No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a State may, consistent with the First and Fourteenth Amendments to the Constitution, compel homecare providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

Whether homecare providers may challenge a law that permits the State to compel them to associate with a union before the State has designated the particular union that will represent them?

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1988, the Mackinac Center for Public Policy is a Michigan-based nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The instant case concerns the Mackinac Center as it has challenged similar governmental activities within the State of Michigan.

SUMMARY OF ARGUMENT

1. Organized labor has suffered a well-publicized, decades-long decline in membership. As one of the strategies for reversing this trend, organized labor launched a major national initiative to increase its membership by redefining employer-employee relations when state or local governments help compensate a service rendered. Of particular interest are home help workers, who provide personal assistance to the elderly and disabled in their own homes. Although care providers are employed by their individual clients, their compensation often occurs through public assistance provided by a state governmental agency for the care recipient. In the mid-1980's organized labor launched a strategic effort to create a new labor market among home help providers.

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1. All parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amicus curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Early organizing drives in Illinois and California attempted to classify home help providers as public employees. These attempts were unsuccessful because courts and state labor boards recognized that home help providers did not have a public employer, nor were they government employees.

Organized labor shifted its strategy, first in California and then in other states. The new approach involved the creation of a public authority that could serve as the purported employer of home help care workers. The new approach involved the creation of a public authority that could serve as the purported employer of home help care workers. The unionization of these providers is unique in that privately employed individuals, who are compensated through needs-based government assistance programs, are organized collectively despite having no formal, professional affiliation with each other. Unions in several states have successfully organized these private individuals into a bargaining unit of "public employees" for the purpose of petitioning the state for changes to public assistance programs. The Seventh Circuit failed to appreciate the true nature of these arrangements in holding that home help providers are public employees.

2. The effort to organize privately employed home health care workers was instructive for Michigan labor organizations, who then sought to organize home help providers similarly situated to Petitioners in the instant matter and later in-home child care providers. Michigan, notably, is one of only a few states to authorize and implement the unionization of home help providers, only to later abandon the arrangement. The unionization of home help providers became heavily contested and resulted in intense public scrutiny due to litigation in state

and federal courts, several legislative enactments and a proposed amendment to state constitution. A discussion of the Michigan home help provider unionization and the subsequent repeal of the policy illustrates how this new model of unionization functions.

3. A review of home help unionization efforts around the country demonstrates that these arrangements share consistent attributes: the classification of private caregivers as public employees for the sole purpose of collective bargaining, as well as the lack of "employer" control over the hiring, supervision or termination of home help providers. The strategic value of these unionization efforts is apparent, as organized labor has won some of its largest organizing victories in decades by organizing home help and child care providers. Given the impingement on the First Amendment rights of home help workers, and the lack of a compelling state interest in doing so, the Seventh Circuit erred in extending the holding of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to apply to Petitioners.

ARGUMENT

I. Declining Membership Leads Organized Labor's National Efforts to Unionize Home Help Providers

Organized labor has suffered a well-publicized, decades-long decline in membership.[2] At its in the

2. *See* Alana Semuels, *Union membership in the U.S. continues its long decline*, Los Angeles Times, Jan. 23, 2013; Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, The New York Times, Jan. 23, 2013, at B1; Melanie Trottman and Kris Maher, *Organized Labor Loses Members*, The Wall Street Journal, Jan. 23, 2013.

1950's, union membership represented 35 percent of the total workforce. Union membership as a percentage of the national workforce has since fallen to historic lows, representing just 11.3 percent of the workforce today, and a mere 6.6 percent of private-sector workers.[3]

As one of the strategies for reversing this trend, organized labor launched a major national initiative to increase its membership by redefining employer-employee relations when state or local governments help compensate a service rendered. Labor organizations began organizing home help providers, who provide personal assistance to the elderly and disabled in their own homes, such as bathing, meal preparation, shopping, and administrating medications.[4] Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1, 3 (2002).

Although care providers are employed by their individual clients, their compensation often occurs through public assistance provided by a state governmental agency for the care recipient. Organized labor's new initiative to organize these care providers represented a "strategic intervention of the union in the formation of a new labor

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3. Press Release, *Union Members – 2012*, Bureau of Labor Statistics (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/union2.htm.

