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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* FAMILY CHILD CARE INC., *et al.*, IN SUPPORT OF PETITIONERS

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Rd., Suite 610
No. Springfield, VA 22151
(703) 321-9180
mavakian@aol.com

Attorney for Amicus Curiae
**Counsel of Record*

QUESTION PRESENTED

Whether the First Amendment Right of Association of home healthcare providers may be impaired by State compulsion imposing union representation upon them.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iii

INTEREST OF AMICUS. 1

SUMMARY OF ARGUMENT.. 4

ARGUMENT. 4

FIRST AMENDMENT ASSOCIATIONAL RIGHTS ARE DISTORTED AND INDUSTRY COMPETITION IS REDUCED AND IMPAIRED BY THE STATUTORY MECHANISMS IMPOSING UNION REPRESENTATION UPON HEALTH CARE PROVIDERS.. 4

CONCLUSION. 27

TABLE OF AUTHORITIES

CASES

Page

Abood v. Detroit Board of Education,
431 U.S. 209 (1977). 21

Agency for International Development v. Alliance for Open Society International Inc.,
133 S. Ct. 2321 (2013). 20

Hudson,Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,
475 U.S. 292 (1986). 22

Knox v. Service Employees International Union Local 1000,
132 S. Ct. 2277 (2012). 8, 20-22

Schlaud v. International Union, UAW,
82 U.S.L.W. 3101 (August 19, 2013). 6

Schlaud v. Snyder,
Case No. 1:10-CV-147 (W.D.Mich.)(March 11, 2011). 8, 12

STATUTES

Minn. Stat. §119B.09(8). 15

Minnesota Family Child Providers Representation Act, Minn. Stat. §§179A.50-52. 15

MISCELLANEOUS

W.L. Messenger, *Does the First Amendment Allow States to Compel Recipients of Government Monies to Support State-Designated Representatives?*, Engage: Vol. 11, Issue 2 (2010), pp.................. 14

INTERESTS OF THE *AMICI CURIAE*[1]

Amicus curiae Family Child Care Inc. ("FCCI") (Olmsted County Child Care Association), is a voluntary trade association in Rochester, Minnesota, which has served licensed family child care providers in southeastern Minnesota since 1973. *See* www.fccimn.com.

Amicus curiae Connecticut Family Daycare Associations Network Inc. ("CFDCAN"), is a 501-C6 trade association in Sandy Hook, Connecticut, which has served licensed child care providers in Connecticut since 1987. *See* cfdcan.org.

Amicus curiae Professional Family Childcare Providers Network ("PFCPN"), is a child care provider group in Newton, Massachusetts, which has served child care providers since 2005.

Amicus curiae Providers Networking ("PN") is a child care provider group in Overland Park, Kansas, which has served licensed family child care providers in Kansas since 2005.

These four associations ("*amici* associations") each offer training and resources to child care providers, work directly with state agencies on

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[1]Counsel for a party did not author this brief in whole or in part or make a monetary contribution intended to fund its preparation or submission, nor did any other person or entity, other than the *amicus curiae*, its members or counsel, make such a monetary contribution. The parties filed blanket consents with the Clerk for the filing of all amicus curiae briefs in the case.

matters related to child care and lobby their respective state legislatures on matters of public policy relating to child care.

Although the *amici* associations therefore provide an alternative to unions,[2] they each face in their respective states the same prospect of forced association with unions as the providers in this case and they each oppose this on various grounds.

The Center on National Labor Policy Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before this

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[2]"Providers already have many organizations working on their behalf such as the National Association for Family Child Care (www.nafcc.org) and state-wide child care associations like Minnesota Licensed Family Child Care Association (www.mlfcca.org)." www.childcareunioninfo.com. "Associations accomplish the same things a union can, however, the cost of dues is far less and membership is completely voluntary." *Ibid.* (emphasis omitted). "Association dues are approximately $30-$50 per year while union dues start around $300 per year." *Ibid.*

court, including *Granite Rock Co. v. Teamsters, Local 287*, No.08-1214; *Larry V. Muko Inc. v. NLRB*, No. 80-1798; and *New York Telephone Co. v. N.Y.S. Department of Labor*, No. 77-961.

