensation and other terms of service applicable to members of the providers' bargaining unit violated petitioners' First Amendment rights by compelling them to "associate" with the bargaining representative. Count II contended that the collection of agency fees from nonmembers of the union was unconstitutional.

Respondents initially moved to dismiss Count I for failure to state a claim, and the district court (Hon. Lawrence E. Kahn) granted those motions, finding petitioners' claim precluded by *Minnesota State Board v. Knight*, 465 U.S. 271 (1984), and unpersua-

sive on its own terms. Pet. App. 21a-35a. By the time the court issued that ruling, the collection of agency fees from non-union members of the bargaining unit had ended, CSEA had refunded to nonmembers all fees collected subsequent to the *Harris* ruling, and the new collective bargaining agreement terminating agency fees had been concluded. Under those circumstances, the parties agreed that Count II was moot, except insofar as four of the ten petitioners claimed they were entitled to damages for agency fees they had paid *prior* to the *Harris* decision. Following briefing, the district court dismissed Count II, agreeing that petitioners' claim was otherwise moot and holding that CSEA was entitled to a good-faith defense against the claim for damages from pre-*Harris* fees. Pet. App. 8a-20a.

In a summary order issued following briefing and argument, the Second Circuit (Newman, Calabresi, and Raggi, JJ.) affirmed on both points. Pet. App. 1a-7a. As did the district court, the court of appeals found petitioners' argument against exclusive representation to be "foreclosed" by *Knight*, and it rejected petitioners' reliance on *Harris*—which had addressed only the agency fee requirement and not the constitutionality of exclusive representation for providers who were not "full-fledged state employees." *Id.* at 4a-5a. The court also upheld the district court's application of the good-faith defense to petitioners' claim for pre-*Harris* damages:

> In obtaining the challenged fair share fees from plaintiffs, CSEA relied on a validly enacted state law and the controlling weight of Supreme Court precedent. Because it was objectively reasonable

> for CSEA "to act on the basis of a statute not yet held invalid," defendants are not liable for damages stemming from the pre-*Harris* collection of fair share fees.

Id. at 7a (citing *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996); *Wyatt v. Cole*, 504 U.S. 158, 174 (1992) (Kennedy, J., concurring)).

ARGUMENT

Neither of the two questions petitioners ask this Court to consider is worthy of the Court's review. In neither case is there any conflict among the lower courts with regard to the question petitioners ask the Court to decide. Nor is the resolution of these questions by the court below in any way in conflict with decisions of this Court or with fundamental principles of law that should guide the resolution of these questions. There is, in short, no reason for this Court to review either of the questions presented, and the Petition should be denied in its entirety.

I. THE SECOND CIRCUIT'S HOLDING THAT NEW YORK COULD AGREE TO BARGAIN EXCLUSIVELY WITH A REPRESENTATIVE CHOSEN BY A MAJORITY OF ITS CHILD-CARE PROVIDERS IS CONSISTENT WITH THE HOLDINGS OF ALL OTHER COURTS AND WITH FIRST AMENDMENT PRINCIPLES

A casual reader might be forgiven for misapprehending the nature of the relationship that is at issue here. According to the Petition, the State of New

York is "*appoint[ing]* representatives to speak for its citizens," Pet. at 13, "*dictating* who speaks for individuals," *id.* at 11, "*forcing* a profession to accept a *government-appointed lobbyist*," *id.* at 10, "*impos[ing]* an exclusive representative," *id.* at 8, and "*regiment[ing]* professions into *mandatory* advocacy groups," *id.* at 14 (all emphases added). With all that, it is unsurprising that "goose-stepping brigades," *id.*, are just around the corner.

