No. 16-

IN THE
Supreme Court of the United States

REBECCA HILL, CARRIE LONG, JANE MCNAMES, GAILEEN ROBERTS, SHERRY SCHUMACHER, DEBORAH TEIXEIRA, AND JILL ANN WISE,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Illinois is compelling individuals who are not government employees, namely home-based Medicaid and daycare providers, to accept an advocacy organization as their exclusive representative for speaking and contracting with the State over certain public policies. The questions presented are:

1. Can the government force individuals into an exclusive-representative relationship with an advocacy organization for any rational basis, or is this mandatory 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 force individuals who are not full-fledged public employees to accept an exclusive representative for speaking and contracting with the government?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are: Rebecca Hill, Carrie Long, Jane McNames, Gaileen Roberts, Sherry Schumacher, Deborah Teixeira, and Jill Ann Wise. Ranette Kesteloot was a Plaintiff-Appellant in the court below but is not a Petitioner.

Respondents, who were Defendants-Appellees in the court below, are: Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas; Michael Hoffman, in his official capacity as the Director of the Illinois Department of Central Management Services; and James Dimas, in his official capacity as the Secretary of the Illinois Department of Human Services.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix (Pet.App.1), as is the reported opinion of the United States District Court for the Northern District of Illinois dismissing Petitioners' claim (Pet.App.9).

JURISDICTION

The Seventh Circuit entered judgment on March 9, 2017. (Pet.App.1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the Appendix (Pet.App.37).

STATEMENT

This case concerns whether the First Amendment allows the government to extend exclusive representation beyond employment relationships and designate mandatory representatives to speak for professions in their relations with the government.

A. Illinois Compels Personal Assistants and Daycare Providers to Accept and Subsidize a Representative for Lobbying the State over Policies That Affect Their Profession.

1. Petitioners are individuals who provide services to persons enrolled in one of two Illinois public-aid programs: the Home Services Program ("HSP"), 20 ILL. COMP. STAT. 2405/0.01–/17.1 (2016), and the Child Care Assistant Program ("CCAP"), 305 ILL. COMP. STAT. 5/9A-11 (2016); ILL. ADMIN. CODE tit. 89, § 50.101 et seq.

HSP is a Medicaid-waiver program that is partially funded by the federal government and pays for home-based care for persons with disabilities. *See Harris v. Quinn*, 134 S. Ct. 2618, 2623–24 (2014). Individuals enrolled in HSP can, among other things, use their subsidies to employ "personal assistants" to aid them with daily living activities. *Id.* Program enrollees are responsible for hiring, training, supervising, evaluating, and terminating their personal assistants, and HSP compensates the personal assistants for their services. *Id.* at 2624–25; 2634–35.

Approximately 25,000 personal assistants are employed by HSP enrollees each year. Am. Compl. ¶ 24 (Pet.App.20). Many are relatives of the enrollees, such as their parents or siblings. *Id.* ¶ 18 (Pet.App.19). Petitioners Rebecca Hill, Jane McNames, Gaileen Roberts, Deborah Teixeira, and Jill Ann Wise are personal assistants who provide care to a son or daughter enrolled in HSP. *Id.* ¶¶ 19–23 (Pet.App.20).

CCAP is a public assistance program that subsidizes the childcare expenses of qualified families with low incomes. *Id.* at ¶¶ 25–26 (Pet.App.20). Families enrolled in CCAP can elect to use the qualified daycare provider of their choice, which includes licensed "daycare homes" and "license-exempt providers" (collectively "daycare providers"). *Id.* at ¶ 27 (Pet.App.21).

A licensed daycare home is a private, residence-based business that sells childcare services to the

public. Am. Compl. ¶¶ 28–29 (Pet.App.21). Daycare homes can serve up to sixteen children, and may have one or more employees. *Id.* Some daycare homes serve customers who partially pay for their services with CCAP monies. *Id.* ¶ 33 (Pet.App.22). Petitioners Carrie Long and Sherry Schumacher operate daycare homes whose customers include families enrolled in CCAP. *Id.* ¶¶ 36–37 (Pet.App.23).

License-exempt providers include: (i) relative care providers who provide daycare services, either in their own home or in the child's home, to children to whom the providers are related; and (ii) individuals who provide daycare services in the child's home to no more than three children or to children from the same household; and (iii) daycare homes that either serve no more than three children or children from the same household. *Id.* ¶ 30 (Pet.App.21); *see* ILL. ADMIN. CODE tit. 89, § 50.410(e)–(h). Approximately 69.7% of license-exempt providers in fiscal year 2013 were relative care providers—i.e., were grandparents, aunts, or cousins caring for children to whom they are related. Am. Comp. ¶ 31 (Pet.App.22). Plaintiff Ranette Kesteloot was a relative care provider who provided care to her great-grandchildren who receive CCAP assistance. *Id.* ¶ 35 (Pet.App.23).

Like personal assistants, these daycare providers are not employed by the State of Illinois. Rather, they either are operators of a private business whose customers includes families who partially pay for rendered services with public monies, or are relatives

who receive public monies for caring for children to whom they are related. *Id.* ¶ 38 (Pet.App.23).

2. Although providers[1] are not Illinois employees, former Illinois Governor Rod Blagojevich issued executive orders in 2003 ("EO 2003-08") and 2005 ("EO 2005-01") that called for the State to recognize "exclusive representative[s]" of personal assistants and daycare providers for bargaining with the State over aspects of HSP and CCAP. Pet.App.45,48. Governor Blagojevich's justification was that it "is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services," and personal assistants purportedly "cannot effectively voice their concerns" about HSP without a representative. Ill. Exec. Order No. 2003-08 (Pet.App.46); *see* Ill. Exec. Order No. 2005-01 (Pet.App.49) (similar). Shortly after issuance of each executive order, the State designated Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU") to be the personal assistants' and daycare providers' "exclusive representative" for dealing with the State. Am. Compl. ¶¶ 42–45 (Pet.App.25–26).

Governor Blagojevich's executive orders were later codified.[2] Under Illinois law, providers are consid-

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[1] The Petition will use the term "providers" to collectively refer to personal assistants, license-exempt providers, and operators of family daycare homes.

[2] 20 ILL. COMP. STAT. 2405/3(f) (codifying EO 2003-08); 5 ILL. COMP. STAT. 315/3–/28 (codifying EO 2005-01).

ered "public employees" solely for purposes of Illinois Public Labor Relations Act ("IPLRA"), but for no other purposes, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." 5 ILL. COMP. STAT. 315/3(n) (Pet.App.37–38). The IPLRA deems SEIU the providers' exclusive representative, *id*. at 315/3(f), which grants the advocacy group legal authority to act as the providers' agent for speaking and contracting with the State over certain HSP and CCAP policies, irrespective of whether individual providers approve. *See id*. at 315/6(c)–(d) (Pet.App.39–40); Am. Compl. ¶ 50 (Pet.App.28).

SEIU exercised its authority to speak for providers by meeting and speaking with state policymakers for the purpose of influencing HSP and CCAP policies. Am. Compl. ¶ 61 (Pet.App.31). SEIU also conducted public demonstrations and protests, ran television, radio, and print advertising campaigns, and engaged in other forms of advocacy as the providers' exclusive representative. *Id*. ¶¶ 62–63 (Pet.App.31). For example, SEIU aired television commercials on June 29, 2015, to pressure Illinois Governor Bruce Rauner and other policymakers to accede to SEIU's demands concerning the HSP and CCAP. *Id*.

SEIU also used its authority to contract for providers by entering into successive agreements with the State as the providers' proxy. *Id*. ¶ 50 (Pet.App.28). The most recent contracts, which expired on June 30, 2015, will be referred to as the "HSP Contract" and

the "CCAP Contract."[3] The contracts called for the State to increase its HSP and CCAP payment rates. *Id*. ¶¶ 55–56 (Pet.App.29–30). Actual payment rates, however, are based on legislative appropriations, available federal funding, and federal regulations requiring the rates to be based on prevailing market rates and the program enrollees' needs. *Id*.[4]

The contracts also required the State to assist SEIU with recruiting members, by means such as mailing SEIU membership materials to new providers and compelling providers to attend thirty minute SEIU recruitment meetings as part of their orientation and/or trainings, and with collecting SEIU membership dues from providers. *Id*. ¶ 52 (Pet.App.28). SEIU also had the State seize compulsory fees from all providers who decided not to join SEIU, until the Court held the practice unconstitutional in *Harris*, 134 S. Ct. 2618. *Id*. ¶ 53 (Pet.App.28). Between fiscal years 2009 and 2013,

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[3] The HSP and CCAP Contracts are available, respectively, in the circuit court appendix on pages 25–52 and 53–76. Appellants' App., Am. Compl. Exs. A & B, ECF Nos. 9-1 & 9-2.

[4] *See* 42 U.S.C. § 1396a(a)(30)(A) (requiring that payment rates be "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"); 45 C.F.R. § 98.43 (requiring childcare rates to be based on a biennial market rate survey and to be at amounts sufficient to ensure subsidized children have access to childcare services equal to unsubsidized children).

SEIU seized more than $30 million in compulsory fees from HSP payments made to personal assistants, and more than $44 million in membership dues and compulsory fees from CCAP payments made to daycare providers. *Id.*

B. The Lower Courts Hold Exclusive Representation Is Not Subject to First Amendment Scrutiny.

Petitioners oppose being forced to associate with SEIU and its advocacy. In their Amended Complaint, they allege that the First Amendment prohibits the State and SEIU from forcing them to accept SEIU as their mandatory agent for speaking and contracting with the State over public policies that affect their professions. Am. Compl. ¶¶ 72–73 (Pet.App.33–34).

The district court dismissed the Amended Complaint on the grounds that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), required it to answer "no" to the question of whether exclusive "representation itself infringe[s] or impinge[s] associational rights." Pet.App.13. The court concluded that *Knight's* rejection of an associational argument made in that case "necessarily included the full breadth of associational rights," even though "*Knight* did not expressly discuss the right not to associate." *Id.*

The Seventh Circuit affirmed, holding that, under *Knight*, exclusive representation is "not subject to heightened scrutiny," Pet.App.4, but only "rational-basis scrutiny," Pet.App.8. With that decision, the

Seventh Circuit joined the First Circuit in concluding that the First Amendment is no barrier to the government granting an organization the power to exclusively represent individuals in their relations with the government. *See D'Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016).

REASONS FOR GRANTING THE PETITION

The first question presented is one of profound importance: can the government force individuals to accept an advocacy group as their exclusive representative for dealing with the government for any rational basis? The First and Seventh Circuits erroneously interpreted *Knight* to give the government free rein to appoint exclusive representatives to speak for individuals. In doing so, the courts have defied this Court's holdings that mandatory associations only are constitutional if they satisfy exacting First Amendment scrutiny. *E.g., Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). The Court should take the first question to establish that the government may dictate who speaks for citizens in their relations with the government only when doing so is justified by compelling interests.

