

No. 18-766

IN THE
Supreme Court of the United States

TERESA BIERMAN, KATHY BORGERDING,
LINDA BRICKLEY, CARMEN GRETTON, BEVERLY OFSTIE,
SCOTT PRICE, TAMMY TANKERSLEY, KAREN YUST,

Petitioners,

v.

MARK DAYTON, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE STATE OF MINNESOTA, *et al.*,

Respondents.

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

**AMICUS CURIAE BRIEF OF
THE FAIRNESS CENTER
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

The State of Minnesota compels individuals who are not public employees, namely individual Medicaid providers, to accept an exclusive representative for speaking with the State over certain public policies. The questions presented are:

1. Can the government designate an exclusive representative to speak for individuals for any rational basis, or is this mandatory expressive association permissible only if it satisfies heightened First Amendment scrutiny?

2. If exclusive representation is subject to First Amendment scrutiny, is it constitutional for the government to compel individuals who are not government employees to accept an organization as their exclusive representative for dealing with the government?

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INTEREST OF THE *AMICUS CURIAE*¹

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

SUMMARY OF ARGUMENT

Homecare workers in at least ten states have seen exclusive representation interfere with their care of the disabled and elderly and violate their First Amendment rights. But in Pennsylvania, the equivalent of such representation was imposed on homecare workers via executive order,² subject to change with the

¹ All parties have consented to the filing of this brief through blanket consents filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amicus Curiae* made a monetary contribution to its preparation or submission.

² See Pa. Exec. Order No. 2015-05 ¶ 3.a(2), *reprinted as amended* in 45 Pa. Bull. 1937 (Apr. 18, 2015), 4 Pa. Code § 7a.113 (2015). (“There shall only be one Direct Care Worker Representative recognized at any time”); *but see Markham v. Wolf*, 190 A.3d

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

REASONS FOR GRANTING THE PETITION

I. This Court Should Clarify the First Amendment Rights of Homecare Workers

A. Homecare Workers in Pennsylvania Are Subjected to Forced Representation Outside of the Employment Context

Homecare workers in Pennsylvania have long been vulnerable to attempts to force exclusive representation upon them through executive orders, with the most recent attempt ultimately prevailing in unionizing over 20,000 homecare workers.

1. Homecare Programs Serve an Important Purpose in Pennsylvania

Over the last 30 years, the trend in long-term caregiving has shifted from institutional care to more at-home care, with such care now comprising nearly 43 percent of Medicaid spending on long-term care. Janet O’Keeffe et al., U.S. Dep’t of Health & Human Servs., *Understanding Medicaid Home & Community Services: A Primer* 22 (2010), available at <https://aspe>.

1175, 1188 (Pa. 2018) (“[T]he Executive Order does not use the term “exclusive representative” to describe the DCW representative. This is significant.”).

[hhs.gov/system/files/pdf/76201/primer10.pdf](https://www.hhs.gov/system/files/pdf/76201/primer10.pdf). Established after Congress authorized the waiver of certain federal requirements in 1981, Medicaid waiver programs allow states to fund home- and community-based services for some Medicaid-eligible individuals. Legislative Budget & Fin. Comm., *Family Caregivers in Pennsylvania's Home and Community-Based Waiver Programs S-1* (June 2015), available at <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf> [hereinafter *Family Caregivers*]. Once a state waiver plan has been approved by the federal Centers for Medicare and Medicaid Services, states can receive federal matching funds to finance their waiver programs covering home health nursing services and personal care services, among others. *Id.* at 4.

In Pennsylvania, as in many other states, this homecare is commonly delivered by private-sector employees, either through agencies, which employ homecare workers, or directly to recipients (sometimes referred to as “participants” or “consumers”), who employ their own homecare workers.³ Pennsylvania has

³ As one state court explained in summarizing Pennsylvania’s participant model,

Under the Participant Model, [homecare workers] are recruited, hired, and managed by a participant who employs the [worker]. . . . As employers, participants have federal employer identification numbers, are subject to workers’ compensation and unemployment requirements, and pay relevant employer taxes. Under Act 150, participants have the “right to make decisions about, direct the provision of and control . . . [home] care services.” Section 2(3) of Act 150, 62 [Pa. Stat.] § 3052(3). Thus, participants’ control over their care is unfettered other than compliance with home care service regulations.