4. Due to multiple jurisdictions discussed herein, workers providing in-home care services are referred to using a variety of labels, including "home help providers," "homecare providers," "personal assistants," and "personal care attendants." Unless quoting from a cited source, this brief refers to said workers as "home help providers."

market," which "established a new form of industrial relations." *Id*. at 18.

Organized labor has encountered problems seeking to organize home help employees. Organizing the workers under the National Labor Relations Act (NLRA) was precluded; the NLRA defined "employee" to exclude both those "in the domestic service of any family or person at his home" and "any individual having the status of an independent contractor." 29 U.S.C. § 152(3). Further complicating matters for organized labor was the NLRA definition of "employer," which excludes "any State or political subdivision thereof." 29 U.S.C. § 152(2).

The National Women's Law Center discussed the challenges related to organizing child care providers, which are analogous to home help providers:

> Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person's home from the legal definition of "employee." . . . . [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child's home, [are] otherwise not in an employer-employee relationship under the federal labor relations laws.

. . .

> Even if . . . providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of "employer" under the federal labor laws, and thus state and local public-sector employees . . . require specific legal authority in order to obtain collective bargaining rights with their government employer . . . .
>
> In other words, without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers' representative.

Deborah Chalfie et al., *Getting Organized: Unionizing Home-based Child Care Providers* 6-7 (2007) (emphasis added).[5]

A review of the early efforts to organize home help providers will illustrate the practical and legal obstacles concomitant with organizing care providers, and will describe organized labor's strategy for overcoming those hurdles.

In 1985, the Service Employees International Union (SEIU) attempted to unionize all of the home

5. *Available at* http://goo.gl/DKj5Qg.

help providers in Chicago and portions of Cook County. The state labor board held providers were not public employees, stating:

> Embodied in . . . the Illinois Public Labor Relations Act (Act) . . . is a statement of the Act's fundamental purpose and this Board's resulting responsibility "to regulate labor relations between public employers and employees." An application of this Act to the relationship between [the state agency] and the service providers would render this purpose meaningless. The facts herein present us with a very unique situation which is virtually impossible for us to regulate. There is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients).

State of Illinois Dep't of Cent. Mgmt. Serv. and Dep't of Rehab. Serv. and Serv. Employees Int'l Union, AFL-CIO, 1985 WL 1144994 (Ill. State Labor Relations Bd. Dec. 18, 1985).[6]

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6. Notwithstanding the 1985 state labor board ruling, years later Gov. Rod Blagojevich signed an executive order requiring state recognition of a union of home help providers under the Illinois Public Labor Relations Act. Ill. Exec. Order 2003-8 (Mar. 4, 2003). It is unclear whether an executive order could overcome an agency interpretation of a statute; nevertheless, the Illinois Legislature later codified the arrangement. Ill. Pub. Act 93-204 (the enactment Petitioners are challenging as unconstitutional).

In the 1980s, SEIU attempted to organize all the home help providers against the County of Los Angeles. When the county refused to meet and confer with SEIU as a bargaining agent, SEIU brought suit. The California Court of Appeals held that the home help providers were not employees under the controlling statute. *Serv. Employees Int'l Union v. Cnty. of Los Angeles*, 275 Cal. Rptr. 508 (Ct. App. 1990). In making its decision, the appellate court looked to the common law test of what constituted an employee-employer relationship and held no such relationship existed between the home help provider and the county. The court quoted the trial court decision with approval:

> The county exercises no supervisory control over providers. The manner in which the provider's tasks are performed is determined by the recipient, as are the hours when such services are performed. The provider is free to terminate his or her services without notice to the county; likewise, a recipient may discharge a provider at any time without notice to the county. If a provider is not performing satisfactorily the county has no right to intervene. Where the recipient's health or safety is endangered by such unsatisfactory performance, the county's only recourse is to place the recipient in an appropriate facility.

Id. at 511.

California labor organizers responded by formulating and effecting a three-part strategy to "engage in the structuring of a new sector of the workforce," which

included grassroots organizing, policy changes, and coalition building. Delp & Quan, *supra* at 5-6.

The SEIU's grassroots outreach illustrates obstacles organized labor navigated. A workforce of independent contractors serving private clients is naturally quite fragmented. The targeted workers in Los Angeles County spoke more than 100 languages and were scattered over 4,083 square miles. *Id.* at 2, 4. To simply identify the workers, organizers visited "senior citizens' centers, doctor's offices, markets, churches . . . [and] even dug in trash cans to find lists of workers." *Id.* at 6. The union also had to overcome the negative connotations of organizing, which could lead to "wage demands and strikes against elderly and disabled consumers." *Id.* at 5.