The Court should take the second question to resolve whether states have a compelling interest in extending exclusive representation to individuals who are not public employees. In *Harris*, this Court held Illinois could not extend compulsory union fee requirements beyond "full-fledged state employees" to personal assistants because, among other reasons,

the State's interest in workplace labor peace did not extend that far. 134 S. Ct. at 2738–41. Exclusive representation should be confined to employment relationships for the same reason, and not be allowed to spread to citizens' relationship with their sovereign.

Finally, the Court should grant the petition if it grants review in *Janus v. AFSCME, Council 31*, 16-__ (U.S. June 6, 2017), which addresses whether Illinois constitutionally can compel state employees to subsidize an exclusive representative. The petitions present several common legal issues that should be resolved together. Alternatively, the petition should be held pending disposition of *Janus*.

I. First Question: Exclusive Representation Should Be Subject to Exacting First Amendment Scrutiny.

A. The First and Seventh Circuits' Holdings That Exclusive Representation Is Subject Only to Rational Basis Review Gives the Government Free Rein to Appoint Mandatory Advocates to Speak for Citizens in Their Relations with the Government.

1. The constitutional importance of this case is made evident simply by describing what Illinois has done. The State has granted an advocacy group (SEIU) statutory authority to speak and contract for everyone in two professions (personal assistants and daycare providers) regarding certain state policies that affect their respective professions (aspects of the HSP and CCAP programs). Simply put, Illinois is

forcing certain citizens to accept a government-appointed lobbyist, as SEIU's function as an exclusive representative is quintessential lobbying: meeting and speaking with public officials, as an agent of regulated parties, to influence government policies that affect those parties. *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (stating "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group").

An example proves the point. If a professional association representing other Medicaid providers, such as doctors, met and spoke with State officials to advocate for higher Medicaid rates, or if a trade association of daycare centers petitioned state policymakers to increase CCAP rates, those actions certainly would constitute "lobbying." SEIU's function as an exclusive representative is indistinguishable from either activity, except SEIU is not a voluntary lobbying association, but a compulsory one appointed by the government.

If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for individuals in their relations with the government. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). This protection applies with particular force to advocacy concerning public affairs because "expression on

public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Consequently, a citizen's right to choose which organization, if any, lobbies the government on his or her behalf is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981).

2. The Seventh Circuit here, like the First Circuit in *D'Agostino*, has given government officials carte blanche to trample on this liberty by holding that the government, *for any rational basis*, can certify exclusive representatives to speak and contract for individuals in their relations with the government. Pet.App.8; *D'Agostino*, 812 F.3d at 243–44.[5] The implications of these decisions are staggering.

Illinois's conduct represents not the top of a slippery slope, but the bottom. Illinois has imposed an exclusive representative on: (1) parents who provide care to their disabled sons or daughters in their own homes, Am. Compl. ¶¶ 18–23 (Pet.App.19–20); (2) grandparents who provide daycare to their grandchildren in their own homes, *id.* ¶¶ 30–31

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[5] The Second Circuit reached a similar conclusion in an unpublished order in *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, __ U.S. __, 137 S. Ct. 1204 (Feb. 27, 2017). That non-precedential order does not constitute that circuit's law.

(Pet.App.21–22); and (3) individuals who operate home-based daycare businesses, *id.* ¶¶ 28–29 (Pet.App.21). Illinois's appetite for this mandatory association did not end there. The State recently extended exclusive representation to nurses and therapists who provide home-based care to Medicaid enrollees. *See* 2012 Ill. Legis. Serv. P.A. 97-1158 (West).[6]

Illinois' conduct is not anomalous, but is part of a troubling trend that began in the early 2000s. Since that time, fourteen states have authorized mandatory representation for Medicaid providers,[7] eighteen

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[6] This Act extended the IPLRA to "individual maintenance home health workers," 5 ILL. COMP. STAT. 315/3(n), who are nurses and therapists who provide home-based care, ILL. ADMIN. CODE tit. 89, § 676.40(d). In the HSP Contract, the State agreed to "voluntarily recognize the [SEIU] as the exclusive collective bargaining representative of such persons." HSP Contract 17.

[7] CAL. WELF. & INST. CODE § 12301.6(c)(1) (West, Westlaw through Ch. 9 of 2017 Reg. Sess.); CONN. GEN. STAT. § 17b-706b (West, Westlaw through Public Acts enrolled & approved on or before May 31, 2017); 20 ILL. COMP. STAT. 2405/3(f); MD. CODE ANN., HEALTH-GEN. § 15-901 (West, Westlaw through leg. eff. May 27, 2017); MASS. GEN. LAWS ch. 118E, § 73 (West, Westlaw through Chapter 9 of the 2017 1st Annual Sess.); MINN. STAT. § 179A.54 (West, Westlaw through 2017 Reg. Sess.); MO. REV. STAT. § 208.862(3) (West, Westlaw through emerg. leg. approved through Mar. 30, 2017 of 2017 1st Reg. Sess.); OR. REV. STAT. § 410.612 (West, Westlaw through 2017 Reg. Sess. leg. eff. through May 18, 2017); VT. STAT. ANN. tit. 21, § 1640(c) (West, Westlaw through Law No. 28 of 2017–18 1st Sess.); WASH. REV. CODE § 74.39A.270 (West, Westlaw through Ch. 129 of 2017 Reg. Sess.); Ohio H.B. 1, §§ 741.01–.06 (July 17, 2009)

states have authorized mandatory representation for home daycare businesses,[8] and two states have authorized mandatory representatives for individuals who operate foster homes for persons with disabilities.[9] In January 2016, the City of Seattle went even further by enacting a first of its kind ordinance calling for the certification of an exclusive representative to speak and contract for independent-contractor drivers in their relations with both the city and ride-sharing technology companies (such as Uber and Lyft). SEATTLE, WASH., CODE § 6.310.735 (2016).

(expired); Exec. Budget Act, 2009 Wis. Act 28, § 2241 (repealed 2011); Pa. Exec. Order No. 2015-05 (Feb. 27, 2015); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

[8] CONN. GEN. STAT. § 17b-705; 5 ILL. COMP. STAT. 315/3(n); MASS. GEN. LAWS ch. 15D, § 17; ME. REV. STAT. ANN. tit. 22, § 8308(2)(C) (repealed 2011); MD. CODE ANN., EDUC. § 9.5-705; MINN. STAT. § 179A.54; N.M. STAT. ANN. § 50-4-33 (West, Westlaw through emerg. leg. through Ch. 137 of the 1st Reg. Sess., 53rd Legislature); N.Y. LAB. LAW § 695-a et seq. (West, Westlaw through L.2017, chs. 1–23, 25, 26, 50–58); OR. REV. STAT. § 329A.430; R.I. GEN. LAWS § 40-6.6-1 et seq. (West, Westlaw through Ch. 2 of Jan. 2017 Sess.); WASH. REV. CODE § 41.56.028; Ohio H.B. 1, §§ 741.01–.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed); Iowa Exec. Order No. 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order No. 07-21 (July 18, 2007) (rescinded); N.J. Exec. Order No. 23 (Aug. 2, 2006); Pa. Exec. Order No. 2007-06 (June 14, 2007) (rescinded); Interlocal Agreement Between Mich. Dep't of Human Servs. & Mott Cmty. Coll. (July 27, 2006) (rescinded).

[9] OR. REV. STAT. § 443.733; WASH. REV. CODE § 41.56.029.

These government actions alone demonstrate the importance of the first question presented, as the above-mentioned schemes affect hundreds of thousands of individuals. These actions, however, will be the narrow end of the wedge if government officials can appoint exclusive representatives to speak for individuals for any rational basis. Under this level of scrutiny, state officials could politically collectivize any profession or industry under the aegis of a state-favored interest group. For example, under the Seventh Circuit's ruling, Illinois could mandate that other healthcare professionals (such as doctors or dentists) or businesses (such as hospitals or insurers) accept state-designated organizations as their exclusive representative for petitioning the State over its regulation of that profession or industry.

3. These ramifications are intolerable. "The First Amendment mandates that [courts] 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). "It is for the speaker, not the government, to choose the best means of expressing a message." *Hill v. Colorado*, 530 U.S. 703, 781 (2000) (Kennedy, J., dissenting). Consequently, "citizens, subject to rare exceptions, must be able to discuss issues, great or small, through the means of expression they deem best suited to their purpose." *Id*.

The government cannot be allowed to dictate, for any rational basis, which advocacy organization will speak for citizens in their relations with the govern-

ment. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Riley,* 487 U.S. at 791. Indeed, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

An unbounded government authority to appoint mandatory representatives to speak for citizens threatens not only individual liberties, but also the political process the First Amendment protects. These organizations will be government-created "factions:" similarly-situated individuals forced together into an association to pursue self-interested policy objectives (here, seeking higher Medicaid and CCAP payment rates). The problems caused by *voluntary* factions have been recognized since the nation's founding. *See The Federalist No. 10* (J. Madison). Far worse will be the problems caused by *mandatory*, government-created factions. An advocacy group that citizens are conscripted to accept, and that has special privileges in dealing with the government that no others enjoy, will have political influence far exceeding citizens' actual support for that group's agenda. Allowing the government to create such artificially powerful advocacy organizations will skew the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the

First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

It is for good reason that this Court is reluctant to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or to "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" *Harris*, 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id.*

The First and Seventh Circuits' opinions give government carte blanche to regiment citizens into mandatory advocacy groups. As a consequence, the opinion below cannot be allowed to stand. The Court should grant the writ and, as discussed below, hold that exclusive representation only is constitutional when it satisfies exacting scrutiny.

B. The First and Seventh Circuits' Opinions Conflict with This Court's Holdings That Mandatory Associations Must Satisfy Exacting Constitutional Scrutiny.

In *Knox*, this Court reiterated that mandatory associations are "exceedingly rare because . . . [they] are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). The Court

has required, in a variety of contexts, that mandatory associations satisfy this level of constitutional scrutiny. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *Roberts*, 468 U.S. at 623; *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion); *see also Roberts*, 468 U.S. at 623 (citing earlier cases).

The First and Seventh Circuits' decisions defy these precedents by allowing states to force individuals into an exclusive-representative relationship with an advocacy group for any rational basis. If there is any mandatory association that should have to pass constitutional muster, it is this one, as providers are being forced to accept a mandatory agent for lobbying the State over matters of public policy.

The same level of scrutiny should apply here as applies when the government compels individuals to associate with political organizations to receive public monies, which is exacting scrutiny, *see Elrod*, 427 U.S. at 362–63; *O'Hare Truck*, 518 U.S. at 714–15. Even when representing government employees, a "public sector union is indistinguishable from the traditional political party in this country." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 256 (1977) (Powell, J. concurring in judgment). The two types of organizations share similar goals, for "[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership." *Id.*; *accord id.* at 242–44

(Rehnquist, J., concurring). The organizations also engage in similar expressive activities, for "[i]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and concern policies that are "important political issues." *Harris*, 134 S. Ct. 2632–33.