The reality is that the relationship attacked by this lawsuit is the same kind of collective bargaining relationship that has been the foundation of American labor relations for nearly a century—in which the State obligates itself (or, in the private sector, the employer is required by law) to recognize a bargaining representative if the members of its labor force by majority action choose to select such a representative, and to bargain exclusively with that representative, with the objective of concluding a binding contract, over the terms and conditions of service applicable to all members of the bargaining unit.[2]

---

[2] Systems of collective bargaining involving multiple competing unions in the same workforce are used in some European countries, but in the United States that model has not been thought to promote stable labor relations. *See* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 48 (1998) (noting that after "members only" bargaining "led to paralysis or chaos," Congress turned to "the 'democratic' solution—exclusive representation by majority rule . . . ."). Accordingly, Congress adopted the system of exclusive representation in both the Railway Labor Act of 1926, 45 U.S.C. § 152 Fourth, and the National Labor Relations Act a decade later, 29 U.S.C. § 159(a), and the same

Precisely such an exclusive representation relationship was upheld by this Court against First Amendment attack in *Minnesota State Board v. Knight*, 465 U.S. 271 (1984).[3] The sole difference in this case is that the members of the workforce who are paid by the State for services they provide at its behest, and who have been permitted to organize, select a representative, and bargain collectively over the terms and conditions governing their work, are persons whom the common law would label "independent contractors" rather than "employees." The State of New York nonetheless made the judgment that the reality of the economic relationship between the providers and the State was such that the providers should be treated like public employees for the limited purpose of collective bargaining over the compensation they receive

---

system has been adopted by those states that permit collective bargaining in the public sector. *See*, *e.g.*, N.Y. Civ. Serv. Law § 204(2).

[3] In the *Knight* litigation, several community college faculty members challenged on First Amendment grounds provisions of Minnesota law that required the public employer to "meet and negotiate" with the exclusive representative over terms and conditions of service and to "meet and confer" with the union over broader policy issues. A three-judge district court rejected the attack on the "meet and negotiate" authority in a decision that this Court summarily affirmed. *Knight v. Minnesota Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 5-7 (D. Minn. 1982), *aff'd mem.*, 460 U.S. 1048 (1983). The district court, however, struck down the requirement that the public employer "meet and confer" with the exclusive representative on policy issues that were not mandatory subjects of bargaining. Upon plenary consideration, this Court reversed that determination in the decision cited in text.

from the State and other terms and conditions of their service that are fixed by the State.

That is, indeed, is the same judgment Congress made in originally enacting the National Labor Relations Act, which—until its amendment in 1947—was construed by this Court as "not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126 (1944) (holding that a newspaper publisher was required to bargain collectively with its vendors, notwithstanding that they were "independent contractors" rather than "employees" under common-law definitions). Petitioners nonetheless contend that the distinction between "employees" and "independent contractors" transforms collective bargaining through a majority-selected exclusive representative from the foundational principle of American labor relations into an unconstitutional "mandatory association."

No court has ever so held—in this or any other context. To the contrary, every court to have considered petitioners' argument that this fundamental principle of the American system of labor relations becomes constitutionally unacceptable if it is applied to a workforce made up of independent contractors rather than common-law employees has squarely rejected it.

Because the lower courts are unanimous in their treatment of this issue, and because the result they have reached is fully consistent with this Court's First Amendment jurisprudence, the Petition should be denied with respect to this issue.

A. The Lower Courts are Unanimous in Rejecting Petitioners' Constitutional Argument

Since this Court's holding three Terms ago in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that state-compensated home-care providers who were not "full-fledged public employees" could not be compelled to pay a service fee (in lieu of union dues) to the union that represents them in collective bargaining, multiple lawsuits have been brought (nearly all of them by the same attorney), asking the courts to go even further and hold that—even without such a fee requirement—a state violates the First Amendment associational rights of state-compensated child-care and home-care providers by agreeing to bargain collectively with a majority-selected representative over the providers' compensation and other terms and conditions of service that are fixed by the State.

No such claim has been successful. To the contrary, every court that has decided the issue has rejected petitioners' argument.

The Second Circuit's opinion dismissing petitioners' claim in this case joins an earlier decision of the First Circuit to the same effect. In *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016), the First Circuit held, in an opinion authored by retired Justice David Souter, that the plaintiffs' First Amendment claim was precluded by this Court's decision in *Knight*:

> Since non-union professionals, college teachers, could claim no violation of associational rights by an exclusive bargaining agent speaking for their en-

> tire bargaining unit when dealing with the state even outside collective bargaining, the same understanding of the First Amendment should govern the position taken by the family care providers here, whose objection goes only to bargaining representation.

