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 a Writ of Certiorari
to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of New York compels Petitioners and all family daycare businesses to accept a mandatory representative for lobbying and contracting with the State on their behalf. Does this violate their First Amendment right of free speech and association?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it implicates every individual's fundamental right to earn an honest living while maintaining their freedom of speech and association.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has candidly observed that its "acceptance of the opt-out approach" for dissenting employees forced to support a labor union against their will "appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Knox v. SEIU, Local 1000*, 132 S. Ct. 2777, 2290 (2012). The same can and should be said of the Court's acceptance of "labor peace" as an interest so compelling that a state may mandate association with a union and compel workers to submit to it as their exclusive representative.

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[1] Rule 37 statement: All parties received timely notice of amicus's intent to file this brief; petitioners lodged a blanket consent to *amicus* briefs, while respondents' consents to this brief have been filed with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

This "labor peace" rationale for infringing First Amendment rights rests on the flimsiest of structures. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), simply assumed that the Court's decisions in *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), had already recognized "labor peace" as a "compelling interest." But those cases regarded "labor peace" only as justifying Congress's exercise of its Commerce Clause authority to regulate labor relations, not as a basis to override workers' First Amendment rights.

Careful review of the Court's precedents shows that no case before *Abood* squarely addressed workers' First Amendment rights to be free from compelled association with a labor union. As *Abood* recognized, the very purpose of forcing dissenting employees to associate with a union is to facilitate its speech on their behalf—while suppressing their individual views—and thereby achieving "labor peace." 431 U.S. at 224. But the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988).

New York's transparent scheme to compel family daycare businesses' to associate with a union absent any legitimate state interest is the predictable result of *Abood*'s casual disregard of public employees' First Amendment rights. Indeed, the decision below demonstrates what little regard many courts have for the First Amendment in the union context due to *Abood*'s flippant treatment of the constitutional implications of mandatory association.

This Court, however, recently recognized that "[t]he *Abood* Court's analysis is questionable on several grounds." *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). *Harris* gave the Court an opportunity to consider whether *Abood* could or should be extended to allow a state to collect agency fees for the union it designated as the exclusive representative of at-home workers who were considered state employees only for the purpose of exclusive representation. *Id.* at 2623. The *Harris* Court "refuse[d] to extend *Abood*" to permit the collection of agency fees from those who are "not full-fledged public employees." *Id.* at 2638.

This case presents the Court with an opportunity to consider the question *Harris* did not ask: May a state, consistent with the First Amendment, mandate an exclusive representative for those who are "not full-fledged public employees"—or employees of the state at all?

The court below cited *Abood* in quickly dismissing whether the Petitioners' First Amendment associational rights had been violated. *Jarvis v. Cuomo*, 2016 U.S. App. LEXIS 16638, *3 (2d Cir. Sept. 12, 2016). But *Abood* was on shaky footing when it was decided and still cannot be reconciled with this Court's cases recognizing "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 132 S. Ct. at 2288. The holding below is not a simple application of *Abood* but an unjustifiable expansion of an already tenuous doctrine. *See Harris*, 134 S. Ct. at 2638 ("[W]e therefore confine *Abood*'s reach to full-fledged public employees.").

The Court should take this case to clarify that *Abood* does not allow lower courts to justify every im-

position of exclusive representation. This question is pressing because many states are pushing to unionize more and more at-home workers. Indeed, as Petitioners note in their brief, 18 states have unionized family child-care providers. Pet. for Cert. at 12 n.3, *Jarvis v. Cuomo*, No. 16-753. Allowing states to impose exclusive representatives on these workers without meaningful First Amendment scrutiny will lead to a world in which any person or group the state feels lacks an "organized voice" will be impeded from petitioning state officials about policy decisions that affect them. Instead, their speech will be subsumed into a designated collective, with nary a hope that it could somehow reach decision-makers.

This Court should grant certiorari to make clear that "labor peace" is not a talisman that waves away any and all First Amendment concerns. *Abood*'s holding came about as a historical accident and should not be extended further. Whatever the government's interest in "labor peace," therefore, that interest is not implicated here. The government does not manage these daycare workers and exercises no control over their working conditions. To hold otherwise would distort *Abood* far beyond its logic, allowing the government to forcibly "organize" *any* business if feels lacks an "organized voice."