An organization that represents individuals who are not public employees in their relations with the government is not just akin to a political organization: *it is* a political advocacy organization. *See supra* pp. 9–10. SEIU's conduct as an exclusive representative proves the point. SEIU has not only met and spoken behind closed doors with Illinois policymakers concerning HSP and CCAP policies—a classic lobbying activity—but it also has "conducted public demonstrations and protests; conducted television, radio, and print advertising campaigns; and engaged in other forms of political advocacy to influence state policymakers and the public to support [SEIU's] positions concerning HSP and CCAP policies and funding." Am. Compl. ¶¶ 61–62 (Pet.App.31). SEIU's "expressive activities concerning HSP and CCAP policies often address other public policies that SEIU[ ] supports, such as increasing taxes, raising the minimum wage, and making changes to immigration policy." *Id.* ¶ 66 (Pet.App.32). Even as a general matter, SEIU is viewed as, and characterizes itself as, a progressive advocacy group. *Id.* ¶ 67 (Pet.App.32). SEIU is a "political" organization in any meaningful sense of that word.

A requirement that citizens accept SEIU's representation to receive HSP or CCAP payments for their services should be subject to the same constitutional scrutiny as would requiring citizens to accept any other political organization's representation to receive public monies. The Court should grant review to clearly establish that exclusive representation, like any other mandatory association, constitutionally is permissible only when it is the least restrictive means for achieving a compelling state interest.

C. The Court Should Grant Certiorari to Clarify That *Knight* Does Not Exempt Exclusive Representation from First Amendment Scrutiny.

The First and Seventh Circuits failed to apply the proper level of scrutiny primarily because they misconstrued *Knight* to hold that exclusive representation is not a mandatory association subject to heightened scrutiny. Pet.App.4–5; *D'Agostino*, 812 F.3d at 244. The *Knight* Court made no such ruling, as that case "involve[d] no claim that anyone is being compelled to support [union] activities." 465 U.S. at 291 n.13. *Knight* only addressed an issue that is not present here: whether *excluding* employees from union bargaining sessions infringed on their ostensible constitutional right to participate in those sessions. *Id.* at 273.

This Court framed the issue before it as precisely that: "[t]he question presented . . . is whether this restriction on participation in the nonmandatory-

subject exchange process violates the constitutional rights of professional employees." *Id.* The "appellees' principal claim is that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. This Court disagreed, finding that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.[10] The Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied *an opportunity to participate* in their public employer's making of policy." *Id.* at 292 (emphasis added).

Knight has no bearing on this case because Petitioners do not allege that Illinois wrongfully excludes them from its meetings with SEIU. Nor do they assert a "constitutional right to force the government to listen to their views." *Id.* at 283. Rather, the providers here assert their constitutional right not to be forced to associate with an exclusive representative and its speech. Their claim that exclusive representation *compels* association is different from the alleged *restriction* on speech addressed in *Knight*.

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[10] The associational argument *Knight* addressed likewise only concerned whether excluding employees from union bargaining sessions impinged on their associational rights by indirectly pressuring them to join the union. *Id.* at 288 (holding that "Appellees' speech and associational rights . . . have not been infringed by Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative" (emphasis added)).

Knight's holding that government officials constitutionally are free to choose to whom they *listen* does not mean those officials are free to dictate who *speaks* for individuals in their relations with the government. *Knight* does not support the lower court's holding in this case.

More generally, it is inconceivable that this Court, when deciding in 1984 the narrow issue of whether a college can exclude faculty members from union bargaining sessions, intended to rule that the First Amendment does not bar states from forcing in-home healthcare and daycare providers to accept an exclusive representative. Such schemes did not even exist at that time. Yet, that is how broadly the First and Seventh Circuits have interpreted *Knight*.

Knight cannot bear the incredible weight the lower courts place upon it. The Court should grant certiorari to eliminate the lower courts' misapprehension of *Knight*, and establish that *Knight* does not exempt exclusive representation from First Amendment scrutiny.

D. The First and Seventh Circuits' Opinions Are Inconsistent with This Court's and the Eleventh Circuit's Precedents Concerning Exclusive Representation.

The First and Seventh Circuits not only misread *Knight*, but ignored this Court's precedents concerning exclusive representation of employees. The Court has long recognized that an exclusive representative's power to speak and contract for all employees

in a bargaining unit, whether they approve or not, impinges on their individual liberties.

Exclusive representatives are often referred to as "exclusive bargaining *agents*." *Harris*, 134 S. Ct. at 2640 (emphasis added). This is for good reason: "By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). The Court has found this mandatory agency relationship analogous to that between trustee and beneficiary, and akin to "the relationship . . . between attorney and client." *ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991).

Unlike other agency relationships, however, "an individual employee lacks direct control over a union's actions." *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990). That is because exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Those "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

As a result, exclusive representatives can, and often do, pursue agendas and enter into agreements that the represented individuals oppose and that

harm their interests. *See Knox*, 132 S. Ct. at 2289; *Abood*, 431 U.S. at 222. A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Specifically here, SEIU is empowered to speak, or "bargain[ ]," with the State on behalf of all providers, *see* 5 ILL. COMP. STAT. 315/6(c), irrespective of whether they approve of SEIU's advocacy. Many providers likely did not approve given that SEIU's advocacy concerned matters of public controversy, Am. Compl. ¶¶ 64–66 (Pet.App.32), and was often self-interested to boot, *id.* ¶¶ 52–53 (Pet.App.28). SEIU is also empowered to enter into binding contracts as the providers' proxy, irrespective of whether the providers approve of the contractual terms. *Id.* ¶ 51 (Pet.App.28). Many providers did not approve of prior contracts, which forced nonconsenting providers to pay compulsory fees to SEIU and attend recruitment meetings with SEIU organizers. *Id.* ¶¶ 52–53 (Pet.App.28).

Given an exclusive representative's power to speak and contract for individuals against their will, this Court has long recognized that exclusive representation restricts individual liberties. In *14 Penn Plaza LLC v. Pyett,* the Court held that exclusive representatives can waive unconsenting individuals' rights to bring discrimination claims in court because, among other reasons, "[i]t was Congress' verdict that the benefits of organized labor outweigh *the sacrifice of individual liberty that this system necessarily demands*." 556 U.S. 247, 271 (2009) (emphasis

added). In *Vaca v. Sipes*, the Court held that exclusive representatives owe a fiduciary duty to represented individuals based, in part, on the fact that "the congressional grant of power to a union to act as exclusive collective bargaining representative" results in a "corresponding reduction in the individual rights of the employees so represented." 386 U.S. 171, 182 (1967). And in *American Communications Ass'n v. Douds*, the Court held it constitutional to require union officials to pledge not to be communists because of the power that exclusive representation grants a union over employees. 339 U.S. 382, 401–02 (1950). The Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them," and "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Id*. at 401.

The Eleventh Circuit in *Mulhall v. Unite Here Local* 355 similarly recognized that exclusive representation impinges on associational rights. 618 F.3d 1279, 1286–87 (11th Cir. 2010). *Mulhall* addressed whether exclusive representation by a union (Unite) threatened an employee (Mulhall) with associational injury, even though he could not be required to join the union under Florida's Right to Work law. *Id*. The court held that "[i]f Unite is certified as the majority representative of . . . employees, Mulhall will have been thrust unwillingly into an agency relationship[.]" *Id*. at 1287. Thus, "regardless of whether

Mulhall can avoid contributing financial support to or becoming a member of the union . . . [Unite's] status as his exclusive representative plainly affects his associational rights." *Id.*[11]

The Seventh Circuit's conclusion that an exclusive representative is not a mandatory association cannot be squared with these precedents, or with the extraordinary authority these government-appointed agents possess. The court's conclusion is not even logical. It requires two pairs of contradictory premises to be true: that providers are represented by SEIU, but not associated with SEIU; and that SEIU speaks and contracts for providers, but providers are not associated with SEIU's speech and contracts. These propositions are incongruous, and equivalent to saying that a principal is not associated with his own agent or his agent's actions.

SEIU's authority to speak and contract for providers necessarily associates them with SEIU, its speech, and its contracts. Indeed, that is the point of the exclusive-representative designation: to establish

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[11] *Mulhall* further found that, while exclusive representation "amounts to 'compulsory association,' . . . that compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' . . . based on a legislative judgment that collective bargaining is crucial to labor peace." *Id.* (quoting *Acevedo–Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002)). This labor peace interest, however, does not justify unionizing non-employee providers. *Harris*, 134 S. Ct. at 2640; pp. 26–28 *infra*.

that the union speaks and contracts for *all* individuals in a unit, and not just its members. *Cf.* S*zabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). An exclusive representative plainly is a mandatory expressive association. As such, it is subject to exacting constitutional scrutiny.

II. Second Question: The Government Cannot Extend Exclusive Representation Beyond Public Employees Because, under *Harris*, the Government's Interest in Workplace Labor Peace Does Not Extend That Far.

If the Court takes the first question to resolve whether exclusive representation is subject to exacting scrutiny, it should also take the second question to resolve whether Illinois's extension of exclusive representation to individuals who are not public employees survives that scrutiny. The Court should find that it does not because, under *Harris*, Illinois's labor peace does not extend that far. 134 S. Ct. at 2640.

In *Abood,* exclusive representation of public employees was deemed to be justified by a public employer's interest in "labor peace." 431 U.S. at 220–21, 224; *see Harris*, 134 S. Ct. at 2631. According to *Abood*, that is an interest in avoiding workplace disruptions that could be caused by conflicting and competing demands from multiple unions. 431 U.S. at 220–21, 224. *Abood* borrowed the interest from cases construing federal labor laws, *id.* at 220–21,

and transferred it to the public sector without any analysis, *id.* at 224. That lack of analysis was criticized at the time. *Id.* at 259–61 (Powell, J., concurring in judgment); *accord id.* at 242–44 (Rehnquist, J., concurring). Justice Powell, for instance, remarked that he "would have thought that 'conflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id.* at 261.

Whatever its merits in an employment relationship, the labor peace interest has no application outside of one. *Harris* "confine[d] *Abood*'s reach to full-fledged state employees." 134 S. Ct. at 2638. *Harris* similarly confined the reach of the labor peace interest, *id.* at 2641, on the basis that: (1) "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes"; (2) "[f]ederal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace"; (3) "the specter of conflicting demands by personal assistants is lessened" given SEIU's limited authorities; and (4) "State officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Id.* The last point especially is salient. Neither Illinois nor any other state has any legitimate interest in using exclusive representation to quell conflicting demands from diverse associations of citizens, as such demands are the essence of the democratic pluralism the First Amendment protects.

Under *Harris*, no constitutionally sufficient state interest justifies imposing an exclusive representative on individuals who are not full-fledged public employees.[12] Consequently, it is unconstitutional for states to extend these regimes of mandatory representation beyond government workplaces.

It is important that the Court grant the writ to issue such a holding because, absent this limiting principle, states could force a host of professions into exclusive-representative relationships with advocacy groups. *See supra* pp. 11–14. Just as *Harris* confined compulsory fees to full-fledged public employees because otherwise "it would be hard to see just where to draw the line," 134 S. Ct. 2638, so too should exclusive representation be confined to such employees.