Id. at 243. And, as did the court below in this case, the First Circuit held that this Court's decision in *Harris* was inapposite to the exclusive-representation question before it. *Id.* at 244.

Several district courts have also decided the same question, and all have reached that same result. *See Bierman v. Dayton*, No. 0:14-cv-03021-MJD-LIB, 2017 WL 29661, at **5-7 (D. Minn. Jan. 3, 2017); *Hill v. Service Emps. Int'l Union*, No. 15 CV 10175, 2016 WL 2755472 (N.D. Ill. May 12, 2016), *appeal pending*, No. 16-2327 (7th Cir.); *Mentele v. Inslee*, No. C15-5134-RBL, 2016 WL 3017713 (W.D. Wash. May 26, 2016), *appeal pending*, No. 16-35939 (9th Cir.). The *Hill* case was argued on appeal in the Seventh Circuit on December 7, 2016, while the *Mentele* appeal is in the early stages of briefing in the Ninth Circuit.[4]

Petitioners do not, and cannot, contend that there is any conflict whatever among the lower courts that requires resolution by this Court. Every court that has addressed the permissibility of collective bargaining through an exclusive representative in the context of state-compensated child-care or home-care providers has applied this Court's precedents—notably *Knight* and *Harris*—and has reached the

---

[4] The district court entered final judgment in the *Bierman* case on January 4, 2017, so that the time for filing an appeal in that case had not yet run when this brief was submitted.

same conclusion. There is, accordingly, no reason for this Court to address the question petitioners ask it to decide—and certainly not at this time, with at least two and possibly three additional cases raising the same issue on substantially identical facts currently pending in the courts of appeals.[5]

B. Collective Bargaining Through an Exclusive Representative Over the Terms of a Labor Contract Infringes No First Amendment Associational Rights

The beginning, middle, and end of petitioners' First Amendment argument is its characterization of the State's agreement to bargain exclusively with a representative chosen by the majority, with the aim of negotiating a binding contract governing the child-care providers' compensation and other working conditions that the State controls, as creating a "mandatory association" that can be justified, if at all, only through the lens of exacting scrutiny. *Harris*, they say, establishes that the compelling interests that justify such

---

[5] Petitioners' attempt to create a circuit split based on *Mulhall v. Unite Here Local 355*, 618 F.3d 1279 (11th Cir. 2010), is entirely misplaced. That decision had nothing to do with the constitutionality of exclusive representation in the child-care or home-care sectors, and it held no more than that a plaintiff resisting union representation had an "interest" that was sufficient for purposes of standing. *Id.* at 1287-88; *see D'Agostino*, 812 F.3d at 245 (rejecting petitioners' argument). And even that holding was called into question when this Court, having granted certiorari on the merits of that case, dismissed the writ as improvidently granted. *See Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting) (noting that the plaintiff "arguabl[y] . . . lacks Article III standing").

impingements on First Amendment rights in the context of "full-fledged" public employees do not apply to child-care or home-care providers.

The flaw in this argument lies in its premise. Both logic and precedent establish that this system of exclusive representation in no way impinges on the providers' First Amendment associational rights so as to require justification by some compelling interest.

The starting point for analysis is the State's determination that, rather than fixing the compensation and other terms of service for its workforce of child-care providers by unilateral fiat, it would seek to manage that workforce by negotiating contracts with a representative of the providers. The State further determined that instead of creating or selecting a representative itself, it would negotiate and contract with whatever representative (if any) was chosen by a majority of the providers themselves—and, as a corollary, that it would refrain from negotiating and contracting over the providers' working conditions with any other entity.

That much is entirely unobjectionable, for this Court has clearly established that the government is "free to consult or not to consult whomever it pleases," and that "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Knight*, 465 U.S. at 285. Thus, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288; *see also Smith v. Arkansas State Highway Emps., Local 1315*, 441 U.S. 463 (1979).

And it is equally clear that there is nothing else in the exclusive representation arrangement that impinges on the First Amendment associational rights of bargaining-unit members, so as to require justification by a heightened level of scrutiny. No provider is required to join, to refrain from joining, or—following the termination of the agency fee requirement after the *Harris* decision—to support CSEA, financially or otherwise. And nothing prevents petitioners from forming or associating with any other advocacy group of their choosing. Nor does anything in the exclusive representation arrangement constrain petitioners' right, as individuals or through any representative of their choice, to communicate with OCFS or any other governmental entity on matters of concern to them; indeed, the statute at issue expressly confirms that right. *See* N.Y. Lab. Law art. 19-C, § 695-g(5).