ARGUMENT

"LABOR PEACE" IS NOT A COMPELLING INTEREST THAT EITHER TRUMPS THE FIRST AMENDMENT OR SUPPORTS MANDATORY UNIONIZATION

Abood held that *Hanson* and *Street*'s recognition of "labor peace" as an "important" government interest

"presumptively support[s] the impingement upon associational freedom" inherent in compelling public employees to support a labor union. 431 U.S. at 225. But what *Abood* took to be settled law was nothing of the sort. Before that errant decision, the Court had never recognized "labor peace" as an interest that per se overrides employees' First Amendment rights. Instead, "labor peace" was just the jurisdictional hook by which Congress was allowed to regulate intrastate employment relationships under the Commerce Clause. But the assertion of federal regulatory authority does not wipe away First Amendment rights. When applied to independent laborers such as Petitioners, "labor peace" is not a compelling state interest under even minimal First Amendment scrutiny.

A. The "Labor Peace" Doctrine Is a Historical Accident

To the extent a "labor peace" doctrine exists, it concerns Congress's authority to regulate labor relations, not to trump First Amendment rights.

1. Labor Peace as a Commerce Clause Doctrine

The "labor peace" concept first appeared in the 1917 case *Wilson v. New*, 243 U.S. 332, 342, 348 (1917), which challenged Congress's authority to set the hours of work and wages of railroad employees so as to settle a nationwide railroad-worker strike that threatened to "interrupt, if not destroy, interstate commerce." In those circumstances—"that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and

the infinite injury to the public interest which was imminent"—the Court found that Congress's exercise of power was appropriate. *Id.* at 347–48.

A 1937 case, *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937), extended that holding more generally to the regulation of railroads' labor relations. There a railroad refused to recognize the union that craft-shop employees had chosen in a government-supervised election under the Railway Labor Act (RLA). It argued that the RLA, "in so far as it attempts to regulate labor relations between [the railroad] and its 'back shop' employees, is not a regulation of interstate commerce authorized by the commerce clause because . . . they are engaged solely in intrastate activities." *Id.* at 541. Citing evidence of disruptive strikes, "industrial warfare" between the railroads and their employees, and the phenomenon of "general strikes," the Court found the RLA to be appropriate for "settl[ing] industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement." *Id.* at 553.[2]

That same year, the Court upheld the National Labor Relations Act (NLRA) on "industrial peace" grounds. *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), was a broadside attack on federal power to regulate labor relations generally. The respondent, a major iron and steel manufacturer, challenged both the scope of the NLRA and its appli-

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[2] *See also id.* at 556 ("Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation.").

cation to its operations, contending that its business was not a part of the "stream of commerce" and therefore was outside Congress's reach. The Court disagreed, based on the "effects" on interstate commerce of labor discord in the respondent's business:

> [T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. Congress had therefore acted appropriately to facilitate employee representation, the Court held, because "collective bargaining is often an essential condition of industrial peace." *Id.* at 42.

The Court quickly came to view "industrial peace" or "labor peace" as the NLRA's fundamental purpose, applying the Act in dozens of cases with that goal in mind. *See, e.g.*, *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939) ("[T]he fundamental policy of the Act is to safeguard the rights of self organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce."); *N.L.R.B. v. Local Un-*

ion No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 476 (1953) (rejecting application of the Act contrary to its "declared purpose of promoting industrial peace and stability"). None of these cases involved employees' First Amendment rights.

2. *Hanson* and *Street* Skip Past the First Amendment Question

1. *Hanson*, a challenge by railway employees to a union-shop arrangement under the RLA, also did not suggest that "labor peace" has anything to do with speech or associational rights. Instead, it used "labor peace" in the same manner as its predecessors, as the justification for Congress having jurisdiction under the Commerce Clause. A threshold issue was whether the RLA could preempt a conflicting provision of the Nebraska Constitution that barred union-shop arrangements. 351 U.S. at 233. Citing *Jones & Laughlin Steel*, the Court found the question an easy one: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Id.* at 233.

Hanson had little or nothing to say about the kind of First Amendment claim that arose in *Abood* (and here). To begin with, the employees did not challenge Congress's authority *vel non* to authorize union-shop agreements consistent with the limitations of the First Amendment. Instead, they argued that the RLA infringed their speech and associational rights because they were "compelled not only to become members of the union but to contribute their money to be used in the name of the membership of the union for propaganda for economic or political programs which may be abhorrent to them." Br. of Appellees Robert L.