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[12] The rational basis that the Seventh Circuit found for extending exclusive representation to providers, namely that it is a rational means to "hear[ ] the concerns of providers" and allows "efficient access to this information" (Pet.App.8), is insufficient to satisfy exacting scrutiny. It is not a compelling interest, as association cannot be compelled for the very purpose of generating speech. *United States v. United Foods*, 533 U.S. 405, 415 (2001). Exclusive representation is also not the least restrictive means to hear providers' concerns, as Illinois can solicit their views through a variety of voluntary means, such as by requesting providers' comments in rulemaking, holding public meetings, and conducting surveys. Illinois does not need to force providers to accept SEIU representation, against their will, to obtain policy recommendations from them.

III. The Court Should Resolve This Petition in the Same Term As *Janus,* or Hold It in Abeyance Pending *Janus.*

On June 6, 2017, an Illinois state employee filed a petition for a writ of certiorari that presents the question of whether "*Abood* [should] be overruled and public-sector agency fees arrangements declared unconstitutional under the First Amendment." Pet. (i), *Janus v. AFSCME, Council 31*, 16-___ (U.S. June 6, 2017) ("*Janus* Pet."). Although "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked," in the sense that the former is not dependent on the latter, *Harris*, 134 S. Ct. at 2640, this petition and *Janus* nevertheless present overlapping issues.

This case and *Janus* involve the same statute—the IPLRA—and turn, in large part, on an exclusive representative's power and nature in the public sector. An exclusive representative's power to speak and contract for unconsenting individuals, and thus to engage in advocacy they may oppose, is why compelling those individuals to accept or subsidize an exclusive representative infringes on their First Amendment rights. *See supra* pp. 22–26; *Janus* Pet. 9–11. The political nature of bargaining with the government is why these infringements implicate core First Amendment concerns. *See Harris*, 134 S. Ct. at 2632–33. The extraordinary powers that come with being an exclusive representative also are a reason why agency fees fail constitutional scrutiny: the fees are unnecessary because these privileges more than

adequately compensate unions that choose to accept that mantle. *See Janus* Pet. 22–25.

The answer to the first question in this case—whether an exclusive representative is a mandatory association subject to exacting scrutiny—affects whether fees to support an exclusive representative are constitutional. If regimes of exclusive representation compel association, then forcing individuals to also subsidize those regimes exacerbates that First Amendment injury. *See Janus* Pet. 25–27. Alternatively, if an exclusive representative is not a mandatory association, then individuals cannot be forced to support it, for "compulsory subsidies for private speech . . . cannot be sustained" unless there exists "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy." *Knox*, 132 S. Ct. at 2289 (quoting *United States v. United Foods*, 533 U.S. 405 (2001)).

Given these common issues, this case and *Janus* should be decided in the same term. Doing so will allow the Court to issue consistent jurisprudence concerning if and when the government can compel individuals to either accept or subsidize an exclusive representative for dealing with the government.

Alternatively, this petition should be held pending *Janus*. If the Court grants review in *Janus*, its subsequent decision will likely reach issues that affect the resolution of the important questions presented in this case. The Court should thus determine, after deciding *Janus*, whether to take this case, or wheth-

er to vacate and remand the Seventh Circuit's decision for further consideration in light of *Janus*.

CONCLUSION

The government cannot be allowed to dictate, for any rational basis, which organization speaks for individuals in their relations with the government. The First Amendment reserves that choice to each individual. The Court should take this case to hold that states need a compelling interest to force individuals into an exclusive-representation relationship, and that no such interest justifies extending exclusive representation to individuals who are not full-fledged public employees. The writ of certiorari should be granted on both questions.

Respectfully submitted,

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June 6, 2017

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-2327

REBECCA HILL, *et al.*,
Plaintiffs-Appellants,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
HEALTHCARE ILLINOIS, INDIANA,
MISSOURI, KANSAS, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 15 CV 10175 – Manish S. Shah, *Judge*.

ARGUED DECEMBER 7, 2016 –
DECIDED MARCH 9, 2017

Before BAUER and FLAUM, *Circuit Judges*, and SHADID, *District Judge*.[*]

FLAUM, *Circuit Judge*. Appellants, home healthcare and childcare providers, challenge the exclusive-bargaining-representative provisions of the Illinois Public Labor Relations Act, 5 Ill. Comp. Stat. 315/1 *et seq.* ("IPLRA"). Appellants argue that the statutory

[*] Of the Central District of Illinois, sitting by designation.

scheme violates their First Amendment associational rights. The district court dismissed their complaint for failing to state a claim. We affirm.

I. Background

Appellants provide home-based personal care and childcare services under various programs administered by Illinois agencies. The Home Services Program ("HSP"), 20 Ill. Comp. Stat. 2405/3(f), pays about 25,000 "personal assistants" who help "customers" with basic living needs. The customers are responsible for hiring and supervising the personal assistants, and the State of Illinois pays the assistants. *See generally Harris v. Quinn*, — U.S. —, 134 S. Ct. 2618, 2623–25 (2014). Illinois' Child Care Assistance Program ("CCAP"), 305 Ill. Comp. Stat. 5/9A-11, subsidizes childcare services for low-income and at-risk families. Parents choose their own providers and contribute to the cost if financially able. The program pays about 60,000 childcare providers. We refer collectively to the people working under these programs as "providers."

The IPLRA generally allows public employees in a bargaining unit to choose, by majority vote, an exclusive bargaining representative to negotiate with the State over employment terms. *See* 5 Ill. Comp. Stat. 315/3(f); *id.* 315/9(a-5).[1]

A majority of both HSP and CCAP providers chose defendant-appellee Service Employees International Union ("SEIU") as their exclusive bargaining representative. Though the SEIU bargains with Illinois

[1] Home healthcare and childcare providers are unlike many public employees, because the providers are defined as public employees only for purposes of the IPLRA. 5 Ill. Comp. Stat. 315/3(n). As a result, they are not considered "full-fledged" public employees. *Harris*, 134 S. Ct. at 2638. However, under the IPLRA the providers still choose exclusive bargaining representatives.

over key employment terms for the providers, they are under no obligation to join the SEIU or pay dues.[2] The SEIU cannot discriminate against a provider because of his or her membership in a labor union, or lack thereof. *Id.* 315/10(a)(2). Thus, providers are able to present their own grievances to the State, publicly oppose the SEIU, and associate with whomever they want, without retaliation from the union. In effect, the IPLRA authorizes Illinois to listen to only one voice before deciding pay rates, hours, and other key work conditions for the providers, and allows a majority of a given bargaining unit to select that voice.

Appellants sued the SEIU and Illinois officials under 42 U.S.C. § 1983. The providers alleged that the IPLRA violates the First and Fourteenth Amendments because, by authorizing the SEIU to bargain on behalf of HSP and CCAP providers, the statute forces appellants into an agency-like association with the SEIU. They sought declaratory and injunctive relief prohibiting the HSP and CCAP bargaining units from choosing bargaining representatives.

Defendants-appellees moved to dismiss the complaint for failure to state a claim. The district court granted the motion, holding that "plaintiffs' theory runs counter to the established principle that a state does not infringe on associational rights by requiring the type of exclusive representation at issue here." *Hill v. Serv. Emps. Int'l Union, Healthcare Ill., Ind., Mo., Kan.*, No. 15 CV 10175, 2016 WL 2755472, at *1 (N.D. Ill. May 12, 2016).

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[2] Previously, the IPLRA contained a mandatory fee provision requiring HSP and CCAP bargaining-unit members to pay union dues. However, that part of the statute was struck down in *Harris* as creating an unconstitutional mandatory association between the providers and SEIU. 134 S. Ct. at 2639–40.

II. Discussion

We review de novo a district court's grant of a motion to dismiss. *Volling v. Kurtz Paramedic Servs., Inc.*, 840 F.3d 378, 382 (7th Cir. 2016). Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To properly state a claim, a plaintiff's complaint must contain allegations that plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level." *Kubiak v. City of Chi.*, 810 F.3d 476, 480 (7th Cir.), *cert. denied sub nom. Kubiak v. City of Chi., Ill.*, 137 S. Ct. 491 (2016) (internal quotation marks and citation omitted). "We accept as true all of the well-pleaded facts in the complaint and draw all reasonable inferences in favor of plaintiff[s-appellants]." *Id.* at 480–81.

The First Amendment encompasses both the freedom to associate and the freedom *not* to associate. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 2288, (2012) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Mandatory associations are subject to exacting scrutiny, meaning they require a compelling state interest that cannot be achieved through significantly less-restrictive means. *Id.* at 2289. Appellants argue that the IPLRA creates a mandatory association subject to heightened scrutiny. However, case law forecloses such an argument.

In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court held that a Minnesota law giving elected bargaining units exclusive power to "meet and confer" with employers did not interfere with the employees' First Amendment associational rights. *Id*. at 273. The Court found

that the challenged laws "in no way restrained appellees' freedom to speak . . . [or] to associate or *not to associate* with whom they please, including the exclusive representative." *Id.* at 288 (emphasis added). Noting that the plaintiffs were free to form advocacy groups and were not required to join the union, the Court reasoned that any "pressure to join the exclusive representative . . . [was] no different from the pressure to join a majority party that persons in the minority always feel . . . [and did] not create an unconstitutional inhibition on associational freedom." *Id.* at 289–90 (footnotes omitted). Similarly, here, appellants do not need to join the SEIU or financially support it in any way. They are also free to form their own groups, oppose the SEIU, and present their complaints to the State. Thus, under *Knight*, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny.

Harris does not alter this proposition. In *Harris*, the Supreme Court assessed the IPLRA (the same law at issue here), struck down its mandatory-fee provision, and left the balance of the act intact. *See generally* 134 S. Ct. 2618. In so doing, the Court declined to extend *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (upholding a mandatory union fee for non-union-member teachers) beyond applying to "full-fledged" public employees. 134 S. Ct. at 2638. The Court also reasoned that personal assistants are not full-fledged public employees, because they are considered public employees only for purposes of the IPLRA, and not in other contexts. *Id.* at 2635–36. The Court held that requiring non-full-fledged public employees to pay fees supporting the union interfered with the employees' associational rights and did not serve a compelling governmental interest, *id.* at 2639–40 (citing *Knox*, 567 U.S. 298, 132 S. Ct. at 2289; *Roberts*, 468 U.S. at

623). Yet, though the Court was aware of the entire statutory scheme, it focused almost exclusively on the mandatory-fee provisions. *See id.* at 2640 ("Nor do [plaintiffs] challenge the authority of the SEIU[] to serve as the exclusive representative of all the personal assistants in bargaining with the State. All they seek is the right not to be forced to contribute to the union, with which they broadly disagree."). Thus, *Harris* did not speak to the constitutionality of the exclusive-bargaining-representative provisions of the IPLRA.