That is just as it was in *Knight*. Holding that the system of exclusive representation for the bargaining unit of community college professors did not violate the plaintiffs' right to "associate or not to associate," 465 U.S. at 288, this Court explained that the plaintiffs were "not required to become members" of the union that represented the bargaining unit, were "free to form whatever advocacy groups they like," and that exclusive representation "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." *Id.* at 288-89.

Knight's holding that the State's recognition of an exclusive representative—both for purposes of negotiating a collective bargaining agreement and to

meet and confer on policy issues, *see supra* note 3—"in no way restrained appellees' . . . freedom to associate or not to associate with whom they please," *id.* at 288, is controlling here. Petitioners make no attempt to explain how their speech and associational rights are any more heavily impacted by the exclusive-representation relationship than were the First Amendment rights of the college professors in *Knight*—and it is difficult to see how they would be.[6] Because petitioners' freedom of association, like the associational freedom of the *Knight* plaintiffs, is "in no way restrained," *id.*, there is no need to identify some justification that would pass the test of exacting scrutiny. *University of Pa. v. EEOC*, 493 U.S. 182, 201 (1990) (no special justification necessary where challenged action "does not infringe any First Amendment right").

That being the case, it is irrelevant to the question presented here that *Harris* found the "labor peace rationale" that justified an agency fee requirement, *see* Pet. at 16, to be inapplicable beyond the context of "full-fledged" public employees. The *Harris* opinion made clear that the constitutionality of exclusive representation was not at issue in that case: "Petitioners do not . . . challenge the authority of the [union] to serve as the exclusive representative of all the personal assistants in bargaining with the State.

---

[6] As this Court has noted in a related context, "whether state law labels a government service provider's contract as a contract of employment or a contract for services . . . is at best a very poor proxy for the [First Amendment] interests at stake." *Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

All they seek is the right not to be forced to contribute to the union . . . .” 134 S. Ct. at 2640. Thus, as Justice Souter explained in *D’Agostino*, *Harris*

> did not speak to . . . the premise assumed and extended in *Knight*: that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit.

812 F.3d at 244.

Petitioners assert that the mere fact that CSEA bargains with the State on their behalf creates a “mandatory agency relationship” between them and the union, “analogous to that between trustee and beneficiary,” Pet. at 19, and they point to the union’s duty of fair representation as evidence of this agency relationship. *Id.* at 20. But while it is certainly correct to say that a union certified as exclusive bargaining representative has a fiduciary duty to act on behalf of the bargaining unit, that duty does not create an “agency relationship” between the union and any *individual* member of the bargaining unit. Rather, the union’s duty runs to the bargaining unit *as a whole*—not to individual members. What petitioners call a “mandatory agency relationship” is simply CSEA’s obligation, during negotiations with the State and in implementing and enforcing the collective bargaining agreement, to represent the interests of the *entire* bargaining unit—and not to discriminate arbitrarily against any member thereof, whether a union member or not. *See In re Civil Serv. Bar Ass’n*, 64 N.Y.2d 188, 196 (1984); *cf. Vaca v. Sipes*, 386 U.S. 171 (1967).

This duty of fair representation burdens CSEA, not the petitioners, and it operates not to *infringe* petitioners' associational rights but to *protect* individual providers—including in particular nonmembers of the union—from discrimination. *See D'Agostino*, 812 F.3d at 244 ("[I]t is not the presence but the absence of a prohibition on discrimination that could well ground a constitutional objection."). As one of the district courts to have addressed this same question has pointed out, there is "no authority for the proposition that the imposition of a legal duty on an entity impermissibly burdens the rights of the *beneficiaries* of that duty." *Bierman*, 2017 WL 29661, at *7 (emphasis added).

