No. 16-753

IN THE
Supreme Court of the United States

MARY JARVIS, SHEREE D'AGOSTINO, CHARLESE DAVIS, MICHELE DENNIS, KATHERINE HUNTER, VALERIE MORRIS, OSSIE REESE, LINDA SIMON, MARA SLOAN, LEAH STEVES-WHITNEY,

Petitioners,

v.

ANDREW CUOMO, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF NEW YORK ET AL.,

Respondents.

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

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. First Question: The Court Should Resolve Whether the First Amendment Restrains the Government from Extending Exclusive Representation Beyond Public Employees to Professions and Other Citizens.

A. The Second and First Circuits' Decisions Will Allow States to Appoint Exclusive Representatives to Speak and Contract for Individuals for Any Rational Basis.

The State and CSEA's briefs are interesting not so much for what they say, but for what they do not. Neither Respondent disputes that the Second and First Circuits' decisions give the government free rein to appoint exclusive representatives to speak and contract for any profession in their relations with government. *See* Pet., 10-14. Neither Respondent suggests any limiting principle for exclusive representation. In fact, CSEA does the opposite by claiming that "there is no need to identify some justification that would pass the text of exacting scrutiny" to uphold the State's extension of exclusive representation to family daycare providers. CSEA Br., 16.

The Court cannot allow states a free hand to compel individuals to accept "an organized voice in governmental decisionmaking on issues that impact the manner in which they carry out their profession," N.Y. Comp. Codes R. & Regs tit. 9, § 6.12. The First Amendment reserves to each individual the right to choose which association, if any, represents his or her interests before government. *See* Pet., 11-14. The government cannot be permitted to claim that right for itself, and dictate which association speaks for individuals in their relations with government.

The writ should be granted to make clear that the government cannot force individuals into exclusive-representative relationships for any rational basis, but only where this mandatory association satisfies exacting constitutional scrutiny. Consistent with *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court should further find that no compelling state interest justifies exclusive representation outside of employment relationships. For, without this limiting constitutional principle, states will continue to expand exclusive representation beyond employment relationships to citizens' relationship with government policymakers.

B. Family Daycare Homes Are Small Businesses, Not a State Workforce.

CSEA attempts to obscure the extraordinary nature of New York's imposition of an exclusive representative on family daycare providers by misleadingly referring to them as the State's "workforce of child care providers." CSEA Br., 14. Family daycare homes are private, independent *businesses* that sell daycare services to the public. Pet., 2-3. Their only connection to the State is that, like most businesses, they are subject to State regulation and sometimes serve customers who pay with public-assistance monies. *Id*. Family daycare homes are no more a State "workforce" than are private health clinics that sometimes serve patients enrolled in Medicaid, or grocery stores that sometimes sell food to customers enrolled in the Supplemental Nutrition Assistance Program (SNAP).

The family daycare businesses that New York is subjecting to mandatory CSEA representation are not all "compensated by the State of New York," as CSEA claims. CSEA Br., 1. The representation unit encompasses all family daycare homes outside of New York City, whether they accept State monies or not. N.Y. Lab. Law Art. 19-C, § 695-c(2). (App. 37a). And the scope of CSEA's representation extends beyond payments these businesses may receive from New York, to encompass petitioning the State over public policies that include the "stability, funding and operation of child care programs," "expansion of quality child care," and "licensing/registration, policies and regulations, rule making, and conditions of operation." Second Agreement, § 3a.

CSEA is thus not akin to a union that represents employees vis-à-vis their employer. It is a government-appointed interest group that lobbies the State over public policies that affect a particular profession. Or, to again use the words of Executive Order 12, CSEA is meant to be daycare providers' "organized voice in governmental decision making on issues that impact the manner in which they carry out their profession," N.Y. Comp. Codes R. & Regs tit. 9, § 6.12. If the First Amendment prohibits anything, it prohibits the government from organizing the voices of its citizens on matters of governmental decision making.

C. New York Is Forcibly Associating Family Daycare Providers with CSEA and Its Expressive Activities.

1. New York has associated family daycare providers with CSEA and its speech because the State granted CSEA statutory authority to speak and contract for these individuals. That infringes on the First Amendment of those providers who, like Petitioners, do not want CSEA speaking on their behalf. *See* Pet., 18-19. Unable to rebut this simple proposition—i.e., that individuals represented by a union are associated with that union—the State and CSEA attempt to obscure the dispositive point by addressing strawman positions of their own invention.

First, CSEA contends it is constitutional for the State to choose to listen and deal with CSEA under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). CSEA Br., 14. But Petitioners' argument is not that the State infringes on their First Amendment rights by listening to CSEA, but rather does so by granting CSEA authority to speak and contract with the State on their behalf.