Other courts examining similar challenges and state programs have also concluded that *Harris* did not limit *Knight*'s approval of exclusive bargaining representatives. *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir.) (Souter, J., by designation), *cert. denied*, 136 S. Ct. 2473 (2016) ("What *Harris* did not speak to, however, was the premise assumed and extended in *Knight:* that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit."); *see also Jarvis v. Cuomo*, 660 F. App'x 72, 74–75 (2d Cir. 2016), *cert. denied*, No. 16-753, — S. Ct. —, 2017 WL 737827 (U.S. Feb. 27, 2017) ("*Harris* addressed only the narrow question of whether individuals who were neither full-fledged state employees nor union members could be required to pay fair share fees to their bargaining unit's exclusive representative; it did not consider the constitutionality of a union serving as the exclusive representative of non-full-fledged state employees in bargaining with the State. Thus, *Harris* does not relieve us from the duty to follow *Knight* even where, as here, plaintiffs are not full-fledged state employees.") (internal citations, brackets, and quotation marks omitted); *Bierman v. Dayton*, No. CV

14-3021 (MJD/LIB), 2017 WL 29661, at *7 (D. Minn. Jan. 3, 2017) (similar).[3] In short, the IPLRA's authorization of a majority-elected exclusive bargaining representative does not compel an association that triggers heightened First Amendment scrutiny.

Appellants argue that this case is akin to several Supreme Court association cases employing heightened scrutiny. Appellants' Br. at 11–12 (citing *Elrod v. Burns*, 427 U.S. 347, 362– 63 (1976) (termination due to employee's political affiliation triggers heightened scrutiny); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996) (same for independent government contractors); *Roberts*, 468 U.S. at 623 (forced admittance of female club members triggers heightened scrutiny); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577–78 (1995) (parade organizers could not be required to include among marchers a group imparting a message the organizers did not wish to convey absent "a compelling, or at least important, governmental object"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656, 658–59 (2000) ("forced inclusion of an unwanted person in a

[3] Appellants argue that this Court should disregard the above authority and instead rely on *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010). However, *Mulhall* is distinguishable from this appeal. In that case, the Eleventh Circuit held that a plaintiff had standing to challenge the impending forced unionization of his company. Aside from the fact that *Mulhall* did not address the merits of the plaintiff's claims, *id.* at 1288, the associational-interest analysis turned on employees being forced to belong to a union, *id.* ("while compulsory affiliation with a union does not, without more, violate the First Amendment rights of employees, it is no less true that compelling an employee to belong to a union *implicates* that person's First Amendment right not to associate") (internal citations, quotation marks, and alterations omitted). In this case, there is no allegation that appellants are forced to join—or even support—the SEIU.

group" triggers heightened scrutiny)). However, these cases are inapposite. As the First Circuit explained in *D'Agostino* in assessing a substantially similar state program, exclusive bargaining representation does not rise to the level of the above cases, as providers "are not compelled to act as public bearers of an ideological message they disagree with[,] . . . accept an undesired member of any association they may belong to, . . . [or] modify the expressive message of any public conduct they may choose to engage in." 812 F.3d at 244 (internal citations omitted). We agree with this reasoning; the IPLRA's exclusive-bargaining provision does not create associations like those the Supreme Court has found to be constitutionally problematic.[4]

As the IPLRA does not create a mandatory association, it is not subject to heightened scrutiny. And appellants do not argue that the IPLRA would fail rational-basis scrutiny. Illinois has legitimate interests in hearing the concerns of providers when deciding what employment terms to offer them, and in having efficient access to this information. Negotiating with one majority-elected exclusive bargaining representative seems a rational means of serving these interests. *See Knight*, 465 U.S. at 291.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[4] Because we hold that the IPLRA does not give rise to a mandatory association, we decline to address appellants' argument that the IPLRA gives Illinois "untrammeled authority . . . to designate mandatory agents to speak and contract for citizens in their relations with government."

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed 05/12/16]

No. 15 CV 10175

REBECCA HILL, *et al*.,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
HEALTHCARE ILLINOIS, INDIANA,
MISSOURI, KANSAS, *et al*.,

Defendants.

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

Collective bargaining in the public sector necessarily involves interaction with the government, and the constitutional limits on state action have a say in the relationships among unions, the individuals and interests they represent, and the government. In this case, plaintiffs claim that a state-law requirement that a union (as an exclusive representative) negotiate terms and conditions of employment with the government on plaintiffs' behalf amounts to a compelled association with the union in violation of the First Amendment. The plaintiffs are not employees of the state, and as such, plaintiffs argue that there is no

compelling justification to require them to be linked to—to speak through—the union. They filed suit and seek a declaration that the exclusive representation regime is unconstitutional. Defendants (the union and the state officials responsible for the particular statutory regime at issue) move to dismiss plaintiffs' complaint, and argue that the First Amendment's freedom to associate has not been abridged in any way.[1] The Supreme Court may revisit its precedents in this area, but until it does, plaintiffs' theory runs counter to the established principle that a state does not infringe on associational rights by requiring the type of exclusive representation at issue here. Defendants' motions to dismiss are granted.

I. Legal Standard

A complaint may be dismissed if it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *see Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix, Ill.*, 779 F.3d 706, 711 (7th Cir. 2015). At this stage, the facts alleged in the complaint are assumed to be true, and inferences from those facts are drawn in plaintiffs' favor. *Id*. Matters of public record—for example, statutes, regulations, and executive orders—are subject to judicial notice and may be considered even if not mentioned in the complaint. *See*, *e.g.*, *White v. Keely*, 814 F.3d 883, 886 n.2 (7th Cir. 2016).

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[1] The current director of the Illinois Department of Central Management Services is Michael Hoffman, and the current secretary of the Illinois Department of Human Services is James Dimas. The Clerk shall substitute Hoffman and Dimas for their predecessors, Tom Tyrrell and Gregory Bassi as defendants in this case. Fed. R. Civ. P. 25.

II. Background

The Illinois Department of Human Services Home Services Program provides funding for certain qualifying individuals to hire personal assistants to perform household and incidental health care tasks. 20 ILCS § 2405/3(f); 89 Ill. Admin. Code § 676.10; [10] ¶¶ 15–18.[2] The personal assistant is paid by the state, but supervised by the person receiving care. *Harris v. Quinn*, 134 S.Ct. 2618, 2624 (2014). Illinois's Child Care Assistance Program is similar—it pays for certain child care services provided to low-income families (by licensed and license-exempt day care providers). 305 ILCS § 5/9A-11; 89 Ill. Admin. Code §§ 50.310, 50.320; [10] ¶¶ 25–32. Under both programs, the state sets the key elements of compensation for covered services. 20 ILCS § 2405/3(f); 305 ILCS § 5/9A-11(f).

The Illinois Public Labor Relations Act authorizes "public employees" to negotiate hours, wages, and other conditions of employment, with the state through a labor organization as their exclusive representative. 5 ILCS § 315/6(a), (c). The designated labor organization represents "the interests of all public employees in the unit." 5 ILCS § 315/6(d). Although they are not actually employed by the state, the personal assistants and child care providers paid through Illinois's Home Services and Child Care Assistance programs are designated "public employees" under the Public Labor Relations act. 5 ILCS § 315/3(n); *see Harris*, 134 S.Ct. at 2626, 2634. State law requires key terms of the caregivers' employment to be negotiated with an exclusive representative. 20 ILCS § 2405/3(f); 305 ILCS § 5/9A-11(c-5). Defendant SEIU Healthcare

[2] Bracketed numbers refer to entries on the district court docket.

Illinois, Indiana, Missouri, Kansas is the designated exclusive representative for the personal assistants and child care providers. [10] ¶¶ 42, 44; 5 ILCS § 315/3(f)(iv)–(v).

The union negotiated and entered into collective bargaining agreements with the state on behalf of all personal assistants and child care providers. [10] ¶ 51. But the plaintiffs do not want to be required to accept the union as their representative for contract negotiations with the state, and do not want to be affiliated in any way with the union. [10] ¶ 70. Their claim is that the statutory system that inserts the union between the plaintiffs and the state on matters related to the plaintiffs' employment amounts to a compelled association in violation of the First Amendment. The plaintiffs in *Harris v. Quinn* did not challenge the authority of the union to serve as the exclusive representative of all personal assistants in bargaining with the state. 134 S.Ct. at 2640. This case raises that challenge.

III. Analysis

The First Amendment implicitly protects the freedom of association. *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 638 (7th Cir. 2014). If the state punishes, interferes with, or distorts the message of associations, the state may improperly burden that constitutionally protected right. *Id*. But there is more to the right because the freedom to associate includes a freedom not to associate. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The state is not constitutionally required to encourage people to associate, *Laborers Local 236*, 749 F.3d at 639, and thus the state is not required to assist non-association. The specific question here is whether authorizing exclusive representation (and mandating it if an exclusive

representative is selected) in negotiations with the state over the terms and conditions of employment that are within the state's control infringes plaintiffs' freedom not to associate with the union.

The Constitution tolerates "impingements" of First Amendment rights in the area of public-sector collective bargaining. Compulsory collective bargaining fees for full-fledged public employees are constitutional. *See Knox v. SEIU, Local 1000*, 132 S.Ct. 2277, 2289 (2012); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). But taking fair-share fees from non-state employees who do not want to join or support the union violates the First Amendment. *Harris*, 134 S.Ct. at 2644. This kind of compelled subsidization (from dissenters or simply the uninterested) of speech crosses the line. Post-*Harris*, plaintiffs no longer have to pay for representation, but does the representation itself infringe or impinge associational rights?

The answer is found in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), and the answer is no. The Court held that associational rights "have not been infringed" by a system where the state negotiates with an entire constituency through a single, exclusive representative association. *Id*. at 288. There was no infringement because the state was entitled to ignore dissenters (and listen only to the exclusive representative), the dissenters were free not to join or support the association, and the dissenters were free to express their views. *Id*. at 287–90. The Court in *Knight* did not expressly discuss the right not to associate, but in holding that no associational rights were infringed, the Court necessarily included the full breadth of associational rights. And absent any infringement, there is no need to balance the justifications for the regime in this case against

the plaintiffs' interests in distancing themselves from the union.

If exclusive representation unconstitutionally inhibits the right not to associate, *Knight* was wrongly decided. But lower courts are bound by *Knight*, and nothing in *Harris* supports a distinction between non-state employees and the full-fledged employees in *Knight*. *Harris* limited the compulsory fees approved by *Abood*, but the Court expressly avoided the issue of exclusive representation generally (an issue that was unchallenged in that case). *See Harris*, 134 S.Ct. at 2640. *Harris* and *Knight* stand together for the proposition that the First Amendment prohibits some compulsory fees but does not prohibit exclusive representation. The state may not endorse taking fees from non-employees without consent, but its choice to listen only to an exclusive representative does not infringe on anyone's associational rights.

The First Circuit's decision in *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), addressed the distinction between *Harris* and *Knight* and is persuasive. In reviewing a Massachusetts child care provider system similar to the one at issue here, and challenged on similar grounds as those asserted by plaintiffs, the court held that no cognizable associational rights were infringed. *Id*. at 243–244. The First Circuit observed that *Knight* presumed and extended a premise: that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *Id*. at 244. *D'Agostino* correctly articulates the *Knight* premise, and *Knight*, in turn, provides the answer to plaintiffs' claim.