There is nothing in the facts presented here that is at all comparable to the "mandatory associations" that have been found to burden First Amendment associational rights. Petitioners are not required to display publicly a message with which they disagree, *Wooley v. Maynard*, 430 U.S. 705 (1977); they are not placed in the position of having their own expressive message altered, *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995); they are not threatened with losing their jobs or contracts because of their political affiliation, *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); and they are not required to admit undesired outsiders to their association, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Boy Scouts v. Dale*, 530 U.S. 640 (2000). These cases, in which the Court has found unconstitutional compelled associations, involve governmental actions that require a person to convey a message or that im-

pair her ability to convey her own message. Here there is nothing of the sort.[7]

There is, in sum, no reason for this Court to review the lower courts' unanimous determination that exclusive representation arrangements like that at issue here raise no First Amendment issue.

II. THE SECOND CIRCUIT'S RECOGNITION OF A GOOD-FAITH DEFENSE TO SECTION 1983 LIABILITY IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE NUMEROUS LOWER COURTS THAT HAVE ADDRESSED THE ISSUE

When this Court initially determined that nongovernmental actors could, under certain circumstances, be held liable along with their governmental counterparts for violations of 42 U.S.C. § 1983, *Lugar*

---

[7] Petitioners have, with good reason, abandoned in this Court the assertion they advanced below that the exclusive representation relationship burdens their First Amendment rights by associating them in the public eye with whatever policy positions CSEA might adopt. In *Knight* this Court noted the public employer's recognition that "not every instructor agrees with the official faculty view" adopted by the exclusive bargaining representative, 465 U.S. at 276, and the Court's cases on involuntary expressive association have made the same distinction. Thus, as Justice Harlan put it in a case involving mandatory bar membership, "everyone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual." *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (internal quotation marks omitted); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

v. Edmondson Oil Co., 457 U.S. 922 (1982), and when it subsequently held that such nongovernmental defendants could not invoke the doctrine of qualified immunity that in many instances would shield their governmental co-defendants from liability for § 1983 damages, *Wyatt v. Cole*, 504 U.S. 158 (1992), it recognized that—when the actions held to be unconstitutional had been undertaken pursuant to presumptively valid existing law—"principles of equality and fairness may suggest . . . that private citizens . . . should have some protection from liability, as do their government counterparts." *Id.* at 168. Thus, although not called upon to decide the question in the cases before it, the Court suggested in both *Lugar* and *Wyatt*—in dicta and in separate opinions joined by five members of the Court—the availability of a good-faith defense for private § 1983 defendants. *Id.* at 168-69; *id.* at 169 (Kennedy, J., joined by Scalia, J., concurring); *id.* at 175 (Rehnquist, C.J., joined by Souter and Thomas, JJ., dissenting); *Lugar*, 457 U.S. at 942 n.23; *see also Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (reiterating *Wyatt* dicta).

On remand, the Fifth Circuit in *Wyatt* squarely addressed the question of a good-faith defense. Finding that it "was largely answered by the[] separate opinions" of Justice Kennedy and Chief Justice Rehnquist, the Fifth Circuit held "that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

In the nearly quarter-century since that decision, the same result has been reached by every other court of appeals that has addressed the issue, *see Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008), and by dozens of district courts.[8] We are unaware of even a single decision—and petitioners cite none—in which *any* post-*Wyatt* court has rejected the availability to private § 1983 defendants of the good-faith defense.