The parties will focus on the constitutional and jurisdictional issues in this case. Equally important, however, and critical to establishing the context for evaluating these questions, are their national implications and the strong public policies in favor of protecting federal statutory and constitutional rights through judicial proceedings, particularly in labor cases.

The interests of the *amici* associations and the Center's commitment to the public interest are at stake in these questions. Beyond these particular issues, however, the *amici* have an interest in the protection of the right of judicial review, particularly in labor cases, and in the accountability of the government and labor unions generally, both of which are challenged by the position of Governor Quinn and the unions in this case.

The *amici* do not doubt that the parties will fully argue their own interests in this case and defend them through settlement or otherwise, but those interests do not necessarily coincide with the interests of the *amici* association and of other providers who are not parties herein or with the public interest.

The *amici* are in a unique position to fully advocate the rights of the public and of those individuals who would suffer from any compromise

of the important policies at stake in this case.

The participation of the *amici* will therefore bring to this case a diverse perspective not presently represented and assist this court in fully considering the public interest.

SUMMARY OF ARGUMENT

The challenged provisions mandating involuntary association violate the First Amendment by distorting the "marketplace of ideas" which it creates, thereby reducing competition and the amount of care, silencing individual providers and hindering their effectiveness.

ARGUMENT

FIRST AMENDMENT ASSOCIATIONAL RIGHTS ARE DISTORTED AND INDUSTRY COMPETITION IS REDUCED AND IMPAIRED BY THE STATUTORY MECHANISMS IMPOSING UNION REPRESENTATION UPON HEALTH CARE PROVIDERS

In addition to the reasons set forth in the Brief for Petitioners, The *amici* here each support the position of Pamela Harris and the other caregivers in this case on the following grounds:

1. Exclusive representation granted to unions, by allowing closed door negotiations on matters of public policy, gives the unions

preferential treatment and thereby hinders the ability of the *amici* associations to effectively lobby on behalf of their members.

2. Collectivization of thousands of private businesses which are competitors with each other, and the creation of a mandatory and exclusive representative for these businesses which compels them to lobby the legislature and bargain with the state through one entity, silences the voices of individual businesses.

3. Each *amici* supports the First Amendment right of each member of each *amici* association to associate freely, and not to associate with, organizations of their choosing.

FCCI, CFDCAN, PFCPN and the Center each supports the position of Harris and the other caregivers in this case on the additional ground that compulsory fees create a hardship for private businesses and further violate their rights by the use of dues and fees for political purposes. *See* n. 5, *infra*.

PFCPN and PN each supports the position of Harris and the other caregivers in this case on the additional ground that their respective states have gone outside of traditional federal and state labor law to recognize unions as the exclusive representative of private child care businesses without majority support in secret ballot elections. *See* nn. 3-4, 7, *infra*. The Center also supports the position of Harris and the other caregivers in this case on this additional ground.

"[E]ighteen (18) states have authorized mandatory representation for home childcare providers, and fourteen (14) permit or permitted the exaction of compulsory fees." Brief for Petitioners, p. 54. "Providers" may include "individuals who … provide care in their own homes to children to whom they are related (i.e., grandparents, aunts, adult siblings, etc.)." Petition for Writ of Certiorari in *Schlaud v. International Union, UAW*, 82 USLW 3101 (August 19, 2013) (No. 13-240) ("*Schlaud* Petition") pp. 2-3; *see also* Appellants' Brief in *Parrish v. Dayton* (September 26, 2013) ("*Parrish* Brief") p. 3 ("grandparents, aunts, or uncles").