Ordinarily, plaintiffs should be given an opportunity to replead. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015). But here, plaintiffs' legal theory would remain the same in any amendment, and would not state a claim under the First Amendment. The complaint is therefore dismissed with prejudice and judgment will be entered in favor of defendants.

IV. Conclusion

Defendants' motions to dismiss, [28] and [29], are granted. Plaintiffs' amended complaint, [10], is dismissed in its entirety. Enter judgment in favor of defendants and terminate civil case.

ENTER:

/s/ Manish S. Shah
Manish S. Shah
United States District Judge

Date: 5/12/16

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed 12/11/15]

No. 15-cv-10175

REBECCA HILL, RANETTE KESTELOOT, CARRIE LONG, JANE MCNAMES, GAILEEN ROBERTS, SHERRY SCHUMACHER,DEBORAH TEIXEIRA, and JILL ANN WISE,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS; TOM TYRRELL, in his official capacity as Director of Illinois Department of Central Management Services; GREGORY BASSI, in his official capacity as Acting Secretary of Illinois Department of Human Services,

Defendants.

Judge Thomas M. Durkin
Magistrate Judge Daniel G. Martin

AMENDED COMPLAINT

INTRODUCTION

This case concerns whether the government can constitutionally force citizens to accept a mandatory representative to lobby the government over public

policies that may affect them. Plaintiffs are Illinois citizens who provide services to persons enrolled in public-aid programs. Specifically, Plaintiffs Rebecca Hill, Jane McNames, Gaileen Roberts, Deborah Teixeira, and Jill Ann Wise provide home-based care to persons with disabilities who are enrolled in the Illinois Home Services Program ("HSP"), 20 ILL. COMP. STAT. 2405/0.01–/17.1 (2015), which is a Medicaid program. Plaintiff Ranette Kesteloot provides child care for relatives who participate in the Illinois Child Care Assistance Program ("CCAP"), 305 ILL. COMP. STAT. 5/9A-11 (2015). Plaintiffs Carrie Long and Sherry Schumacher operate home-based child care businesses that serve customers who are enrolled in the CCAP.

The State of Illinois is forcing Plaintiffs and similarly situated individuals to accept Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU-HCII") as their "exclusive representative" for lobbying the State over its operation of these public programs. By so doing, the State and SEIU-HCII are violating Plaintiffs' rights under the First Amendment to the United States Constitution, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to choose individually with whom they associate to petition the government for redress of grievances.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and 28 U.S.C. § 1343, because Plaintiffs seek relief under 42 U.S.C. § 1983. This Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief based thereon.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arise in this judicial district; Plaintiffs McNames, Johnson, and Schumacher reside and do business in this judicial district; and Defendants do business and operate in this judicial district.

PARTIES

4. Defendant Tom Tyrrell is sued in his official capacity as the Director of Illinois' Department of Central Management Services ("CMS").

5. Defendant Gregory Bassi is sued in his official capacity as the Acting Secretary of Illinois' Department of Human Services ("DHS").

6. Defendant SEIU-HCII is a labor organization that transacts business and maintains its main offices in this judicial district.

7. Plaintiff Rebecca Hill is an HSP provider and lives in Cisne, Illinois

8. Plaintiff Ranette Kesteloot provides care for her great-grandchildren, who receive assistance through CCAP, and lives in Kankakee, Illinois.

9. Plaintiff Carrie Long lives and operates a day care home called Home Away from Home Daycare in Springfield, Illinois, where her customers include families enrolled in CCAP.

10. Plaintiff Jane McNames is an HSP provider and lives in Caledonia, Illinois.

11. Plaintiff Gaileen Roberts is an HSP provider and lives in Cameron, Illinois.

12. Plaintiff Sherry Schumacher lives and operates a day care home called Sherry's Littlest Angels in

South Beloit, Illinois, where her customers include families enrolled in CCAP.

13. Plaintiff Deborah Teixeira is an HSP provider and lives in Chillicothe, Illinois.

14. Plaintiff Jill Ann Wise is an HSP provider and lives in Mount Carmel, Illinois.

FACTS

A. Medicaid Providers

15. HSP is a Medicaid-waiver program partially funded by the federal government. *See* 20 ILL. COMP. STAT. 2405/0.01–/17.1; Ill. Admin. Code tit. 89, §§ 676.10–686.1410. HSP pays for services to be provided for income-eligible persons with disabilities, which enables those persons to live at home and avoid institutionalization.

16. Among other things, persons with disabilities enrolled in the HSP can use their subsidies to hire "personal assistants" to assist them with activities of daily living in their homes, such as eating and dressing.

17. Personal assistants are employed by persons enrolled in the HSP and not by the State. In addition to other responsibilities, program participants are responsible for locating, hiring, training, supervising, evaluating, and terminating their personal assistants. The HSP subsidizes a program participant's costs of employing a personal assistant.

18. Many personal assistants are related to the person receiving the care. A significant number of personal assistants also live in the same residence as the person with disabilities for whom they provide care.

19. Plaintiff Rebecca Hill provides personal care services to her daughter who requires constant care and supervision.

20. Plaintiff Jane McNames provides personal care services to her son, who requires constant care and supervision due to quadriplegia.

21. Plaintiff Gaileen Roberts provides personal care services to her daughter, who requires constant care and supervision due to quadriplegia.

22. Plaintiff Deborah Teixeira provides personal care services to her daughter, who requires constant care and supervision due to a brain injury.

23. Plaintiff Jill Ann Wise provides personal care services to her daughter, who requires constant care and supervision due to Rett syndrome.

24. Approximately 25,000 personal assistants are employed by persons with disabilities who are enrolled in the HSP each year.

B. Child Care Providers

25. Illinois operates a public-assistance program that subsidizes the child care expenses of qualified low-income families called the CCAP. 305 ILCS 5/9A-11; ILL. ADMIN. CODE tit. 89, § 50.101 et seq. CCAP is partially funded by, and must be administered in accordance with, the federal Child Care and Development Fund program. 45 C.F.R. § 98.10.

26. CCAP pays for child care services provided to enrolled families up to a maximum rate set by DHS in accordance with legislative appropriations and federal requirements. *See* 305 ILL. COMP. STAT. 5/9A-11(f); 45 C.F.R. § 98.43. However, the vast majority of families enrolled in CCAP also pay a designated co-payment to their day care providers, the amount of which is set by

DHS through regulation. *See* ILL. ADMIN. CODE tit. 89, §§ 50.310, 50.320. Day care providers can charge enrolled families additional fees for their services.

27. Families enrolled in CCAP can choose their own qualified child care provider, including any licensed day care home, license-exempt provider, or day care center. ILL. ADMIN. CODE tit. 89, § 50.410; 45 C.F.R. § 98.30.

28. "Day care homes" are private, home-based businesses that provide child care services to the public. *See* 225 ILL. COMP. STAT. 10/2.18, 10/2.20. Day care homes are businesses for tax and other purposes, and sometimes employ employees. Day care homes are usually sole proprietorships but can also be partnerships or incorporated.

29. Operating a day care home that serves more than three children requires a license or permit from the Illinois Department of Children and Family Services. *See* 225 ILL. COMP. STAT. 10/3; ILL. ADMIN. CODE tit. 89, §§ 406.1–.27, 408.1–.135. A day care home with a standard license can serve up to twelve children, 225 ILL. COMP. STAT. 10/2.18; while a day care home with a "group" license can serve up to sixteen children, *id.* 10/2.20.

30. "License-exempt child care providers" are individuals who do not need a license to provide child care services to children. There are several types of license-exempt providers:

a. Day care homes that either serve no more than three children or children from the same household, ILL. ADMIN. CODE tit. 89, § 50.410(e);

b. Relative care providers who provide day care services, either in their own home or in the child's home, to children to whom the providers are related, *id*. § 50.410(f), (h); and

c. Non-relative care providers who provide day care services, in the child's home, to no more than three children or children from the same household, *id*. § 50.140(g).

31. Approximately 69.7% of license-exempt providers in fiscal year 2013 were relative care providers. State of Ill. Dep't of Human Serv., Illinois Child Care Report FY 2013, 9 (2013), https://www.dhs.state.il.us/OneNetLibrary/27897/documents/HCDdocuments/ChildCare/2013Re portfinalsingles.pdf.

32. The State contracts with sixteen private Child Care Resource and Referral Agencies ("CCR&Rs") to administer many aspects of CCAP and to support child care providers and enrolled families. *Id.* 13. Among other things, CCR&Rs provide referral services that refer enrolled families to available child care providers and offer extensive training and support services to child care providers.

33. In Fiscal Year 2013, 7,345 day care homes and 52,364 license-exempt family child care providers received payments from CCAP for services provided to families enrolled in this public-assistance program. *Id.* 9.

34. Hereinafter, "child care provider" shall refer to individuals who operate licensed day care homes or are license-exempt family child care providers, and who serve one or more children enrolled in CCAP.

35. Plaintiff Ranette Kesteloot is a license-exempt family child care provider who provides care for her great-grandchildren who receive assistance through CCAP.

36. Plaintiff Carrie Long is a child care provider who operates a day care home called Home Away from Home Daycare, which serves, or served, one or more customers enrolled in CCAP.

37. Plaintiff Sherry Schumacher is a child care provider who operates a day care home called Sherry's Littlest Angels, which serves, or served, one or more customers enrolled in CCAP.

38. Child care providers are not employed by the State of Illinois. Rather, day care homes are private businesses that have one or more customers who partially pay for the day care home's services with public-aid monies, and license-exempt family child care providers are generally grand-parents, aunts, or cousins who receive public monies for caring for children to whom they are related.

C. Illinois Deems Personal Assistants, Child Care Providers, and Other Citizens to be Public Employees Solely for Unionization Purposes.

39. In 2003, former Illinois Governor Rod Blagojevich initiated a scheme to force personal assistants to accept and financially support SEIU-HCII as their representative vis-à-vis the State in exchange for SEIU-HCII's political support and campaign contributions. *See Harris v. Quinn*, 134 S. Ct. 2618, 2626 (June 30, 2014).

40. On March 7, 2003, Governor Blagojevich issued Executive Order 2003-08 ("EO 2003- 08"). Exec. Order No. 2003-8, https://www.illinois.gov/Government/ExecOrders/Documents/2003/execorder2003-8.pdf. EO 2003-

08 recognized that personal assistants are not public employees but nevertheless provided:

> The State shall recognize a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of employment of personal assistants working under the Homes Services Program that are within the State's control.

Id.

41. On July 16, 2003, Governor Blagojevich codified EO 2003-08 by signing Public Act 93 0204, which amended Section 3 of the Disabled Persons Rehabilitation Act to provide as follows:

> Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the

> State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire personal care attendants and personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 1971.

20 ILCS 2405/3(f); 2003 Ill. Legis. Serv. 92-204 (West). Public Act 93-0204 also made conforming amendments to the Illinois Public Labor Relations Act ("IPLRA"), 5 ILL. COMP. STAT. 315/1– 128.