---

[8] In addition to the cases cited below, as well as those cited by petitioners, *see* Pet. at 27 n.8, the following is a sampling of district court decisions that have applied the good-faith defense: *Weldon v. Conlee*, No. 1:13-CV-00540-LJO, 2015 WL 1811882, at *10 (E.D. Cal. Apr. 21, 2015); *Foster v. City of Phila.*, No. CIV.A. 12-5851, 2014 WL 5821278, at *22 (E.D. Pa. Nov. 10, 2014); *Strickland v. Greene & Cooper, LLP*, No. 1:12-CV-02735-MHS, 2013 WL 12061876, at *6–7 (N.D. Ga. Oct. 29, 2013); *Ambrose v. Coffey*, 696 F. Supp. 2d 1119, 1139 (E.D. Cal. 2010); *Palmer v. Garuti*, No. 3:06-CV-795(RNC), 2009 WL 413129, at *7 (D. Conn. Feb. 17, 2009); *Fugate v. Philp*, No. C 06-0277 MMC (PR), 2008 WL 3915709, at *17 (N.D. Cal. Aug. 21, 2008); *Hawkins v. San Mateo Cty. Law Library*, No. C 05-2623 SI (PR), 2008 WL 2782717, at *6 (N.D. Cal. July 16, 2008), *aff'd*, 356 F. App'x 957 (9th Cir. 2009); *Sundquist v. Philp*, No. C06-3387 MMC (PR), 2008 WL 859452, at *18 (N.D. Cal. Mar. 28, 2008), *aff'd*, 346 F. App'x 143 (9th Cir. 2009); *Tarantino v. Syputo*, No. C 03-03450 MHP, 2006 WL 1530030, at *10 (N.D. Cal. June 2, 2006), *aff'd*, 270 F. App'x 675 (9th Cir. 2008); *Egervary v. Rooney*, No. CIV. A. 96-3039, 2000 WL 1160720, at *6 (E.D. Pa. Aug. 15, 2000), *rev'd on other grounds*, 366 F.3d 238 (3d Cir. 2004); *Britt v. Whitehall Income Fund '86*, 891 F. Supp. 1578, 1584 (M.D. Ga. 1993).

And that is for good reason. Even though nonbinding, this Court's discussion of the issue in its dicta and separate opinions in *Wyatt*, *Lugar*, and *Richardson* makes abundantly clear the compelling rationale for the good-faith defense. As one district judge has explained that rationale, it would be

> manifestly unfair to hold that the state actor—whose participation is required for there to be a section 1983 violation at all—is entitled to qualified immunity, but hold the private actor, who did not subjectively believe that he was acting unconstitutionally, liable for the plaintiff's damages.

Franklin v. Fox, No. C 97-2443, 2001 WL 114438, at *5 (N.D. Cal. Jan. 22, 2001) (Breyer, J.). Thus, "the Justices who speak of this good faith defense, as well as the circuits that have applied it, were, and are, concerned with the unfairness of imposing damages liability on private defendants whose honest and reasonable belief in the constitutionality of their conduct turns out later to have been mistaken." Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 Cardozo L. Rev. 81, 91 (2004).

Petitioners make no effort to demonstrate any conflict among the circuits—or even the district courts—on this fundamental issue of whether "private defendants have a good faith defense to Section 1983 liability." Pet. at 9. Rather, their sole argument as to why this Court ought to consider a question on which the numerous decisions of the lower courts are unanimously in agreement with this Court's repeatedly expressed dicta is the contention that some of those courts—including the Second Circuit in this case—have applied the good-faith defense in the

context of First Amendment and other constitutional claims in which "the underlying constitutional tort does not contain a scienter element." Pet. at 28 (quoting Pet. App. 6a).

But the "equality and fairness" rationale for adoption of the good-faith defense in the first place, *Wyatt*, 504 U.S. at 168, leaves no room for the suggestion that its application should be limited to cases that can be "easily analogized to the common-law torts of malicious prosecution or abuse of process." *Franklin*, 2001 WL 114438, at *6. It is, in this context, very much to the point that even though the origins and contours of the doctrine of *qualified immunity* lie in the common law, *see Wyatt*, 504 U.S. at 163-64, application of *that* doctrine is by no means limited to § 1983 claims that can be analogized to common-law torts containing a scienter requirement. *See*, *e.g.*, *Wood v. Moss*, 134 S. Ct. 2056 (2014) (applying qualified immunity to First Amendment claim of viewpoint discrimination).

Unsurprisingly, therefore, petitioners do not, and cannot, cite a single case in which any court has ever rejected application of the good-faith defense on the ground that the § 1983 claim could not be analogized to a common-law tort with a scienter requirement. To the contrary, all of the cases involving such § 1983 claims recognize that the defense is widely available to private defendants *generally*, and not just in those cases where the § 1983 claim involves an attachment or garnishment statute or otherwise can be analogized to a tort requiring scienter.