The SEIU also recognized the need to enact policy changes to create an "employer" common to the 74,000 home care providers in Los Angeles County. The union's political advocacy eventually led to the California Legislature enacting a statute that allowed counties to establish "by ordinance, a public authority to provide for the delivery of in-home supportive services." Cal. Welf. & Inst. Code § 12301.6(a)(2). This public authority would be deemed "the employer of in-home supportive services personnel [who were] referred to [HHP] recipients," although the recipients would "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them." Cal. Welf. & Inst. Code § 12301.6(c)(1). The California Legislature subsequently passed legislation requiring each county to establish a public authority to act as an employer for home help providers by January 1, 2003. Cal. Welf. & Inst. Code § 12302.25(a).

Los Angeles County eventually created one of these entities and, in 1999, SEIU successfully organized against it. This one drive netted organized labor 74,000 additional members and was described as "[o]ne of the most significant gains in union membership in fifty years." David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 Fordham Urb. L.J. 277, 280 (2008).

Oregon was the next state to attempt the organization of home help providers. Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1406 (2008). A bill to create a statewide home care commission was introduced in the Oregon Legislature in 1999, but languished. *Id.* The Oregon Public Employees Union, an affiliate of SEIU, shifted tactics and gathered enough petition signatures from voters to place a proposed constitutional amendment on the ballot. *Id.* The measure was approved by 63 percent of the voters in November 2000. *See* Or. Const. art. XV, § 11. The measure created a home care commission to establish standards of care for "elderly and people with disabilities who receive personal care services in their homes by home care workers hired directly by the client and financed by payments from the State . . . ." *Id.* at § 11(1)(b)(A). The commission was designated "for purposes of collective bargaining" as "the employer of record of home care workers hired directly by the client and paid by the State[.]" *Id.* at § 11(3)(f). The first collective bargaining agreement, delayed by a state budget crisis, was finalized in 2003. Patrice M. Mareschal, *Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States*, 31 Lab. Stud. J. 25, 34 (2006).

In 2001, voters in Washington State approved a similar law through the initiative process, which in pertinent part is codified at Wash. Rev. Code § 74.39A.270. The initiative established a Home Care Quality Authority that bargained with SEIU, the union designated as the representative of some 26,000 home help providers. Mareschal, *supra* at 35. Under the law as initiated, the Legislature ratified any negotiated compensation increases for home help providers; should the Legislature reject or fail to act on the funding request the negotiations are reopened to secure funds necessary to implement the agreement. *Id*. at 36. The law was later modified to enable the home care union to negotiate directly with the Governor. The law states that the Governor is the public employer, and individual providers are public employees, "solely for the purposes of collective bargaining . . . ." Wash. Rev. Code § 74.39A.270(1). Home help recipients retained the right to select, hire, supervise, and terminate individual home help providers. Wash. Rev. Code § 74.39A.270(4).

In addition to California, Oregon, and Washington, six other states currently authorize the unionization of workers who provide home help to recipients of public assistance; these states authorize various public bodies or officers to actively bargain with those recipients. An examination of each state's arrangement reveals several features in common: (1) the creation of a public body to serve as an employer of record for bargaining purposes; (2) the state's disavowal of a true employment relationship with home help providers; and (3) reliance on the state's budgeting process for changes to the compensation of home help providers.

The Illinois statute at issue in the instant matter "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act" designated the State of Illinois as the public employer of personal assistants providing services through the state's Home Services Program. 20 Ill. Comp. Stat. 2405/3(f). The personal assistants are referred to as "public employees" but the statute explicitly constrains the employment relationship:

> 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.

Id.

In Massachusetts, the Legislature passed a law that created the Personal Care Attendant Workforce Council within the executive office of Health and Human Services. Mass. Gen. Laws ch. 118E, § 71. The Council is designated as the employer of "personal care attendants," who are considered "public employees" for the purpose of state collective bargaining. Mass. Gen. Laws ch. 118E, § 73(b). The statute affirms the right of care recipients to "select, hire, schedule, train, direct, supervise and terminate any personal care attendant . . . ." Mass. Gen. Laws ch. 118E, § 73(a). Personal care attendants "shall not be considered public employees or state employees for any purpose" apart from collective bargaining and the care providers are not eligible for state employee benefits programs. Mass. Gen. Laws ch. 118E, § 73(b).