Hanson, et al., at 25, *Railway Employees' Dep't v. Hanson* (filed April 18, 1956).[3] See also *Machinists v. Street*, 367 U.S. 740, 747 (1961) (describing *Hanson* as challenging the constitutionality of "compelling an individual to become a member of an organization with political aspects [as] an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process").

The Court demurred, holding only that, "*[o]n the present record*, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238 (emphasis added). This was because the case was brought before the union-shop agreement at issue went into effect and so there could not yet be any evidence that the union had expended funds for political purposes. *See id.* at 230; *Street*, 367 U.S. at 747–48 ("the action in *Hanson* was brought before the union-shop agreement became effective"). On that basis, the Court upheld the RLA on its face, while re-

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[3] The brief goes on to specify the kinds of practices to which the employees objected:

> [U]nder the union shop the involuntary union member is compelled to contribute his money to pay for union propaganda for economic and political ideas and ideals which may be abhorrent to him. He is compelled to contribute money which the union may donate to religious organizations with whose beliefs he may be in total disagreement. And the propaganda is carried on and the donations made in the name of the union of which he forms a part, under compulsion. The union purports to speak for its membership including conscripts.

Id. at 65.

serving the question of whether "the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement" might run afoul of the First Amendment. 351 U.S. at 238.[4]

Moreover, the Court skipped past that constitutional question for a separate reason: the attenuation between Congress's action to authorize private parties to enter into union-shop agreements and any injury suffered by employees as a result of those agreements. As the Court stressed, "[t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." 351 U.S. at 231. The implication, Justice Powell later observed, was that "Congress might go further in approving private arrangements that would interfere with [employees' First Amendment] interests than it could in commanding such arrangements." *Abood*, 431 U.S. at 248 (Powell, J., concurring). The *Hanson* Court thus had no reason to decide whether the government itself might compel association with a union consistent with the First Amendment.

2. *Street* faced the same narrow question as *Hanson*—whether "First Amendment rights would be infringed by the enforcement of an agreement which

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[4] The Court also turned back a broader Fifth Amendment substantive-due-process challenge to the Act's authorization of union-shop agreements, holding that "Congress might well believe" (*i.e.*, have a rational basis to believe) that authorizing union shops would best advance the constitutional "right to work." 351 U.S. at 234–35. Notably, that challenge, unlike the employees' First Amendment claim, asked the Court to rule on whether Congress may authorize union-shop agreements, irrespective of whether the union engages or may engage in political activity.

would enable compulsorily collected funds to be used for political purposes," 367 U.S. at 747—but on a developed record. Recognizing this as a question "of the utmost gravity," the Court avoided constitutional doubt by construing the Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 749–50. Such expenditures, it held, "fall[] clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union shop agreements was justified" and so should be considered to fall outside the Act's authorization. *Id.* at 768.

Taken together, *Street* and *Hanson* stand for the proposition that Congress's authorization of agreements requiring employees to associate with or support a labor union raises serious constitutional concerns when the union is allowed to expend employees' money on political causes. But neither case resolved the broader question of whether such a law, irrespective of political expenditures by the union, infringes employees' First Amendment rights. The one sentence in *Hanson* that might be thought to address the issue, quoted above, refers to "the present record," indicating that it concerns the narrower question of political expenditures, not the broader question of the RLA's facial validity under the First Amendment—which would not depend on record evidence. *Street*'s description of the issue raised in *Hanson*, also quoted above, confirms the point. 367 U.S. at 747.[5] Nor do

[5] *Street*'s statement that *Hanson* held the RLA "constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents" is not to the contrary, taken in context. 367 U.S. at 749. As the preceding sentence describes, *Hanson* held that the Act was "within the power of

those cases resolve whether, beyond authorizing private union-shop agreements, government may directly compel association with or support of a union. Finally, neither case so much as suggests that the government's interest in "labor peace" has the least thing to do with employees' First Amendment rights.

3. *Abood* Substitutes a Commerce Clause Doctrine for Serious First Amendment Analysis

As this Court acknowledged in *Harris*, *Abood* mangled the Court's precedents beyond all recognition to uphold a mandatory agency shop imposed by the government on public-school teachers. *See Harris*, 134 S. Ct. at 2630–31. *Abood* incorrectly assumed *Hanson* and *Street* had already established that any "interference" with the First Amendment rights of dissenting employees made to financially support a labor union "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Not only that, but those cases, it said, "presumptively support the impingement upon associational freedom created by the agency shop here at issue," one directly imposed on public employees by their government. *Id.* at 225.