A recent article notes that these schemes share several common features: an entity is designated by the state as the representative of providers[3] for the purpose of speaking with a specific

[3]"When a union wins recognition through an executive order or a vote, it then represents every provider within the bargaining unit, even those who do not want representation." www.childcareunioninfo.com (emphasis omitted). In Illinois, "about 14,000 chose unionization for nearly 50,000." *Ibid.* "Iowa is a right to work state and does not allow fair share fees. This does not stop the union from claiming to represent all providers, member or not." *Ibid.* In Kansas, "[n]early a year after negotiating a contract with the state on behalf of the 6600 child care providers AFSCME admitted that only about 100 of the providers had actually joined the union and were full members." *Ibid.* In Maine, "[w]ith little to no benefits of joining the union, membership was low with only about 200 of the 2200 eligible providers choosing to join." *Ibid.* In Minnesota, "[t]his union, which will be comprised of predominantly unlicensed caregivers, will be able to negotiate

exclusively with the state on issues that impact all licensed family child care providers." *Ibid.* (emphasis omitted).

In Maryland,

> The union … represents all providers on the subsidy program, whether they voted or even if they voted ….
>
> A year and a half after unionizing, only about 1000 providers had chosen to join the union. That means over 4000 providers were exclusively represented by a union they did not want to join.

Ibid.

In Washington State, SEIU

> now represents all providers who care for a child on the assistance program regardless of if they voted or how they voted, or if they were even eligible to vote at the time of the election.

Ibid.

Further, in Michigan, the union actively lobbied the state legislature as providers' representative and actively participated in registering providers for the Democratic Party and in assisting Democratic Presidential campaigns even where it had been recognized as providers' exclusive representative only with a state Council, not with a state department or with the state itself and where the Council merely made recommendations which the state usually disregarded. Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Judgment in *Schlaud v. Snyder*, Case No. 1:10-CV-147 (W.D.Mich.) (March 11, 2011) ("*Schlaud* Brief") pp. 2, 16.

In Illinois, "SEIU and child care advocates have successfully worked together since 2006 to secure subsidy rate increases for child care centers, although centers are not covered by the agreement or part of the bargaining unit."

state body, usually pursuant to a mail-ballot election;[4] the purpose for the representation is to

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National Women's Law Center, *Getting Organized: Unionizing Home-Based Child Care Providers 2010 Update* (2010) ("*Getting Organized 2010*") pp. 7-8.

[4]"The election process for FCC [family child care] and FFN ["family, friend and neighbor"] providers has been somewhat less formal than the process used by public-sector or private-sector employees," National Women's Law Center, *Getting Organized: Unionizing Home-Based Child Care Providers* (2007) ("*Getting Organized* 2007") p. 9, and the voting is often flawed. In Illinois,

> [t]hose eligible to vote included grandparents caring for their grandchildren and Family, Friend or Neighbor caregivers that were not running a licensed family child care business. Because the vote only included those caring for children on the subsidy program, many licensed, professional family child care providers were excluded from the vote. Many providers in Illinois didn't even know an election was happening as this election was not highly publicized.

www.childcareunioninfo.com. In other words, the burden of discovering the election was shifted to the providers. *Cf. Knox*, 132 S.Ct. at 2290 ("[R]equiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues – as opposed to exempting them from making such payments unless they opt in – represents a remarkable boon for unions …. An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree") and 2292 ("a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent").

In Connecticut, "ballots were sent by mail," but "many of the addresses were incorrect." *Ibid.* "Of the 10,560 registered providers in Maryland at the time, [Governor] O'Malley's Executive Order limited the election to 5818 providers." *Ibid.* "The providers in Massachusetts were denied the right to a secret ballot election" when Governor Patrick signed a bill "creat[ing] a bargaining unit of approximately 4000 child care providers" even though "a ballot initiative that would have unionized providers in 2006 … was rejected by voters." *Ibid.* In Washington State, "[m]any licensed providers were excluded from the vote." *Ibid.*

In Michigan,

> [m]any registered child care professionals were excluded from the vote …. Out of 40,500 eligible voters, only 5921 voted in favor of unionization. This means fewer than 15% unionized the entire bargaining unit. It also means 34,579 independent child care providers became exclusively represented by a union they didn't vote for.

Ibid. A state Council previously had declared the union the exclusive representative of all home childcare providers for purposes of dealing with the Council predicated on a private arbitrator's certification that a majority of providers had signed authorization cards for the union. *Schlaud* Petition p. 3.