In 2007, Maryland Gov. Martin O'Malley issued an executive order authorizing home help providers directly reimbursed by the state through specified public assistance programs to collectively organize. Md. Exec. Order No. 01.01.2007.15 (Aug. 6, 2007). The order authorized providers to meet and confer with the state concerning reimbursement rates under the programs, payment procedures, and benefits. *Id.* at C. Any provisions of an agreement requiring legislative action were to be jointly presented to the legislative body. *Id.* Subsequently in 2011, the Maryland General Assembly codified the authorization for independent home help providers to bargain with the state. Md. Code Ann., Health-Gen. §§ 15-901, *et seq.* Any agreement that requires the appropriation of funds is "recommended" to the General Assembly for the appropriation. Md. Code Ann., State Pers. & Pens. § 3-501(d)(2). The law affirmed the right of program recipients to "select, direct, and terminate the services" of care providers. Md. Code Ann., Health-Gen. § 15-907.

In 2008, Missouri voters approved a measure titled "The Quality Home Care Act." Mo. Rev. Stat. §§ 208.850-871. The measure created the Missouri Quality Home Care Council and empowered the body to bargain collectively with a representative of home help providers (referred to as "personal care attendants" in statute). Mo. Rev. Stat. § 208.853. The Council is defined as a "public body" and personal care attendants are considered employees of the council for purposes of collective bargaining. Mo. Rev. Stat. § 208.862. The statute later states that these workers "shall not be considered employees of the state of Missouri or any vendor for any purpose." *Id.* The Council is empowered to "recommend" changes to personal care attendants' wages to the Missouri General Assembly. Mo. Rev. Stat. § 208.853.

In Connecticut, the relevant statute, adopted in 2012, creates the Personal Care Attendant Workforce Council, which negotiates with a statewide bargaining unit of "personal care attendants." Conn. Gen. Stat. § 17b-706a(e)(1). Personal care attendants "shall not be considered state employees" and are prohibited from utilizing state employee health benefits and pensions. Conn. Gen. Stat. § 17b-706b. Care recipients who receive state-funded services from a personal care attendant retain the right to "hire, refuse to hire, supervise, direct the activities of, or terminate the employment of any personal care attendant." Conn. Gen. Stat. § 17b-706a(e)(2)(A). Any agreement negotiated between the care attendants and the Council that requires the appropriation of funds is subject to the state's "regular budgetary approval process, subject to funds being made available and affirmative legislative approval." Conn. Gen. Stat. § 17b-706b(c)(8).

In 2013, the Vermont General Assembly authorized home help providers (referred to as "independent direct support providers") to bargain collectively with the state. Vt. Stat. Ann. tit. 21, §§ 1631-44. The providers were not to "be considered state employees for purposes other than collective bargaining." Vt. Stat. Ann. tit. 21, § 1640. A collective bargaining agreement under the statute may not infringe on the rights of care recipients to hire, supervise or terminate any care provider. *Id.* Any state funding pursuant to an agreement with unionized care providers depends entirely on the general assembly:

> If the State and the exclusive representative reach an agreement, the Governor shall request from the General Assembly an appropriation sufficient to fund the agreement in the next

> operating budget. If the General Assembly appropriates sufficient funds, the negotiated agreement shall become effective and binding at the beginning of the next fiscal year. If the General Assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the General Assembly and shall become effective and legally binding in the next fiscal year.

Vt. Stat. Ann. tit. 21, § 1639(a).

Over the last fifteen years, organized labor has continued to refine its approach to organizing home help providers. The unionization of these providers is unique in that privately employed individuals, who are compensated through needs-based government assistance programs, are organized collectively despite having no formal, professional affiliation with each other. Unions in several states have successfully organized these private individuals into a bargaining unit of "public employees" for the purpose of petitioning the state for changes to public assistance programs. This requires the creation of a "public employer" to bargain with the privately employed individuals. Negotiations between the care providers and the ostensible public employer are predicated on the ability to petition legislatures for necessary appropriations or changes in reimbursement rates.