42. On or around July 26, 2003, the State designated SEIU-HCII to be the "exclusive representative" of personal assistants under the IPLRA for purposes of collectively bargaining with the State over aspects of its HSP.

43. On February 18, 2005, Governor Blagojevich issued Executive Order 2005-01 ("EO 2005-01"), which is similar to EO 2003-08 but targets child care providers. Exec. Order No. 2005-1, https://www.illinois.gov/Government/ExecOrders/Documents/2005/execorder2005- 1.pdf. EO 2005-01 required:

> The State shall recognize a representative designated by a majority of day care home

> licensed and license exempt providers, voting in a mail ballot election, as the exclusive representative of day care home providers that participate in the State's child care assistance program, accord said representative the same rights and duties granted to employee representatives by the Illinois Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective negotiations with said representative concerning all terms and conditions of the provision of services for day care home providers under the State's child care assistance program that are within the State's control.

Id. 2–3.

44. On July 15, 2005, Governor Blagojevich recognized SEIU-HCII to be the exclusive representative of all child care providers pursuant to EO 2005-01.

45. On July 26, 2005, Governor Blagojevich codified EO 2005-01 by signing into law Public Act 94-0320. 5 ILL. COMP. STAT. 315/3–/28; 2005 Ill. Legis. Serv. P.A. 94-320 (West). This Act made child care providers public employees solely for purposes of IPLRA, *see* 5 ILL. COMP. STAT. 315/3(n) and 305 ILL. COMP. STAT. 5/9A-11(c-5); and provides that SEIU-HCII "shall be considered to be the exclusive representative of the child and day care home providers defined in this Section," 5 ILL. COMP. STAT. 315(f).

46. On June 29, 2009, Illinois Governor Pat Quinn attempted to impose exclusive representation on additional personal assistants by issuing Executive Order 2009-15. Exec. Order No. 2009-15, https://www.illinois.gov/Government/ExecOrders/Documents/2009/execorder2009-15.pdf. The executive order called for

Illinois to recognize an exclusive representative of all personal assistants who serve persons enrolled in Illinois' Home-Based Support Services Program, 405 ILL. COMP. STAT. 80/20-1, which is a Medicaid program that serves adults with severe mental disabilities. *Id.*

47. In January 2013, Governor Quinn moved to impose exclusive representation on yet another group of individuals, namely registered nurses and therapists, by signing into law Public Act 97-1158. 5 Ill. Comp. Stat. 315/3, /7; 2012 Ill. Legis. Serv. P.A. 97-1158 (West). The Act deems "individual maintenance home health workers" to be public employees solely for purposes of IPLRA. 5 Ill. Comp. Stat. 315/3(n). Individual maintenance home health workers are "registered nurse[s]" and "licensed-practical nurse[s]" who provide in-home services, and therapists who provide "in-home therapy, including the areas of physical, occupational and speech therapy." ILL. ADMIN. CODE tit. 89, § 676.40(d).

48. Public Act 97-1158 also extended the IPLRA to encompass all personal assistants and individual maintenance home health workers who work under the HSP "no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise." 5 ILL. COMP. STAT. 315/3(n); 2012 Ill. Legis. Serv. P.A. 97-1158.

49. Through the actions set forth above, Illinois has falsely deemed individuals who are not actually State employees to be State employees solely for purposes of the IPLRA and unionization.

D. SEIU-HCII Enters into Contracts with Illinois that Force Personal Assistants and Child Care Providers to Support SEIU-HCII.

50. By making SEIU-HCII the "exclusive representative" of personal assistants and child care providers under IPLRA, Illinois granted SEIU-HCII legal authority to act as the agent of all personal assistants and child care providers for purposes of petitioning and contracting with the State over certain HSP and CCAP policies.

51. SEIU-HCII exercised its legal authority by negotiating and entering into successive collective bargaining agreements ("contracts") with the State as the exclusive representative of all personal assistants and child care providers. The most recent contracts, which were effective until June 30, 2015, shall be referred to as the "HSP Contract" and "CCAP Contract" and are attached as Exhibits A and B, respectively, and incorporated into the Complaint.

52. The contracts primarily require that Illinois assist SEIU-HCII with increasing its membership ranks by requiring that Illinois: provide SEIU-HCII with detailed lists of personal information about all personal assistants and child care providers; mail union membership materials to personal assistants and child care providers; refer all questions concerning union representation and membership to SEIU-HCII; and cause personal assistants and child care providers to attend, as part of orientations and/or trainings, thirty-minute SEIU-HCII presentations, the purpose of which is to cause the individuals to become members of SEIU-HCII.

53. The HPS and CCAP Contracts also require Illinois to deduct membership dues for SEIU-HCII from

payments made to personal assistants and child care providers and to seize compulsory "fair share" fees from all payments made to personal assistants and child care providers who are not members of SEIU-HCII. As a result of the foregoing and prior contracts that required similar dues and fee deductions, SEIU-HCII seized over $30 million in compulsory fees from personal assistants between fiscal years 2009 and 2013, and more than $44 million in membership dues and compulsory fees from child care providers between fiscal years 2009 and 2013.

54. In or around July 2014, the State and SEIU-HCII apparently stopped seizing compulsory fees from nonmember personal assistants and child care providers in the wake of the United States Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that such fee seizures from non-State employees are unconstitutional.

55. The HSP Contract called for the State to pay certain hourly reimbursement rates to personal assistants. However, actual payment rates are subject to legislative appropriations and to federal law that requires payment rates be "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). On information and belief, State policymakers could competently establish personal-assistant payment rates without bargaining with SEIU-HCII over those rates.

56. The CCAP Contract called for the State to establish certain CCAP reimbursement rates. Ex. B, at Art. VII. However, actual payment rates are subject

to legislative appropriations; administrative rulemaking, s*ee* 305 ILL. COMP. STAT. 5/9A-11(f); and federal regulations that require states to base their child care rates on a biennial market-rate survey and set child care rates at amounts sufficient to ensure that subsidized children have access to childcare services equal to unsubsidized children, *see* 45 C.F.R. § 98.43. DHS conducts the requisite biennial market-rate surveys. On information and belief, State policymakers could competently establish CCAP payment rates without bargaining with SEIU-HCII over those rates.

57. The HSP and CCAP Contracts require that the State make contributions to an SEIUHCII health fund for the ostensible purpose of offering health insurance to personal assistants or child care providers. However, a low percentage of personal assistants and child care providers, estimated to be less than 20%, receive health benefits from SEIU-HCII.

58. On information and belief, SEIU-HCII's petitioning and contracting with the State is not necessary, and has not been necessary, to improve the services that the HSP or CCAP provide to persons with disabilities or low-income families in need of child care services.

E. Personal Assistants and Child Care Providers Are Being Forced to Associate with Both SEIU-HCII and Its Expressive Activities.

59. Under the IPLRA, an organization certified to be the exclusive representative of a bargaining unit of individuals represents and speaks for all individuals in that unit, *see* 5 ILL. COMP. STAT. 315/6(c-d), regardless of membership status.

60. The State's certification and ongoing recognition of SEIU-HCII as the exclusive representative of

all personal assistants and child care providers associates and affiliates these individuals with SEIU-HCII because it forces them into a mandatory agency relationship with SEIU-HCII, in which SEIU-HCII has legal authority to act as their agent for petitioning and contracting with the State over certain HSP and CCAP policies.

61. SEIU-HCII has met, spoken to, and otherwise petitioned State policymakers concerning HSP and CCAP policies and funding in its capacity as the exclusive representative of all personal assistants and child care providers, and will continue to do so as long as SEIU-HCII is their exclusive representative.

62. SEIU-HCII, in its capacity as an exclusive representative of all personal assistants and child care providers, uses other expressive means to influence State policymakers, including members of the General Assembly and the public, to support SEIU-HCII's positions concerning HSP and CCAP policies and funding. Among other things, SEIU-HCII has conducted public demonstrations and protests; conducted television, radio, and print advertising campaigns; and engaged in other forms of political advocacy to influence State policymakers and the public to support SEIU-HCII's positions concerning HSP and CCAP policies and funding.

63. For example, on June 29, 2015, SEIU-HCII began airing two television commercials designed to pressure Governor Rauner and state policymakers to accede to SEIU-HCII's demands in collective bargaining for new contracts governing the operation of the HSP and CCAP programs. SEIU-HCII also unveiled a new website with the same purpose, www.dangerouscuts.org.

64. The HSP and CCAP policies over which SEIU-HCII petitions and contracts with the State are matters of public and political concern. Among other things, the manner in which these programs are administered affects persons with disabilities and low-income families who need child care services.

65. SEIU-HCII's petitioning and contracts concerning HSP and CCAP also impact the programs' budgets, which then affects the legislative appropriations necessary to support the programs. Appropriations from Illinois' General Fund for HSP and CCAP were $334,075.4 and $143,490.7 million, respectively, in Fiscal Year 2014 alone. The funding levels for both programs are a matter of political and public concern, were subjects of public controversy in prior years, and are currently a subject of public controversy.

66. SEIU-HCII's expressive activities concerning HSP and CCAP policies often address other public policies that SEIU-HCII supports, such as increasing taxes, raising the minimum wage, and making changes to immigration policy. To offer one example, a "lobby day" conducted by SEIU-HCII at Illinois' State Capitol in 2012 to influence the proposed budget for the HSP also called for changes to corporate tax policies.

67. SEIU-HCII characterizes itself as progressive organization; and is viewed, and can be characterized as, a progressive advocacy group. SEIU-HCII often advocates for public policies that are viewed, and can be characterized as, liberal or progressive; and often endorses and supports public officials and candidates for public office who are viewed, and can be characterized as, liberal or progressive.

68. By making SEIU-HCII the exclusive representative of all personal assistants and child care providers for petitioning and contacting the State, Illinois associates and affiliates all personal assistants and child care providers with SEIU-HCII and its petitioning, contracts, and related expressive activities.

69. SEIU-HCII itself asserts on its website that "[m]ore than 35,000 home child care providers and child care center teachers and staff are united in SEIU Child Care & Early Learning, a division of [SEIU-HCII]," and that "Illinois home child care providers were the first in the country to unite our voices in SEIU . . . ." *Child Care & Early Learning*, SEIU HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS, http://www.seiuhcilin.org/category/child-care-early-learning/ (last visited Nov. 2, 2015).

70. Plaintiffs oppose being forced to accept SEIU-HCII as their exclusive representative for petitioning and contracting with the State. They do not want to be forced into an agency relationship with this advocacy group or otherwise affiliated with this advocacy group. Nor do Plaintiffs want to be associated and affiliated with SEIU-HCII's petitioning, contracts, and other expressive activities.

COUNT I

Forcing Plaintiffs to Associate with SEIU-HCII violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

71. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

72. The First Amendment to the United States Constitution guarantees each individual a right to

choose whether, how, and with whom he or she associates to "petition the Government for a redress of grievances" and engage in "speech." A state infringes on these First Amendment rights when it compels citizens to associate with an expressive organization or its expressive activities. That infringement is subject to at least exacting constitutional scrutiny, and is permissible only if it serves a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.