In Minnesota,

> [w]hile only about half of the current licensed providers are eligible to vote, thousands of unlicensed caregivers will get a ballot, including about 75% of those who are no longer providing care.

www.childcareunioninfo.com.

In Kansas,

> [p]roviders were not given the right to a secret ballot election. Instead, cards collected by union organizers in a door to door campaign were used to show support and counted as yes votes. Providers have reported that they were not aware of the union organizing drive until they read about it in the paper.

Ibid.

In Wisconsin,

> [u]nion organizers went door to door collecting signatures on cards. These cards were used to show a majority of support for unionization and the providers were not given the right to vote in a secret ballot election. Any provider who signed a card was considered to be in support of a union and his/her card was counted as a yes vote.

Ibid.

Similarly, in New Jersey, "providers were denied the right to a secret ballot election," "[u]nion organizers collected signatures on cards during a door to door campaign and these cards were counted as yes votes." *Ibid.*

And door to door campaigns contain notorious irregularities:

> Union organizers are supposed to wear identification, however, providers have reported that organizers have come to their homes without identification and have even claimed to be from other organizations like Child Care Aware or the food program ….

influence how the state administers aspects of a public aid program that affects the providers; the state body is obliged to meet and deal with the representative on this issue, with the objective being to reach an agreement that governs what the state body will attempt to do with respect to the program; the agreements between the state body and representative require that all providers pay fees to the representative, which are generally deducted directly from the monies owed to providers for caring for participants in state HCBS and childcare programs;[5] the state-designated representatives

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> Providers have reported organizers using unethical tactics to obtain signatures on cards ….
> Organizers usually come during business hours when providers are busy caring for children ….
> Organizers often come back again and again ….
> Often times, unions hire organizers from out of state and fly them in to do this type of organizing. They are trained in ways to obtain signatures and avoid answering questions.

Ibid.

[5]"Since the first child care union was formed in 2005, unions have siphoned tens of millions of dollars from the child care assistance programs, even as many of those programs faced funding reductions." www.childcareunioninfo.com. In Illinois, "[t]he first contract reached by the union was estimated to cost the state $250 million dollars [sic] for the first 3 years" and

> SEIU has siphoned over $60 million dollars [sic] from the child care assistance program. That's around $10 million dollars [sic] per year taken from child care providers, most of whom did not choose SEIU as their exclusive representative.

Ibid.

A response from the Illinois Department of Human Services to a FOIA request reveals the following breakdown of the more than $60 million paid to SEIU from child care assistance payments in Illinois: $36,620.13 in 2006; $7,933,202.69 in 2007; $7,517,094.47 in 2008; $7,847,614.31 in 2009; $8,416,432.98 in 2010; $9,885,992.42 in 2011; $9,899,740.07 in 2012; and 8,538,699.28 in 2013 through July 10, 2013 (all years are Fiscal Years).

"[T]he Washington legislature included in its 2007-09 budget nearly $86 million to fund the contract." *Getting Organized 2010* p. 9.

A response from the Washington State Department of Social & Health Services ("DSHS") to a similar request reveals the following breakdown of more than $1 million paid to SEIU in less than a three-month period in 2007: $237,748.95 on September 17; $46,616.83 on October 8; $294,140.95 on October 12; $248,488.70 on November 9; $759.08 on November 28; and $263,854.52 on December 11.

An Excel spreadsheet from the Washington State Department of Early Learning ("DEL") reveals an additional $7,423,695.22 paid to SEIU from child care assistance payments in Washington State since Fiscal Year 2009, and DEL indicates that DSHS "is working on producing the data for *the remaining* list of child care assistance payments on behalf of child care providers for union dues" (emphasis added).

In Oregon, "[t]he Legislative Fiscal Office estimated that the initial contracts would cost the State around 75 million dollars." www.childcareunioninfo.com.

In Michigan, union dues were 1.15% of the subsidy check. *Ibid.* The state enforced the seizure of more than $4 million in compulsory union fees even though most of the other terms of the contract were never implemented. *Schlaud* Petition p. 4. The implementation of this seizure of fees cost the state approximately $1 million. *Schlaud* Brief p. 9.