This form of unionization stands in stark contrast to traditional collective bargaining arrangements, which consist of a labor representative negotiating with an

employer on behalf of employees of that employer. As one commentator writes: "The one-on-one character of [an in-home] care relationship — where an individual provider interacts with several [clients], but does so separately with each one — stands in sharp opposition to the vision of *collective* bargaining." Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. Kan. L. Rev. 321, 340 (2007) (emphasis in original).

The unionization of home help providers in Illinois is the first such arrangement to be considered by a federal appeals court. In the decision below, the Seventh Circuit held that homecare recipients and the State of Illinois are joint employer of Petitioners, as the state regulates the providers' industry and how much the providers are paid. Pet. App. 9a-11a. The Seventh Circuit extended the holding of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to apply to personal assistants in the Illinois home-care Medicaid waiver program who are classified as state employees for the purposes of collective bargaining. Pet. App. 13a.

In *Abood*, this Court upheld the constitutionality of requiring public school teachers to finance expenditures by the union for collective bargaining, contract administration, and grievance adjustment purposes. The government's "important" interest in "labor peace" justified the "impingement upon associational freedom" of the public school teachers. *Id.* at 224-25.

The Seven Circuit clearly failed to appreciate the significant distinctions of individuals who are public employees, such as the school teachers in *Abood*, and

individuals who are partially compensated with money distributed by a public assistance program administered by the state. A discussion of the experience in Michigan will illuminate those distinctions.

II. Unionization of Privately Employed Workers Under Public-Sector Law in Michigan

As in the states described above, organized labor in Michigan sought to organize consumer-directed caregivers who are privately employed, though compensated through government assistance programs. Labor organizations in Michigan conducted two efforts to unionize such workers; first, home help providers similarly situated to Petitioners in the instant matter, and later with in-home child care providers.

Michigan, notably, is one of only a few states to authorize and implement the unionization of home help providers, only to later abandon the arrangement. The unionization of home help providers became heavily contested and resulted in intense public scrutiny due to litigation in state and federal courts, several legislative enactments and a proposed amendment to the state constitution. A discussion of the Michigan home help provider unionization and the subsequent repeal of the policy may provide relevant information to assist the Court.

A. Unionization of Home Help Providers

The Home Help Program is part of Medicaid, a needs-based federal program that is administered in Michigan by the Department of Human Services ("Mich.

DHS") and the Department of Community Health ("Mich. DCH"). Department of Community Health Audit of Home Help Program (Mar. 2005). The program provides unskilled care to Home Help Program recipients living independently:

> Home help services . . . are provided to enable functionally limited individuals to live independently and receive personal care services in the most preferred, least restrictive settings. Individuals or agencies provide [home help services]. The services that may be provided consist of unskilled, hands-on personal care for twelve activities of daily living (ADL), (eating, toileting, bathing, grooming, dressing, transferring, mobility) and instrumental activities of daily living (IADL), (taking medication, meal preparation and cleanup, shopping and errands, laundry, housework).

Id. at 1. According to a 2005 survey, 75 percent of home help providers began doing so because a family member or close friend was in need of care. Caroline M. Sallee, *The Role of MQC3 and Home Help: Serving Michigan's Long-Term Care Population* 10, Anderson Economic Group (Dec. 13, 2011). In fiscal 2007 through 2010, the HHP served 48,205, 50,862, 52,082 and 53,516 care recipients, respectively. *Id.* at 15 (average monthly numbers of care recipients).

In April 2004, Mich. DCH and a local governmental entity entered into an interlocal agreement[7], which created the Michigan Quality Community Care Council (MQCCC), a new public body. Interlocal Agreement Between the Department of Community Health and the Tri-County Aging Consortium (Apr. 24, 2004).[8] The new interlocal agreement purported to give MQCCC the power to act as a public employer of home help providers throughout the state who provided assistance through the Home Help Program. The interlocal agreement empowered MQCCC to "bargain collectively and enter into agreements with labor organizations. [MQCCC] shall fulfill its responsibilities as a public employer . . . with respect to all its employees." *Id.* at § 6.11. While purporting to establish MQCCC as the public employer of home help providers, the interlocal agreement stated that consumers (that is, the recipients of home help care) held the "exclusive right to select, direct, and remove the Provider who renders Personal Assistance Services to that Consumer." *Id.* at § 6.03.