73. The Defendants, by compelling Plaintiffs and other personal assistants and child care providers to associate with SEIU-HCII as their exclusive representative, and by associating Plaintiffs and other personal assistants and child care providers with SEIU-HCII's expressive activities without their consent, are violating Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. No compelling, or otherwise sufficient, state interest justifies this infringement on the personal assistant and child care providers First Amendment rights.

74. By being forced to associate with SEIU-HCII, a group with which Plaintiffs would not otherwise associate, Plaintiffs are suffering the irreparable harm and injury inherent in a violation of First Amendment rights for which there is no adequate remedy at law. Unless the Court enjoins these violations, Plaintiffs will continue to suffer irreparable harm and injury.

75. The following statutory provisions are unconstitutional, both on their face and as applied to Plaintiffs, to the extent that they deem personal assistants or child care providers subject to IPLRA: 5 ILL. COMP. STAT. 315/3(f)(iv-v); 5 ILL. COMP. STAT. 315/3(n); 5

ILL. COMP. STAT. 315/3(o); 5 ILL. COMP. STAT. 315/7; 20 ILL. COMP. STAT. 2405/3(f); and 305 ILL. COMP. STAT. 5/9A-11.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that this Court:

A. Issue a declaratory judgment that it is unconstitutional under the First Amendment, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, for Defendants to compel Plaintiffs and other personal assistants and child care providers to associate with an exclusive representative and its expressive activities.

B. Issue a declaratory judgment that the statutory provisions described in paragraph 71 are unconstitutional under the First Amendment, as secured against State infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, and are null and void;

C. Issue preliminary and permanent injunctions that enjoin enforcement of the statutory provisions described in paragraph 71 and enjoin Defendants from requiring Plaintiffs to associate with an exclusive representative and its expressive activities;

D. Award Plaintiffs nominal and compensatory damages from SEIU-HCII;

E. Award Plaintiffs their costs and reasonable attorney fees pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988; and

F. Grant such other and additional relief as the Court may deem just and proper. Dated: December 11, 2015

Respectfully submitted,

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APPENDIX D

Illinois Public Labor Relations Act
(Relevant Provisions)

5 Ill. Comp. Stat. 315/3. Definitions.

As used in this Act, unless the context otherwise rquires:

* * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including (i) interns and residents at public hospitals, (ii) as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal assistants working under the Home Services Program under Section 3 of the Rehabilitation of Persons with Disabilities Act, subject to the limitations set forth in this Act and in the Rehabilitation of Persons with Disabilities Act, (iii) as of the effective date of this amendatory Act of the 94th General Assembly, but not before, child and day care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code, (iv) as of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (n), home care and home health workers who function as personal assistants and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Rehabilitation of Persons with Disabilities Act, no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise . . .

Home care and home health workers who function as personal assistants and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Rehabilitation of Persons with Disabilities Act shall not be considered public employees for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal assistants and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Rehabilitation of Persons with Disabilities Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/). Child and day care home providers shall not be considered public employees for any purposes not specifically provided for in this amendatory Act of the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

5 Ill. Comp. Stat. 315/6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements.

(a) Employees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois and employees excluded from the definition of "public employee" under subsection (n) of Section 3 of this Act, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor

organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities. Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).

(b) Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

(c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required

upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

(d) Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

(e) When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3 (g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer

from the earnings of the nonmember employees and paid to the employee organization.

(f) Only the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments. Except as provided in subsection (e) of this Section, any such deductions shall only be made upon an employee's written authorization, and continued until revoked in writing in the same manner or until the termination date of an applicable collective bargaining agreement. Such payments shall be paid to the exclusive representative.

Where a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement or the resolution of an impasse under Section 14, the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached including dues deduction or a fair share clause. For the benefit of any successor exclusive representative certified under this Act, this provision shall be applicable, provided the successor exclusive representative: (i) certifies to the employer the amount constituting each nonmember's proportionate share under subsection (e); or (ii) presents the employer with employee written authorizations for the deduction of dues, assessments, and fees under this subsection. Failure to so honor and abide by dues deduction or fair share clauses for the benefit of any exclusive representative, including a successor, shall be a violation of the duty to bargain and an unfair labor practice.

(g) Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body of which such employees are members. Such employees may be required to pay an amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise pay such service fee. If the affected employees and the bargaining representative are unable to reach an agreement on the matter, the Board may establish an approved list of charitable organizations to which such payments may be made.

5 Ill. Comp. Stat. 315/7. Duty to Bargain.

A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act" unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification: (1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (3) notifies the Board within 30 days after such notice of the existence of a dispute, provided no agreement

has been reached by that time; and (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given to the other party or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representative of the employees pursuant to the provisions of subsection (a) of Section 9, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Collective bargaining for home care and home health workers who function as personal assistants and individual maintenance home health workers under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in Public Act 93-204 or this amendatory Act of the 97th General Assembly, as applicable.

Collective bargaining for child and day care home providers under the child care assistance program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 94th General Assembly.

* * *

EXECUTIVE ORDER NUMBER 8 (2003)

EXECUTIVE ORDER ON COLLECTIVE BARGAINING BY PERSONAL CARE ASSISTANTS

WHEREAS, personal care assistants ("personal assistants") provide service to Illinois citizens in need ("recipients") as part of the Home Services Program under 20 ILCS 2405/3 and 89 Ill. Admin. Code section 676.10, et seq.; and

WHEREAS, in *State of Illinois* (*Departments of Central Management Services & Rehabilitation Services*), 2 PERI 2006 at 35 (1985), the State Labor Relations Board found that personal assistants are in a "unique" employment relationship and that the State was not "their 'employer' or, at least, their sole employer" under the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., and the Board therefore held that it lacked jurisdiction over the relationship between the State and the personal assistants; and

WHEREAS, the decision in *State of Illinois* left the Executive Branch with discretion over the organization of its relationship with personal assistants; and

WHEREAS, it is important to preserve the recipients' control over the hiring, in-home supervision, and termination of personal assistants and, simultaneously, preserve the State's ability to ensure efficient and effective delivery of personal care services and control the economic terms of the personal assistants employment under the Homes Services Program; and

WHEREAS, each recipient employs only one or two personal assistants and does not control the economic terms of their employment under the Homes Services Program and therefore cannot effectively address concerns common to all personal assistants; and

WHEREAS, the personal assistants work in the homes of recipients throughout Illinois and therefore cannot effectively voice their concerns about the organization of the Home Services program, their role in the program, or the terms and conditions of their employment under the Program without representation; and

WHEREAS, it is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services; and

WHEREAS, personal assistants are not State employees for purposes of eligibility to receive statutorily mandated benefits because the State does not hire, supervise or terminate the personal assistants; and

WHEREAS, the State has productively dealt with a representative of the personal assistants on an informal basis, and a system of collective bargaining has successfully been implemented with respect to similarly situated workers in other states.

THEREFORE, I hereby order the following:

1. The State shall recognize a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of employment of personal assistants working under the Homes Services Program that are within the State□s control.

2. This Executive Order is not intended to and will not in any way alter the "unique" employment arrangement of personal assistants and recipients, nor will it in any way diminish the recipients□ control over the

hiring, in-home supervision, and termination of personal assistants within the limits established by the Home Services Program.

This Executive Order 2003-8 shall take effect upon filing with the Secretary of State.

Rod R. Blagojevich, Governor

Issued by Governor: March 4, 2003

EXECUTIVE ORDER NUMBER 1 (2005)

EXECUTIVE ORDER ON COLLECTIVE NEGOTIATION BY DAY CARE HOME PROVIDERS

WHEREAS, day care homes provide essential services to Illinois children and families in need as part of the State's child care assistance program administered by the Department of Human Services under 305 ILCS 5/9A-11 and 89 Ill. Admin. Code 50.210 et seq.; and

WHEREAS, the State Department of Human Services has adopted as priority goals: fully implementing a child care assistance system that enables all Illinois families to access quality care; supporting quality child care through a system of adequate base rates and financial incentives for implementing progressively higher quality standards; and supporting a child care workforce dedicated to providing the highest quality care;

WHEREAS, there is a continuing need to expand access to quality child care including that provided by day care home providers and low reimbursement rates have contributed to the decreasing numbers of licensed homes and the difficulties of parents in finding adequate care;

WHEREAS, there is a need to stabilize the day care home workforce which includes licensed and license exempt home providers;

WHEREAS, it is important to preserve freedom of choice for parents in selecting appropriate day care services for their children and to do so, the State must be able to ensure the availability of quality child care services on terms that will attract and retain sufficient numbers of licensed and license exempt day care home providers in the State's child care assistance program; and

WHEREAS, individual families receiving services through the State's child care assistance program do not control all the economic terms of the delivery of services and therefore cannot effectively address concerns common to day care home providers; and

WHEREAS, day care home providers are located throughout the State and therefore may not be able to effectively voice their common concerns about the State's child care assistance program, their role in the program, or the terms and conditions of their provision of services under the program without representation; and

WHEREAS, it is essential for the State to receive input from the day care home providers in order to improve the delivery of services under the State's child care assistance program; and

WHEREAS, the Department of Human Services would benefit from a system of representation for day care home providers in implementing its goals for improvement of the State's child care assistance program and in particular the delivery of quality day care home services; and

WHEREAS, a system of representation for providers should provide for a fair election, instituted by a reasonable percentage of providers, given the 70% provider turnover every year, and held promptly in accordance with nationally recognized standards for consent elections; and

WHEREAS, the Department of Human Services, subject to my constitutional authority to ensure the faithful execution of the laws, has plenary authority to determine the terms and conditions under which day care services are provided in the State's child care assistance program, including setting rates and other

compensation and devising a process for ensuring that those rates are fair and reasonable; and

WHEREAS, day care home providers are not State employees for the purposes of eligibility to receive statutory benefits because the State does not hire, supervise or terminate their services.

THEREFORE, I hereby order the following:

I. The State shall recognize a representative designated by a majority of day care home licensed and license exempt providers, voting in a mail ballot election, as the exclusive representative of day care home providers that participate in the State's child care assistance program, accord said representative the same rights and duties granted to employee representatives by the Illinois Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective negotiations with said representative concerning all terms and conditions of the provision of services for day care home providers under the State's child care assistance program that are within the State's control. Any organization that can show that at least 10% of providers wish to be represented by it may participate in such an election, which shall be held within 42 days of a request for an election.

II. In according the day care home providers and their selected representative these rights, the State intends that the "State action exemption" to application of the federal antitrust laws be fully available to the State, day care home providers and their selected representative to the extent that their activities are authorized pursuant to this Executive Order.

III. This Executive Order is not intended to and will not alter in any way either (1) the role of parents in selecting, directing and terminating the services of

day care home providers under the State's child care assistance program nor (2) the fact that the providers are not state employees.

This Executive Order 2005-1 shall take effect upon filing with the Secretary of State.

Rod R. Blagojevich, Governor

Issued by Governor: February 18, 2005