Union membership dues are up to $900 per year in Illinois, $700 per year in New York, $660 per year in Oregon, $600 per year in Washington State and $300 per year and "likely to go up" in Minnesota and were $35 per month in Iowa and $25 per month in Kansas and Ohio. www.childcareunioninfo.com.

"All local unions must follow bylaws and rules determined by the National Union, whether or not those bylaws or rules support this profession." *Ibid.* "A large portion of union dues goes out-of-state to the National Union and many of these dollars are not even used for the benefit of child care providers." *Ibid.* "Unions spend millions of dollars each year supporting political candidates and causes." *Ibid.*

In Minnesota,

> [a]ccording to AFSCME Council 5 constitution and bylaws, around $21 per month out of the dues and fees paid to the local union must be sent to the state affiliate. Some of this will then be sent out of state and not even used for child care in Minnesota.

Ibid.

"The unions have assessed fair share fees to non-members in every state in which they are legally permitted to do so," including Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, Ohio, Oregon ("$25 per month"), Rhode Island, Vermont and Washington State. *Ibid.* "These fees are typically close to the same amount as full dues." *Ibid.* For example, in Ohio, the fair share fee was "$25/month," the same as members' dues. *Ibid.*

In Maryland,

> [w]hile providers were initially successful in blocking "fair share fees" for those who choose not to be members, that has since been changed and now all those in the bargaining unit (represented by the union) are required to pay a fee.

Ibid.

In Rhode Island, "nonmembers will be required to pay fair share fees which could be as high as full member dues." *Ibid.* New York assesses fees even on "providers not participating in the child care assistance program." *Ibid.*

have all been unions, usually affiliates of the Service Employees International Union ("SEIU") or American Federation of State, County, and Municipal Employees ("AFSCME"); and the schemes have been implemented under administrations politically supported by these unions.[6] *See* W.L. Messenger, *Does the First Amendment Allow States to Compel Recipients of Government Monies to Support State-Designated Representatives?*, Engage: Vol. 11, Issue 2 (2010), pp. 88-89.[7]

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[6]In New Mexico, "Governor Richardson signed that contract on his last day in office sparking an outcry from newly elected Governor Martinez." www.childcareunioninfo.com. In Ohio, "Governor-Elect Kasich indicated his intent to reverse the Strickland-era executive orders. Not surprisingly, the statement drew strong rebuke from the two unions who represent the employees." *Ibid.* In Michigan, it was then-Governor Granholm and the union who initiated the unionization in 2005, *Schlaud* Petition p. 3, and newly-elected Governor Snyder who dissolved the Council and stopped the automatic deduction of compulsory union fees in 2011, *id.* at p. 5. In 2007, the National Women's Law Center wrote that "[a]lthough the governors of four states – California, Massachusetts, New York, and Rhode Island – have vetoed legislation to authorize unionization and negotiation, the election of new governors in two of these states may lead to renewed union efforts." *Getting Organized* 2007 p.5.

[7]"Another common feature is that all state schemes use labor law terminology, such as 'exclusive representation' and 'collective bargaining.' Indeed, some state schemes define providers as 'public employees' solely for purposes of a public sector-bargaining statute, but for no other purpose." *Id.* at 89 (citations omitted).

"[H]ome-based child care providers are not in a traditional employer-employee relationship that permits them to unionize." *Getting Organized 2010* p. 6. However, Illinois has declared providers "public employees" solely for purposes of

The article goes on to point out that providers, like many other groups such as public-aid recipients, contractors with government, financial institutions, automobile companies and others, are simply a group of citizens who receive monies from a government program. States are compelling this particular group of citizens to support an entity for the purposes of speaking with state bodies to influence the administration of the government program that affects them.