In January 2005, the MQCCC and SEIU petitioned the Michigan Employment Relations Commission (MERC) to become the collective bargaining agent for home help providers. The Commission oversees the certification process of unions representing public employees in the

7. Under state law, interlocal agreements allow two or more local governmental entities to enter into contractual undertakings or agreements with one another or with the state for the joint administration of any functions or powers that each would have the power to perform separately. Mich. Const. 1963, art. 7, § 28; Mich. Comp. Laws §§ 124.501-512.

8. *Available at* http://goo.gl/lhZrho.

state of Michigan. Mich. Comp. Laws §§ 423.201 *et seq.* The SEIU and the MQCCC mutually consented that home help providers were public employees and that the Commission thereby had jurisdiction:[9]

> 6. The Parties acknowledge that MERC has jurisdiction over questions related to the representation of such employees[,] as the individuals are employees, as defined by the PERA, of the Michigan QCCC, a public body corporate[,] even though the individual persons receiving care retain authority over their personal selection and retention of particular homecare workers.

MQCCC and SEIU Addendum to Consent Election Agreement at 2.[10]

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9. The Commission's jurisdiction in this representation petition was questionable. It is axiomatic that parties cannot consent to a tribunal 's subject-matter jurisdiction where none exists. *Gonzales v. Thaler*, 132 S.Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). The Commission would only possess jurisdiction if home help providers were, indeed, public employees. *Prisoners ' Labor Union v. Dep 't of Corrections*, 61 Mich. App. 328, 330 (1975) ("It is undisputed that [the Michigan Employment Relations Commission] has jurisdiction over the inmates ' claims if and only if those inmates are 'public employees ' within the meaning given that term in [the Public Employment Relations Act]."). A sua sponte determination of whether these people were public employees should have occurred before the Commission allowed a vote.

10. *Available at* http://goo.gl/0n4QKD.

The Commission conducted a vote and SEIU was certified as the collective bargaining agent for 41,000 home help providers in April 2005.[11]

One year later, in April 2006, the first purported collective bargaining agreement was adopted between MQCCC and SEIU. It indicated that consumers (care recipients) retained control over hiring and firing home help providers:

> The parties reaffirm that Home Help Consumers have the sole and undisputed right to: 1) hire Providers of their choice . . . ; 2) remove Providers from their service at will and for any reason; and 3) determine in advance and under all circumstances who can and cannot enter their home.
>
> The parties reiterate their prior acknowledgements that: the persons receiving service each, individually, retain control over the physical conditions at the work location and individually direct the performance of services and that such authority and control on the part of the individual consumers will not be, and is not, diminished in any way by this Agreement, nor by the outcome of any subsequent contractual negotiations between these parties.[12]

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11. Tabulation of Election Results, Case No. R05 A-008 (April 11, 2005), *available at* http://goo.gl/CjtPrb.

12. Collective Bargaining Agreement Between the Michigan Quality Community Care Council and SEIU, Local 79, 2006-2009 at 2, *available at* http://goo.gl/jJEJ6i.

The agreement allowed the union to collect dues and agency fees from home help providers. Union dues and agency fees were deducted from payments issued by the state to home help providers.[13]

Significantly, the MQCCC and the union admitted that their wage schedule of hourly compensation rates for home help providers was merely their request to the Legislature, and that the actual compensation would be determined by the legislative process:

> The following schedule of compensation improvements is premised on the proposed State Budget as presented by the Governor. The parties expressly understand that the proposed Budget, as presented, is subject to alteration. Therefore the compensation increases presented below are subject to change as the State Budget is finalized and adopted.[14]

A second collective bargaining agreement effective October 2009 to September 2012 was executed between MQCCC and SEIU Healthcare Michigan.[15] It maintained the language regarding consumer control of hiring, firing, and control over the premises. The compensation remained substantively the same, but was changed to read: "The parties agree that the 2009/10 wage improvements will be determined by the 2009/10 State budget."[16]

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13. *Id.* at 5-6.

14. *Id.* at 7.

15. Collective Bargaining Agreement Between the Michigan Quality Community Care Council and SEIU Healthcare Michigan, 2009-2012, *available at* http://goo.gl/aisrpg.

16. *Id.* at 9.

Collection of the purported "dues" paid by home help providers first began in November 2006. As of March 29, 2012, the Mich. DCH had transferred $31,317,790.40 to the union as dues/agency fees.[17] This sum represents around $480,000 per month.

B. Unionization of Home-Based Child Care Providers

Another attempt in Michigan to organize private workers under the auspices of public-sector collective bargaining laws involved home-based child care providers. As with the home help workers, organized labor perceived the receipt of state assistance as creating a new labor market and began organizing against the money.