Abood also incorrectly characterized those cases' First Amendment holdings as resting upon the state

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Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* (quoting *Hanson*, 351 U.S. at 238). But that goes only so far: *Hanson* ruled on the narrower First Amendment claim regarding political expenditures, but did not address the waterfront of possible First Amendment claims—including the charge that the Act infringes employees' rights irrespective of union political spending.

interest in maintaining "labor peace." Mixing and matching different parts of the *Hanson* opinion—and paraphrasing when even that was insufficient—*Abood* cobbled together an entirely new doctrine:

> Acknowledging that "(m)uch might be said pro and con" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "(t)he ingredients of industrial peace and stabilized labor-management relations." Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.

Id. at 219 (quoting *Hanson*, 351 U.S. at 233–34).

This new doctrine, it held, recognized no distinction between Congress's mere *authorization* of private-sector union-shop agreements—as at issue in *Hanson* and *Street*—and the government compelling its own employees to associate with and support a union. Finding no actual support for this proposition in either precedent, it could only cite Justice Douglas's attempt to refashion *Street*'s narrow holding into a broad principle that collective action overrides the rights expressly guaranteed by the First Amendment: "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 222–23 (quoting *Street*, 267 U.S. at 778 (Douglas, J., concurring)). At

the time, Justice Douglas's dismissive approach to the First Amendment had garnered the support of no other justice; in *Abood*, the Court accepted it as *Hanson*'s central holding and therefore settled law.

B. *Abood*'s Reliance on "Labor Peace" Conflicts with the First Amendment's Ban on Compelled Speech and Association Absent a Substantial Government Interest—and Is Especially Inapplicable Here

1. *Abood* departed spectacularly from settled First Amendment law. Its chief error mirrors its misunderstanding of the Court's labor-law precedents. *Hanson* and *Street* held that the effects of "labor peace," or the lack thereof, on interstate commerce were sufficient to support the exercise of Congress's Commerce Clause power—an exceedingly low bar. To uphold such an exercise, the Court considers only "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Essentially the same standard applies to due-process claims concerning the regulation of economic activity. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955). That Congress could authorize union-shop agreements under its Commerce Clause power, and that doing so was not barred by the Fifth Amendment's Due Process Clause, *see supra* n.4, are logically irrelevant to whether its action clears the higher bar of First Amendment exacting scrutiny. *Abood*'s bait-and-switch on this point—substituting a Commerce Clause doctrine for any reasoned First Amendment analysis—is unsupportable.

So is its bottom-line holding that government's interest in promoting "labor peace" is substantial or

compelling. The whole point of a labor union is to express certain views through both speech and association. Under an agency-shop agreement, a union "is designated the exclusive representative of those employees" that are compelled to support it. *Abood*, 431 U.S. at 224. In that capacity, it speaks on their behalf, and through their association with the union, employees are bound by that speech, whether or not they agree with it. *Abood* recognized, with respect to a teachers' union, that this association serves specifically to suppress the speech of dissenting employees who may hold "quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures." *Id.* *Abood* regarded this as a *virtue* of compelled association with a union.

The First Amendment does not. Instead, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988). The government "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor does the First Amendment permit it to "sacrifice speech for efficiency." *Id.* at 795. Straightforward application of these basic principles disposes of any argument that the government has a compelling interest in furthering (a mythical) "peace" between employers and employees.

The Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234–35). That freedom may be impinged only by "regulations adopted to serve compelling state

interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Knox*, 132 S. Ct. at 2289 (same); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658–59.

Even indisputably important state interests—such as eradicating discrimination or assuring equal access to public accommodations—have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts*, 530 U.S. at 559. With equal consistency, the Court has upheld those laws that impose no "serious burden" on expressive association. *See Boy Scouts*, 530 U.S. at 658–59 (discussing cases); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire'").