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

ten Medicaid waiver programs funding home-based care, plus one state-funded program, Pennsylvania's Attendant Care Services Act, 62 Pa. Stat. §§ 3051–58 (“Act 150”). According to Pennsylvania's Department of Human Services, Pennsylvania had 72,766 participants receiving care through its homecare waiver programs as of 2011. *Family Caregivers, supra*, at 23.

In the context of agency-employed homecare, unions have successfully imposed exclusive representation on workers under the National Labor Relations Act. But in the context of participant-employed homecare, the National Labor Relations Act clearly excludes homecare workers from unionizing. *See Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014) (“Federal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace.”). Likewise, many state labor laws governing private-sector workers exclude homecare workers from their coverage. *See, e.g.*, 43 Pa. Stat. § 211.3 (excluding, among other workers, “any individual employed . . . in the domestic service of any person in the home of such person.”). Indeed, “[i]n the homecare sector, traditional collective bargaining has often been legally impossible because homecare workers are classified either as employees of the single clients for whom they work or as independent contractors.” Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 195 (2013).

2. Unions Have Long Targeted Participant-Employed Homecare Workers in Pennsylvania for Exclusive Representation

Because federal and many state laws exclude the possibility of exclusive representation under the

participant model, unions have resorted to new, creative state-level measures to impose exclusive representation on those homecare workers. *See* Sachs, *supra*, at 195–96; Cynthia L. Estlund et al., *New Ways of Governing the Workplace: Proceedings of the 2007 Meeting of the Association of American Law Schools Section on Labor Relations and Employment Law*, 11 EMP. RTS. & EMP'T POL'Y J. 111, 131 (2007).

In Pennsylvania, attempts to require exclusive representation of homecare workers first came under the administration of Pennsylvania Governor Ed Rendell, who issued an executive order that imposed exclusive representation on participant-employed homecare workers. *See* Pa. Exec. Order No. 2010-04, *reprinted in* 40 Pa. Bull. 6071 (Oct. 23, 2010), 4 Pa. Code §§ 7a.21–.30 (2010), *rescinded by* Pa. Exec. Order No. 2010-10, *reprinted in* 40 Pa. Bull. 7333 (Dec. 25, 2010), 4 Pa. Code § 7a.31 (2010).⁴ Similar executive orders unionizing homecare workers had previously been issued in Illinois,⁵ Ohio,⁶ and Maryland,⁷ and still another would be issued in Connecticut.⁸ Child care

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

⁵ Ill. Exec. Order No. 2003-8 (Mar. 4, 2003), *available at* <https://www2.illinois.gov/Documents/ExecOrders/2003/execorder2003-8.pdf>.

⁶ Ohio Exec. Order No. 2007-23S (July 17, 2007), *rescinded by* Ohio Exec. Order No. 2015-05K (May 22, 2015).

⁷ Md. Exec. Order No. 01.01.2007.15 (Aug. 6, 2007), *available at* <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/013000/013206/unrestricted/20110024e.pdf>.

⁸ Conn. Exec. Order No. 10 (Sept. 21, 2011), *available at* <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Or>

providers were similarly unionized by executive order throughout the country.

Affected participants and providers challenged Governor Rendell's order as an invalid use of executive power and secured a preliminary injunction precluding its implementation. *See Markham*, 147 A.3d at 1276. A month later, Governor Rendell rescinded the home care executive order. *See* 4 Pa. Code § 7a.31.⁹

Governor Tom Corbett was elected to the next term following Governor Rendell's. He issued an executive order rejecting his predecessor's approach in favor of a "Long-Term Care Commission," a stakeholder forum that did not include any exclusive representative for homecare workers. *See* Pa. Exec. Order No. 2014-01, *reprinted in* 44 Pa. Bull. 1120 (Mar. 1, 2014); *see also Pennsylvania Long Term Care Commission Final Report* 3–4 (Dec. 2014), *available at* http://www.dhs.state.pa.us/cs/groups/webcontent/documents/report/c_134443.pdf.

But in February 2015, following the election of Governor Tom Wolf, another executive order effectively resulted in the unionizing of homecare workers. *See* 4 Pa. Code §§ 7a.111–.117. Governor Wolf's executive order bore "striking similarities" to the one issued by Governor Rendell, *Markham*, 147 A.3d at 1276, also affecting homecare workers and recipients of services provided under the participant model. 4 Pa. Code § 7a.111. According to statistics from Pennsylvania's Department of Human Services, 26,885 homecare workers were providing services under the

ders/Others/Governor-Dannel-P-Malloy--Executive-Order-No-10.pdf.