Michigan receives a federal Temporary-Assistance-for-Needy-Families block grant, which is administered by Mich. DHS. Some Michigan parents receive a subsidy from the state for child care. In most cases, the Mich. DHS subsidy is less than the full cost of child care, and families are responsible for paying the difference between the subsidy and the cost of the provider.[18] The child care subsidy is directed to the child care providers from the state.

Labor organizations recognized an opportunity to capture new revenue from the subsidy payments transferred from the Mich. DHS to self-employed child

17. FOIA response to the Mackinac Center for Public Policy (Apr. 3, 2012) *available at* http://goo.gl/UszXZM.

18. *Income Eligibility Chart*, Department of Human Services, http://goo.gl/V644pP (last visited Nov. 26, 2013).

care providers. A union called Child Care Providers Together Michigan (CCPTM) — a joint enterprise of the United Auto Workers and the American Federation of State, County and Municipal Employees — was created for this purpose.

In July 2006, the Mich. DHS and a community college entered into an interlocal agreement, creating the Michigan Home Based Child Care Council (MHBCCC).[19] That agreement defined a "provider" as including one "who receives payments for providing home-based child care services through the Department."[20] The parties clarified that "[i]t is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs."[21] The agreement also professed to give the MHBCCC the "right to bargain collectively and enter into agreements with labor organizations. [MHBCCC] shall fulfill its responsibilities as a public employer …."[22]

In September 2006, CCPTM filed a petition for representation proceedings with the Michigan Employment Relations Commission, seeking to unionize

19. Interlocal Agreement between Mich. Dep 't of Human Serv. and Mott Cmty. College (July 27, 2006), *available at* http://goo.gl/4Kmcgk.

20. *Id*. at § 1.15.

21. *Id*. at § 2.01.

22. *Id*. at § 6.10.

against the MHBCCC.[23] In its petition, the CCPTM stated that the bargaining unit included more than 40,000 home-based child care providers who provide services under the Michigan Child Development and Care Program.[24] MERC ran a certification election by mail and CCPTM was certified as the bargaining representative.[25]

The MHBCCC and CCPTM entered into a collective bargaining agreement in 2008. Collective Bargaining Agreement between MHBCCC and CCPTM (effective Jan. 1, 2008).[26] The preamble to the agreement recognizes its distinctive nature:

> This agreement formalizes the unique relationship between the MHBCCC and the CCPTM . . . .
>
> CCPTM and MHBCCC recognize that the implementation of various provisions in this Agreement will necessarily require the assistance and cooperation of entities that are not a party to this Agreement, primarily the Department of Human Services. CCPTM and MHBCCC agree to work together in good

23. Petition for Representation Proceedings, No. R06 I-106 (Sept. 8, 2006), *available at* http://goo.gl/6ySzpg. As with home help providers, the Michigan Employment Relations Commission failed to question its jurisdiction over home child care providers.

24. *Id.*

25. Tabulation of Election Results, Case No. R06 I-106 (Nov. 14, 2006) *available at* http://goo.gl/f5okXH.

26. *Available at* http://goo.gl/yUNNWj.

> faith in order to secure the assistance and cooperation of the appropriate entities when required by the provisions of this Agreement.

Id. at 3. The parties indicated the unique arrangement did not constitute a traditional employee-employer relationship between CCPTM and MHBCCC, as the agreement stated that "parents have the sole and undisputed authority to: 1) hire Providers of their choice; and 2) remove Providers from their service at will for any reason." *Id.* at 14.

The union and "employer" were not empowered to mutually agree to terms of compensation for the home-based day care providers; the agreement recognized that the parties were dependent upon the Legislature to fund any agreement reached:

> Although the parties understand that economic increases are largely contingent upon necessary legislative funding, MHBCCC agree to work jointly with CCPTM to find creative solutions to fund economic increases when new funds are insufficient.
>
> The MHBCCC, in agreement with the Union, will recommend to the Governor to make the necessary budget recommendations to the Legislature for Home Based Child Care Providers as outlined in Appendix B — Rates. And in addition, will provide the necessary political support to make effective the economic increases in this agreement.