The "labor peace" rational is fundamentally flawed, because, as *Abood* recognized, the very purpose of forcing employees to associate with a labor union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve "labor peace." 431 U.S. at 224. This circular

logic admits no legitimate government interest, much less a compelling one. It also pales in comparison to other government interests. The government's interest in promoting public safety—that is, domestic peace—is no doubt compelling, but only extends so far as the regulation of speech that presents a "clear and present danger." *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Cf. Virginia v. Black*, 538 U.S. 343 (2003). Likewise, the federal government's interest in the "common defense" reflects its constitutional responsibility, U.S. Const. art. I, § 8, cl. 1, but does not extend to the regulation of expressive association. *United States v. Robel*, 389 U.S. 258, 265–66 (1967).

And government has no compelling interest in coercing citizens' allegiance to the principles of our Constitution or their respect of the symbols of our nation. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Texas v. Johnson*, 491 U.S. 397 (1989). By comparison, government's interest in forcing workers to support and adhere to certain opinions regarding their wages, working conditions, and the like is trifling—especially in cases like this one where there is no "labor peace" to be achieved.

The court below viewed the outcome of this case as a foregone conclusion under *Abood*. But upholding New York's imposition of an exclusive representative on family daycare businesses solely because they "lack an organized voice in governmental decision making," Pet. for Cert. at 3, would vastly increase *Abood*'s infringement of First Amendment associational rights. And it is worth noting that the appointment of an exclusive representative here certainly does associate all such providers with the representative regardless of official membership or the

payment of fees. As an initial matter, the state has compelled union-provided orientations as a result of the union's collective-bargaining activity. *Id.* at 5.

Further, an exclusive representative is bound to represent all class members, regardless of whether they belong to the union. Indeed, when the Civil Service Employees Association (CSEA) is meeting with state officials to discuss how much family-daycare providers should receive in remuneration for the services they provide to low-income and other at-risk people, it is speaking not just for union members but for all family daycare providers. Those who choose not to join the union will therefore nevertheless be associated with it and be subject to the agreements it makes. Thus, the State of New York has essentially assigned a lobbyist to represent—and speak for—an entire profession whether they agree with the position of the union or not.

2. The First Amendment is incontrovertibly implicated here—and *Abood* should not be extended to allow greater infringement of associational freedom. New York has no cognizable interest in maintaining "labor peace" among family daycare workers merely because they lack an organized voice in governmental decision-making. "Labor peace" is not an empty semantic vessel that the state may fill up merely by asserting a speculative need. Instead, as described above, its contents were set at a time when Congress's Commerce Clause power was seen as less robust than today. The "labor peace" doctrine reflects those roots, referring to the pacification of the kinds of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the NLRA was passed to ad-

dress "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"). *See also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937); *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 233 (1956); *Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

Abood adopted this "familiar doctrine[]" as a justification for compelled speech and association in limited circumstances. 431 U.S. at 220; *id.* at 224 (explaining that a Michigan agency-shop scheme was justified by the same "evils that the exclusivity rule in the Railway Labor Act was designed to avoid"). It described that doctrine thus:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220–21.

Concerns over the confusion and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or state-provided workplace at all, and fami-

ly daycare providers "do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own." *Harris*, 134 S. Ct. at 2640 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added)). Because the state does not manage family daycare providers and takes no responsibility for their labor conditions, it lacks the power to bargain with CSEA over the terms of employment that implicate "labor peace."

Federal and state labor laws reflect the fact that the organization of household workers does not further the interest of "labor peace." The NLRA specifically excludes "any individual employed . . . in the domestic service of any family or person at his home" from coverage. 29 U.S.C. § 152(3). The Ninth Circuit, interpreting the NLRA shortly after its passage, described Congress's logic: "[T]here never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *N. Whittier Heights Citrus Ass'n v. N.L.R.B.*, 109 F.2d 76, 80 (9th Cir. 1940).

For similar reasons, until this past decade, states generally excluded such workers from coverage under their collective-bargaining statutes. See Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

If the state is permitted to impose an exclusive representative on family daycare providers because "they lack an organized voice," even where they are not employees of the state, where will it stop? As Pe-

titioners point out, expanding *Abood* here could permit states to mandate exclusive representation for "*all other regulated professions or industries*." Petition for Cert. at 11-12 (emphasis in original).

This is an untenable abridgment of the people's First Amendment rights that the Court should address. The freedom of association is too important for the government to designate an organization to speak for all those doing similar work simply for the sake of convenience.

CONCLUSION

The people's chosen representatives should not be permitted, without meaningful scrutiny, to choose representatives for the people. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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