The fact that New York can choose to whom it *listens* does not mean that the State is free to dictate who *speaks* for individuals vis-à-vis the State. An example proves the point. If New York's Governor decided to listen only to the American Medical Association (AMA) when it came to State policies affecting physicians, that would not violate anyone's constitutional rights. The Governor is constitutionally free to

listen to whatever advocacy groups he wants. But, if the Governor signed a law granting AMA exclusive authority to lobby and contract with the State for all New York physicians, whether they approve or not, that would impinge on dissenting physicians' First Amendment rights. The same principle applies to family daycare providers.

Second, Respondents claim CSEA representation does not preclude providers from individually speaking or petitioning the State. State Br., 12-13; CSEA Br., 15. That is immaterial, even if true. The government is not free to compel citizens to associate with advocacy groups so long as those citizens are otherwise free to speak.

In compelled association cases in which the Court found constitutional violations, the victims almost always were otherwise free to speak. In *Boy Scouts of America v. Dale*, the Boy Scouts were free to speak against the positions of the activists with which it was compelled to associate. 530 U.S. 640 (2000). In *Wooley v. Maynard*, motorists were free to express messages different from the motto inscribed on the license plates they were required to display. 430 U.S. 705 (1977). In *United States v. United Foods*, mushroom producers were free to express messages different from the advertising they were compelled to subsidize. 533 U.S. 405 (2001). And, in *Miami Herald Publishing Co. v. Tornillo*, "the statute in question here has not prevented the Miami Herald from saying anything it wished," in addition to the articles it was compelled to publish. 418 U.S. 241, 256 (1974).

Yet, this Court held each instance of compelled association or speech unconstitutional.

Third, Respondents aver that the State no longer forces family daycare providers to join or subsidize CSEA. State Br., 10; CSEA Br., 15. That is not exculpatory, as it does not change the reality that forcing daycare providers into an unwanted agency relationship with CSEA infringes on their associational rights. As the Eleventh Circuit held in *Mulhall v. UNITE HERE Local 355*, "regardless of whether [an individual] can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights," because the individual is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. 618 F.3d 1279, 1287 (11th Cir. 2010).

Mulhall's conclusion is no less persuasive, or less binding in that circuit, merely because the decision concerned standing. *Mulhall's* holding that exclusive representation "amounts to '*compulsory association*,'" but that this "compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' based on a legislative judgment that collective bargaining is crucial to labor peace," *id.* (quoting *Acevedo–Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002) (emphasis added), is directly at odds with the Second and First Circuits' holdings that exclusive representation does not impinge on associational rights and requires no heightened justification. (App. 4a-5a). The Court should resolve this circuit split.

2. Respondents make only two apposite arguments on the merits. CSEA asserts its agency relationship runs to "the bargaining unit *as a whole*," but not to "any *individual* member of the bargaining unit." CSEA Br., 17. That is illogical. The bargaining unit is composed of individuals. CSEA cannot speak for everyone in it, but no one in particular. The greater includes the lesser. CSEA's authority to speak and contract for all family daycare providers necessarily associates those providers with CSEA, in both the eyes of the law and the eyes of the public.[1]

The State, for its part, asserts that it did "not force day-care providers to unionize," and that CSEA is "not 'government appointed' to be the day-care providers' representative," because a majority of providers chose CSEA representation. State Br., 17. That is untenable. It was *the State* that recognized CSEA as providers' exclusive representative. Second Agreement, § 3. And it was *the State* that granted CSEA statutory authority to speak and contract for them. N.Y. Lab. Law Art. 19-C, § 695-f (App. 39a-40a).

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[1] Petitioners certainly have not "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." CSEA Br., 19 n.7. The public will associate providers with the positions taken by their representative. For example, if a union that represents teachers at a school makes certain bargaining demands, or calls a strike, the public attributes those demands and actions to the teachers themselves.

The proposition that a majority of providers approved of these State actions is not exculpatory, but damning, as the First Amendment exists to protect individual rights from majority rule.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them *beyond the reach of majorities* and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; *they depend on the outcome of no elections*.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). The Court should not tolerate states putting to majority votes which advocacy organization shall speak for members of a profession in their relations with government. The writ should be granted.

D. The Second and First Circuits' Decisions Conflict with This Court's Precedents.

The State and CSEA make no attempt to square the Second and First Circuits' decisions that exclusive representation does not impinge on associational rights with this Court's repeated recognition that exclusive representation does impinge on individual liberties. *See* Pet., 21 (discussing cases). This includes the Court's most recent recognition of "the sacrifice of individual liberty that this system neces-

sarily demands" in *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009).