At issue is compulsory political representation. The representation imposed upon providers would be like the government designating the American Association of Retired Persons as the mandatory representative of all senior citizens on Medicare; ACORN as compulsory voice of all individuals who receive government-subsidized housing; or the American Banking Association as the mandatory trade association for all financial institutions receiving Troubled Asset Relief Program

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unionization. *See* Brief for Petitioners pp. 9-11. Similarly, the Minnesota Family Child Providers Representation Act, Minn. Stat. §§179A.50-52, considers family child care providers "state employees" "for purposes of the Public Employment Labor Relations Act" but "not … for any other purpose" even though Minn. Stat. §119B.09(8) provides that "receipt of federal, state, or local funds by a child care provider … does not establish an employee-employer relationship between the child care provider and the … state" and the Child Care Assistance Program ("CCAP") Guide states that "CCAP is not your employer." *Parrish* Brief pp. 3-4. The executive order recognizing AFSCME in Kansas in 2007 also reclassified private child care businesses as state employees for the sole purpose of collective bargaining.

funds, and then forcing the members of each group to pay these organizations to lobby the government for more money and benefits from these programs.

The implications are vast:

> Most troubling are the implications of the asserted interest: that a state can designate a compulsory voice for citizens if it deems that they do not adequately voice their views voluntarily. This purports a state interest in dictating the degree to which individuals should engage in core First Amendment activities. It also assumes a state interest in dictating how much political influence particular groups of citizens should wield. If this is accepted as a legitimate state interest by the courts, matters once exclusively reserved to individual choice under the First Amendment – choosing whether and how to speak to and petition the government for a redress of grievances – will be subject to the tyranny of the majority ….
>
> If it is held constitutional to compel providers to support state-designated lobbying representatives, states and Congress will be free to impose similar types of representation on other groups ….
>
> [S]tate-designated representation alters the fundamentals of the political

> process by granting government officials the ability to artificially empower special interest groups to support their agendas. An advocacy group that individuals must support financially as a condition of receiving public benefits, and that enjoys special privileges in lobbying the state, will naturally have resources that far exceed what citizens would provide to it voluntarily. Thus, that group will wield political influence that exceeds citizens' voluntary support for the group and its agenda. This necessarily distorts the "market place" of competing ideas upon which the democratic process is predicated.[8]

[8]"Child care unions are now facing more resistance than ever before." www.childcareunioninfo.com. According to a survey of licensed family child care providers in Minnesota, 86.3% opposed formation of a union of licensed family child care providers and only 5.54% supported it; the survey was designed and circulated by the Minnesota Licensed Family Child Care Association during March 7-13, 2013, and had a 20% return rate. *See* www.fccimn.com.

However, further distortion of the "marketplace of ideas" would exacerbate the problem which already exists that voters who support unionization often do so because of misunderstanding.

In Illinois,

> [m]any of those who voted for SEIU did so believing they would get health insurance as this was one of the benefits touted by union organizers. After the first contract was negotiated it was clear that

> benefits would be limited to a small percent.

www.childcareunioninfo.com. Although the legislature appropriated $27 million for the health insurance program, no more than 5000 out of 49,000 providers participated. *See Getting Organized 2010* pp. 7-8.

Overall, "[o]nly a tiny percent of child care providers who pay dues or fees have obtained any form of health insurance" and, of course, "[a]ll benefits negotiated by a union with the state are subject to legislative funding." www.childcareunioninfo.com; *accord*, *Getting Organized 2010* p. 9 ("the agreement was contingent on the legislature's approving the funds necessary to implement the agreement").

In Illinois,

> [w]hile the union has been able to negotiate minimal increases to the child care assistance reimbursement rates, these increases have barely managed to keep up with the rising cost of child care. Union free Minnesota child care providers get higher reimbursement rates than their unionized counterparts in Illinois.

www.childcareunioninfo.com.

In Maine, "[i]n the first contract, the union was not able to negotiate health insurance or even a raise in the child care assistance reimbursement rates." *Ibid.* In Maryland, "providers … have not seen any health insurance." *Ibid.* In Minnesota, "[t]he majority of child care providers paying dues and fees have not received any tangible benefits in return. Only a tiny percent have received health insurance." *Ibid.* In New Mexico, "[t]he contract did not give the providers a raise in subsidy rates and did not give them any health insurance benefits." *Ibid.* In Oregon,

> [i]n the contract for licensed providers, the union was not successful in negotiating a raise in the child care assistance reimbursement rates ….