Petitioners acknowledge half a dozen cases in which the courts have applied the good-faith de-

fense even though the constitutional tort was not readily analogous to such a common-law claim. *See* Pet. at 27 n.8. And others could be added to petitioners' list. *E.g.*, *Clement*, 518 F.3d at 1096-97 (insufficient notice under Due Process clause of towing motor vehicle); *Vector Research*, 76 F.3d at 698-99 (Fourth Amendment illegal search); *Nemo v. City of Portland*, 910 F. Supp. 491, 499 (D. Or. 1995) (First Amendment free speech rights); *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258, at **5-6 (N.D. Ill. Dec. 20, 2016) (First Amendment claim for recovery of agency fees).[9] Indeed, one of the cases in which this Court has suggested the availability of the good-faith defense involved an Eighth Amendment claim (in a suit against private prison guards) not analogous to any tort requiring scienter. *Richardson*, 521 U.S. at 413-14; *see* Nahmod, 26 Cardozo L. Rev. at 88 (noting that the "common law background of malicious prosecution and abuse of process . . . cannot plausibly explain the availability of a good faith defense in *Richardson*").[10]

---

[9] Like the Second Circuit in this case, two district courts have applied the good-faith defense to preclude claims for damages based on pre-*Harris* payment of agency fees. *See Winner v. Rauner*, 2016 WL 7374258, at **5-6; *Hoffman v. Inslee*, No. C14-200-MJP, 2016 WL 6126016, at *4 (W.D. Wash. Oct. 20, 2016), *appeal pending*, No. 16-35749 (9th Cir.).

[10] Even in attachment and garnishment cases like *Lugar* and *Wyatt*, moreover, the defendant's state of mind is irrelevant to the plaintiff's constitutional claim that her Due Process rights were violated. Rather, the private defendant's state of mind becomes relevant only in assessing whether damages should be awarded against him or her. The same is true here.

Nor is there anything to petitioners' contention that, because a "defense" must "involve 'the essence of the wrong,'" applying the good-faith defense in cases without an analogous tort containing a scienter requirement amounts to granting an "immunity." Pet. at 28 (quoting *Richardson*, 521 U.S. at 403). The Second Circuit correctly answered that contention by pointing out that, "unlike standard defenses, affirmative defenses need not relate to or rebut specific elements of an underlying claim." Pet. App. 6a.[11] What is at issue here is not at all the same as the qualified immunity to which government officials may be entitled—which not only shields them from liability for damages but immunizes them from suit entirely. *Wyatt*, 504 U.S. at 165-66. It is, instead, simply a defense to a claim for damages where the nongovernmental defendant has acted in good-faith reliance on existing law. *See generally* Nahmod, 26 Cardozo L. Rev. at 95-96 (reviewing differences between good-faith defense and qualified immunity).

To the extent there exists any unsettled question with regard to the good-faith defense, it is whether this is indeed an affirmative defense (as to which the defendant has the burdens of pleading and proof) or, rather, an element of the § 1983 cause of action. But that is a question that is not presented by this case, because the result would have been the same in either event. Petitioners' argument below that CSEA did not act in good-faith reliance on state law in assessing agency fees prior to *Harris* was based solely

---

[11] And, for the same reason, petitioners' contention that this affirmative defense cannot be located in § 1983's statutory language, Pet. at 29-30, has no merit.

on the contention that such reliance was objectively unreasonable in light of the state of the law before the *Harris* decision. *See* Appellants' Brief at 46-49 (2d Cir. Doc. #33). Because the only issue that was joined below as to CSEA's good faith *vel non* was a purely legal one, the placement of the burden of pleading and proving relevant facts was not an issue. This case therefore would not be an appropriate vehicle for resolving whether the good-faith defense is properly considered an affirmative defense or an element of the cause of action, even if that issue were otherwise worthy of certiorari.

In short, this issue, like the first, involves no conflict among the lower courts that requires resolution, nor does it otherwise merit this Court's consideration.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAREN J. RYLEWICZ
Civil Service
Employees Ass'n, Inc.
143 Washington Avenue
P.O. Box 7125, Capitol Station
Albany, NY 12223
(518) 257-1443
daren.rylewicz@cseainc.org

JOHN M. WEST
(*Counsel of Record*)
JAMES GRAHAM LAKE
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com
glake@bredhoff.com

Counsel for Respondent
Civil Service Employees Association

January 2017