The State and CSEA make no attempt to defend the Second and First Circuits' heavy reliance on *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). *See* Pet., 17-18. Nor could they, as *Harris* held *Abood* inapplicable to individuals who are not full-fledged employees. 134 S. Ct. at 2638.

Finally, the State and CSEA make no attempt to rebut Petitioners' position that *Harris'* holding that the "labor peace" justification for exclusive representation of employees does not apply to independent providers, *id.* at 2640-41, means that New York's Representation Act cannot survive exacting constitutional scrutiny. Pet., 16-18. In fact, Respondents make no argument whatsoever for why the Act survives exacting scrutiny.

The State and CSEA, instead, rely on *Knight* to justify the lower courts' decisions. As previously discussed, *Knight* addressed whether a public employer can constitutionally *exclude* employees from union bargaining meetings in which the employees want to participate. Pet., 21-23. *Knight* says as much at both its beginning and end. *See* 465 U.S. at 273 (stating "[t]he question presented in this case is whether this restriction on participation in this nonmandatory exchange process violates the constitutional rights of professional employees . . ."); *id.* at 292 (concluding "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to

participate in their public employer's making of policy"). *Knight* did not address whether, much less hold that, government is free to impose an exclusive representative on anyone for any rational basis.

The writ should be granted to correct the lower courts' misapprehension that *Knight* exempts exclusive representation from constitutional scrutiny. As this Court stated in *Knox v. SEIU, Local 1000,* mandatory associations are "exceedingly rare," and are permissible "only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. 2277, 2289 (2012); (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))). This must also apply to regimes of exclusive representation, which are the epitome of a government-mandated association.

E. This Case Is a Suitable Vehicle to Resolve the Important First Amendment Issue Presented Here.

As CSEA notes, there are three other cases challenging the constitutionality of state expansions of exclusive representation to individuals who are not public employees. CSEA Br., 12-13. The Court, however, should not wait for one of these cases. This case is as suitable a vehicle as the others for resolving whether exclusive representation is subject to constitutional scrutiny and, if so, whether it satisfies that scrutiny outside of an employment relationship.

The Court should expeditiously resolve these questions because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Hundreds of thousands of daycare and Medicaid providers are already being forced, in violation of their First Amendment rights, to accept exclusive representatives for lobbying states over policies that affect their professions. The writ should be granted in this case.

II. Second Question: The Court Should Resolve Whether Private Defendants Sued for First Amendment Violations Have a "Good Faith" Defense to Section 1983 Liability.

CSEA's brief supports Petitioners' principal reason why the Court should take the second question: this Court has never decided whether private defendants have a good faith defense to Section 1983 damage claims, and yet the Second Circuit and an increasing number of district courts are holding that private defendants have a good faith defense to *all* Section 1983 damage claims, to include those arising under the First Amendment. *See* CSEA Br., 20-22.[2]

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[2] CSEA assumes too much when it implies that appellate courts other than the Second Circuit have held that good faith is a defense to *all* Section 1983 claims. CSEA Br., 21. Those appellate decisions involved constitutional torts—namely, ex parte searches or seizures that violated due process guarantees—in which state of mind was a common law element. *See* Pet., 26-27.

Petitioners and CSEA, of course, disagree on the merits of this development. But no one denies its importance. Accordingly, the Court should resolve if and when private parties can raise a good faith defense under Section 1983.

CSEA's justification for a universal good faith defense further supports review, as it is untenable. CSEA asserts an "'equality and fairness' rationale for adopting the good faith defense in the first place." CSEA Br., 23 (quoting *Wyatt v. Cole*, 504 U.S. 158, 168 (1992)). But courts cannot carve exemptions into Section 1983 based on nothing more than misguided notions of fairness. *See Rehberg v. Paulk*, 132 S. Ct. 1497, 1502–03 (2012) (holding that courts "do not simply make [their] own judgment about the need for immunity," and "do not have a license to create immunities based on [their] view of sound policy.").

This is especially true given that Section 1983 "contains no independent state-of-mind requirement," *Daniels v. Williams*, 474 U.S. 327, 328 (1986), and states that "every person" who deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law," 42 U.S.C. § 1983. The notion that private defendants are *not* "liable to the party injured in an action at law" under Section 1983, unless they act with a certain state-of-mind, conflicts with the statute's plain language.

Almost twenty-five years have passed since this Court first suggested in dicta that private defendants might enjoy some sort of "good faith" defense to Sec-

tion 1983 claims involving ex parte seizures. *See Wyatt*, 504 U.S. at 168-69. The Court should finally resolve whether such a defense exists and, if it does, the scope of that defense.

CONCLUSION

The petition for a writ of certiorari should be granted on both questions.

Respectfully submitted,

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