> In Federalist No. 10, James Madison warned of the dangers posed to democratic governance by "factions" of individuals united for narrow, rent-seeking purposes. A compulsory faction, artificially created by the state for the very purpose of advocating for a defined group of citizens on a discrete issue, raises this danger to a new level.

Id. at 90 (citations added and omitted); *see also* Brief for Petitioners pp. 49-56.

> They were not successful in negotiating health insurance into a contract for the providers.

Ibid. Unions have also failed to obtain health insurance in Iowa, Kansas, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Rhode Island, Vermont and Wisconsin. *Ibid.*

> Washington State
>
> > is one of the few states that have negotiated limited funding to purchase health insurance for providers. As in the other states this has happened, the number of providers who can be on the insurance program is capped. In Washington, the program allows for up to 600 providers (less than 10% of those paying dues and fees) to get some form of health insurance. Only the provider is covered, his/her family is not and the provider must meet strict requirements.

Ibid.

Government distortion of the "marketplace of ideas" is very serious, for

> [t]he First Amendment creates an *open* marketplace in which differing ideas about political, economic, and social issues can compete *freely* for public acceptance, *without improper government interference*. The government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves.*

Knox v. Service Employees International Union Local 1000, 132 S.Ct. 2277, 2288 (2012) (emphasis added, citations omitted) (holding that union violated First Amendment rights of objecting nonmembers by requiring them to pay a special assessment); *see also Agency for International Development v. Alliance for Open Society International Inc.*, 133 S.Ct. 2321, 2327 (2013) ("*AID*") ("It is … a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say. At the heart of the First Amendment lies the principle that each person should decide *for himself or herself* the ideas and beliefs deserving of expression, consideration, and adherence") (emphasis added, citations omitted) (holding that requiring affirmation of a belief as a condition of federal funding violates First Amendment). Further, "compelled funding of the speech of other private speakers or groups" is "[c]losely related to compelled

speech and compelled association." *Knox*, 132 S.Ct. at 2288.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977), *reh'g denied*, 431 U.S. 915 (1977), the court specifically found that "public employee unions attempt to influence governmental policymaking." As Justice Rehnquist's concurring opinion notes,

> [s]uccess in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.

Id. at 243. The court accepted the tension placed on the First Amendment. *See id.* at 231. But Justice Powell's vigorous concurring opinion correctly predicted what would become a grant of unlimited power to public sector unions unless more than a "relationship" to collective bargaining was adopted both as a restraint on unions and as protection for First Amendment rights. *See id.* at 261 n. 16.

Knox makes clear that

> we did not call for a balancing of the "right" of the union to collect an agency fee against the First Amendment rights of nonmembers .... Far from calling for a balancing of rights or interests,

> *Hudson*[9] made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest.

132 S.Ct. at 2291 (citation added). After *Knox* and *AID*, *Abood* cannot stand.

In addition, the negative effect of unionization on competition is evident from the reduction in care which has, empirically, accompanied it. Illinois' experience has been summarized as follows: "High dues, more tax dollars, fewer children served, fewer child care providers, insignificant increases and few benefits." *See* www.childcareunioninfo.com.

Unionization "has resulted in many families losing their assistance after budget cuts and has forced some states to implement a waiting list for eligible families," *ibid.*:

> One accomplishment the unions were able to make in some states in which

[9]*Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986).

> they reached a contract was to increase subsidy rates. However, when subsidy rates are locked in, cuts to the program cannot be made by reducing rates; cutbacks must come from somewhere else. This has resulted in many families losing their assistance after budget cuts and has forced some states to implement a waiting list for eligible families.

Ibid.

Specifically in Illinois, "fewer families can now qualify for assistance," *ibid.*:

> One of the benefits of the contract was an increase in child care assistance rates. Those who saw the biggest raise were the unlicensed family, friend, neighbor providers. The contract locked subsidy rates in at a higher rate. While this seems like a great thing, one of the unintended consequences is that fewer families can now qualify for assistance. When there is a budget shortfall and cuts must be made, they can no longer cut rates, instead they must cut families from the program ….
>
> In between 2005 and 2011, the number of children served through the Federal CCDF child care assistance fund has dropped by 20,000 even though funding has gone up. In 2005,

> there was over $40 million dollars [sic] less in total CCDF child care assistance expenditures than in 2011 yet they were able to serve 20,000 more children with the program in 2005 with less money.