⁹ Governor Rendell's order unionizing family child care providers does not appear to have been likewise rescinded.

Medicaid waiver and Act 150 programs as of March 2015. *Family Caregivers, supra*, at 24.

The order establishes a process for election of a “representative” for homecare workers and a requirement that, once elected, the representative “meet and confer” with administration officials to discuss enumerated matters, including terms and conditions of homecare workers’ employment. 4 Pa. Code § 7a.113. To facilitate election of the representative, the order requires Pennsylvania’s Department of Human Services to compile monthly a list of the names and addresses of all homecare workers who were paid in the previous three months, which can be provided to an organization¹⁰ that has support from just 50 homecare workers. *Markham*, 147 A.3d at 1267–68. At any point, the organization seeking representative status can force an election with support from just ten percent of the workers on the list, with a majority of *those voting* imposing exclusive representation on all other homecare workers. *Id.* In 2015, the union currently representing homecare workers in Pennsylvania¹¹ became the representative for all covered homecare workers based on 2,663 votes, out of approximately 20,000 workers eligible to vote. *See Markham*, 147 A.3d at 1268.

Thereafter, the order requires the Secretary of the Department of Human Services and other officials to meet with the exclusive representative at least monthly. These “meet and confer” sessions must include

¹⁰ The organization must first prove to be “[a]n employee organization that has as one of its primary purposes the representation of direct care workers in their relations with the Commonwealth or other public entities.” 4 Pa. Code § 7a.114(b).

¹¹ The United Home Care Workers of Pennsylvania is a joint project of the Service Employees International Union and the American Federation of State, County and Municipal Employees.

discussion, among other topics, of “[s]tandards for compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]oluntary payroll deductions.” 4 Pa. Code § 7a.113. Any mutual understandings reached between the Secretary and the exclusive representative during this meet and confer process must be reduced to writing. *Id.*; see also *Markham*, 147 A.3d at 1268.

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

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

Shortly after the Executive Order issued, several homecare workers and the participants who employ them brought two different lawsuits challenging the order. See *Markham*, 190 A.3d at 1179–80. Undersigned *amicus* represented two clients who opposed this imposition of a state-mandated exclusive representative into their long-running homecare setup. One client has provided homecare services to his employer, a quadriplegic adult with muscular dystrophy, for over

25 years. Until the Executive Order, the two had successfully and amicably negotiated the terms and conditions of the homecare worker's employment without the aid of a union, and the homecare worker opposed his exclusive representation by a labor organization. The two thus challenged the Executive Order in state court, arguing that it exceeded the Governor's power under the state constitution.

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

3. The Pennsylvania Supreme Court Eventually Allowed Representation of Homecare Workers Largely Because Such Representation Took Place Outside of the Employment Context

On a consolidated appeal by Governor Wolf, however, the Pennsylvania Supreme Court upheld the Governor's Executive Order as a permissible exercise of the governor's power. *See Markham*, 190 A.3d at 1185–89.

The court stated that what drove its analysis was that, unlike the process set forth by existing labor law, “the entire process set forth in the Order is voluntary, non-binding, non-exclusive, and unenforceable.” *Id.* at

1184–85.¹² In fact, the court concluded, the Executive Order set up an entirely distinct form of representation in which the employer would be excluded from discussions:

[C]ollective bargaining statutes establish an enforceable process by which employees, through their union and only through their union, deal directly with the employer of the employees whom the union represents. [43 Pa. Stat. § 211.5; 43 Pa. Stat. § 1101.701]. That is not the case with the Executive Order. The participants are the employers of the DCWs, and the Order makes clear that the Commonwealth is not the employer of the DCWs.

Id. at 1188.

The court denied an application for reargument. *Markham v. Wolf*, No. 110 MAP 2016 (Pa. Nov. 16, 2018) (order denying application for reargument).

B. Forced Representation of Homecare Workers in Pennsylvania Demonstrates the Significant and Unique Constitutional Threat in this Context

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

¹² The Pennsylvania Supreme Court opined that representation was non-exclusive. However, the Executive Order made clear that “[t]here shall only be one Direct Care Worker Representative recognized at any time.” 4 Pa. Code § 7a.113(b)(2).

Forced unionization presents a significant threat to homecare workers' First Amendment rights. Under the system now operational in Pennsylvania, for example, a representative is elected by a majority of votes cast, with an election held if an employee organization has the support of only ten percent of workers. The homecare representative can win an election with a bare majority of those voting, then becomes the speaker for over 20,000 homecare workers in the state on employment topics with the Commonwealth.