Ibid.

Predictably, there has been a corresponding decline in the number of providers in Illinois:

> Since unionizing in 2005, the snapshot of family child care looks very different. Despite having more than double the population than union free Minnesota, Illinois now has fewer licensed family child care providers than Minnesota. The number of legally unlicensed caregivers has also dropped dramatically by over 10,000 since the union was recognized.

Ibid.

Similarly, in Washington State,

> SEIU also negotiated a raise in subsidy rates and got the rates locked in through their contract. This has proved to have unintended negative consequences though. In 2011, when a 6.3% budget cut was ordered, reducing subsidy rates was not an option so in

> order to meet the cuts 4000 low income families were notified that they would be losing their child care assistance and were being kicked out of the program. While a cut in subsidy rates is not desirable, a 10% cut would be better than losing ones [sic] assistance all together [sic].

Ibid.[10] [11]

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[10]The divisiveness of unionization also may reduce quality:

> Rep. John Scibak (D-South Hadley[, Massachusetts]), co-chair of the Public Service Committee, stated: "I am concerned that this legislation has driven a wedge within the field and among providers that I'm not sure is necessarily a good thing in terms of quality and access."

www.childcareunioninfo.com.

In Maryland "[t]hese measures were fought by child care providers" and in Michigan "[c]hild care providers sued in Federal court." *Ibid.* In Rhode Island, Governor Carcieri, vetoing a previous attempt to unionize, "called it an 'unmitigated legal and financial disaster' for both taxpayers and the state's child-care system." *Ibid.* "In Vermont child care providers joined together and spent countless hours fighting efforts to pass child care union legislation for two years in a row, most recently killing a child care union bill in committee in March of 2013." *Ibid.* In Wisconsin, "[w]hile the Governors [sic] recommendations were being debated, union organizers, employees and supporters were protesting at the Capitol." *Ibid.* California recently succumbed.

In Minnesota,

> [w]hen providers learned of the possibility of involuntary unionization, they worked together and fought back ….

> Two separate lawsuits were filed ….
>
> Providers showed up at each hearing to testify against this bill. At times, providers who signed up to testify in opposition were turned away. This bill set a record for the longest floor debate in the Minnesota Senate with a marathon 17 hour overnight session.

Ibid.

[11]Since "[c]hild care providers …. are not covered under the National Labor Relations Act" and "[i]n many cases, they are not covered by any state labor laws," "they have no way to decertify or break free from the unions once those unions are recognized." www.childcareunioninfo.com.

Further,

> [s]ince child care providers are spread out across the state, even in the states where providers do have the legal means to file a decertification petition, it would be near impossible for them to collect enough signatures to file a decertification petition as it would entail them going door to door across the state to collect these signature [sic].

Ibid.

Notwithstanding these difficulties, in Iowa "the original Executive Order [granting bargaining rights to child care providers] was repealed"; in Kansas "the Executive Order granting bargaining rights is now defunct"; "[t]he Maine legislature voted to overturn the union and the repeal was signed into law"; in Michigan "the State had to agree never to force child care providers into a union again"; in New Jersey "the Executive Order unionizing providers is now defunct"; in Ohio "[t]he unions were repealed"; and in Wisconsin "[c]hild care providers were part of the group that lost bargaining rights under Governor Walker." *Ibid.*

CONCLUSION

For these reasons and those set forth in the Brief for Petitioners, the Court should grant the relief which the providers seek in this case.

Respectfully submitted,

Michael E. Avakian*
Center on National Labor
Policy, Inc.
5211 Port Royal Road
Suite 610
No. Springfield, VA 22151
(703) 321-9180
mavakian@aol.com

Attorney for Amici Curiae

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* Counsel of Record