Unfortunately, this arrangement effectively replaces the previous setup where the homecare worker was free to negotiate his own conditions of employment directly with his employer. Instead, the representative now speaks with the Commonwealth for homecare workers on, among other topics, “[s]tandards for compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]oluntary payroll deductions.” 4 Pa. Code § 7a.113. The representative’s speech on these topics—previously discussed and resolved between homecare workers and the disabled or elderly individuals for whom they care—is presumed to represent the interests of homecare workers and takes place on a platform before high-ranking government officials.

The threat to First Amendment rights is especially egregious here, where the representation takes place outside of the employment context. In Pennsylvania, the Executive Order not only forces on homecare workers an exclusive speaker—the equivalent of a union—and requires the government to recognize and discuss with them terms and conditions of employment but also mandates that this discussion happen *with no involvement from homecare workers’ actual employers*. And homecare workers in Pennsylvania are

not alone in facing this threat to their First Amendment rights. *See* Pet. 20 n.5. Rather, the rights of other non-public employees throughout the country are similarly sacrificed for political gain.

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

There is no interest, compelling or otherwise, to justify exclusive representation in the homecare setting. As this Court observed in *Harris*, the “labor peace” justification of exclusive representation is not present in the homecare context, where workers “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.

And any interest wholly dissolves with the mandating of representation outside of the employment context, as Pennsylvania appears to have done. *See* 4 Pa. Code § 7a.115 (“Nothing in this Executive Order shall be interpreted to grant Direct Care Workers the status of Commonwealth employees.”). It makes little

difference whether individual homecare workers remain free to speak with their employer or the government when their supposed “representative” is already putting words in their mouth at the negotiating table with high-ranking public officials.

Pennsylvania’s experience highlights the potential for growing and unchecked abuse of First Amendment rights. In Pennsylvania, exclusive representation of homecare workers is a game of political football: attempted during one governor’s administration, partly enjoined and rescinded, then abandoned and replaced during the term of the next governor—and then again attempted, this time successfully, when yet another governor was elected. And homecare workers’ rights were ultimately sacrificed on the order of a single politician, the governor, with no input by the legislature or any other political check. *See* Deborah Chalfie et al., Nat’l Women’s Law Ctr., *Getting Organized: Unionizing Home-based Child Care Providers* 8 (2007), available at <http://www.nwlc.org/sites/default/files/pdfs/GettingOrganized2007.pdf> (“Executive orders have the disadvantage of being revocable by succeeding governors with the stroke of a pen”). Pennsylvania’s imposition of exclusive representation of homecare workers thus exemplifies the need for this Court to clarify the application of the First Amendment. While it is currently homecare workers who have become political pawns, this unchecked power threatens many other workers whose rights might also be sacrificed for the advantage of governors and other politicians seeking to curry political favor with public unions. *See* Transcript of Oral Argument at 53–54, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681) (question of Justice Alito noting that unionization of workers in Illinois by executive order was attempted by a governor who had received

campaign contributions from unions). Homecare organizers have advanced no principle that would limit such an arrangement to the homecare or daycare context; literally any individual could be targeted for exclusive representation if permitted outside of the employment context.

In sum, exclusive representation of homecare workers promises to homecare workers and recipients the worst of both worlds. Homecare workers are forcibly represented by an organization that may or may not reflect their interests yet are not granted any protections available to public employees. Meanwhile, elderly and disabled recipients effectively lose the ability to operate directly with their homecare workers as private-sector employers, independently managing and directing their own care. The First Amendment cannot allow for forced representation of homecare workers, especially outside of the employment context.

Given the important First Amendment rights at stake, it is imperative for this Court to weigh in. The Pennsylvania experience reveals how, without clear guidance from this Court on the parameters of First Amendment rights in this context, vulnerable citizens' rights may be sacrificed for political expediency, with few political checks to stand in the way. Indeed, this Court should grant certiorari to clarify that its decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), need not be read to permit, and did not explicitly sanction, this unchecked impingement on First Amendment rights in this context of non-public employees.

CONCLUSION

As the history in Pennsylvania makes clear, the constitutional rights of homecare workers have been particularly vulnerable to threats arising from exclusive representation, requiring this Court's clarification of the application of the First Amendment to these non-public employees.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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