Id. at 26. If the Michigan Legislature did not provide the requested funding, the parties are to meet to determine how to proceed. *Id.*

The MHBCCC and the CCPTM agreed "union dues" were to come from the child care subsidy payments:

> Deductions of Union dues shall begin no later than thirty (30) days from the first date for which a provider received subsidized payment.
>
> . . .
>
> Union dues and initiation fees shall be deducted from the Provider's payments and remitted to the Union . . . . The warrant stub will state "Union Dues" and the amount of the deduction . . . .

Id. at 9, 15. The collective bargaining agreement defined "providers" as those day care providers who were licensed, registered, or enrolled and receiving subsidy payments. *Id.* at 5. Thus, according to the document's terms, a home-based day care provider was covered by the collective bargaining agreement only when receiving payment through state subsidies.

C. Dissolution of Home-Based Child Care Providers' Unionization

The unionization of Michigan home-based child care providers prompted two high-profile lawsuits challenging the arrangement in 2009.[27]

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27. A petition for writ of certiorari in one of these matters is currently pending before this Court. *Schlaud v. UAW*, 717 F.3d 451 (6th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3101 (U.S. Aug. 19, 2013) (No. 13-240).

These two matters generated significant public awareness and news coverage of the unionization of private day care providers. In March 2011, newly appointed Mich. DHS Director Maura D. Corrigan announced the department had dissolved the agreement with the MHBCCC and would no longer fund it or collect so-called union dues from home-based child care providers, stating unequivocally that home-based day care providers are not state employees.[28] This action essentially ended the unionization of home-based day care providers. No litigation ensued over this administrative action.

D. Dissolution of Home Help Providers' Unionization

The unionization of home help providers who care for disabled adults also attracted significant public attention. The Michigan Legislature responded by defunding MQCCC, the "public employer" of home help providers, for fiscal year 2011-12. Rather than shutting down, the MQCCC stayed afloat by obtaining funding from nongovernmental sources, including SEIU.[29] On April 9, 2012, the MQCCC and SEIU agreed to an extension of the collective bargaining agreement, extending its terms until February 2013.[30]

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28. Press Release, *Michigan Department of Human Services, Mott Community College Dissolve Agreement That Created Michigan Home Based Child Care Council*, Mich. Dep 't of Human Serv. (Mar. 1, 2011), http://goo.gl/Qg3ECw.

29. Assorted Documents Related to SEIU $12,000 Provision to MQCCC, Mackinac Center (last viewed Nov. 25, 2013), http://goo.gl/6hXfqs.

30. Contract Extension Between MQCCC and SEIU (Apr. 9, 2012), *available at* http://goo.gl/pnLT5K.

The Michigan Legislature twice amended the statutory definition of "public employee" in 2012. The first revision was Public Act 45 of 2012, which amended Mich. Comp. Laws § 423.201(1)(e) to indicate that no one could be classified as a government agency employee who did not qualify as an employee of that agency under a 20-factor Internal Revenue Service employment test.

Subsequently, the Michigan Legislature passed Public Act 76 of 2012, which amended the statutory definition of "public employee" to clarify that those who receive "a direct or indirect government subsidy in his or her private employment" are not public employees. Mich. Comp. Laws § 423.201(1)(e)(i). These revisions indicated rejection of organized labor's new public employment theory that indirect recipients of state subsidies were public employees subject to unionization.

Even with the passage of Public Acts 45 and 76, the Mich. DCH did not stop processing the so-called "dues" and "fees" in question. The practice was temporarily halted after an informal legal opinion from the Michigan Attorney General indicated that the enactment of Public Act 76 should terminate the withdrawals. Letter from Richard A. Bandstra, Chief Legal Counsel, Michigan Attorney General, to Rep. Paul E. Opsommer, Michigan House of Representatives (May 24, 2012).[31]

In early 2012, SEIU undertook two actions to extend its ability to represent home help workers by: initiating a proposed constitutional amendment; and suing over the Legislature's enactments.

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31. *Available at* http://goo.gl/7MO7sv.

The proposed constitutional amendment was initiated by a group called Citizens for Affordable Quality Home Care (a coalition consisting of SEIU and government aid program advocates), to be placed on the statewide November 2012 ballot.[32] The proposed amendment, Proposal 12-4, would have amended the Michigan Constitution by creating a new public body within the executive branch of state government and would have authorized that body to bargain collectively with in-home care givers. Pursuant to the amendment, the new public body would have assumed the duties and obligations of the MQCCC, including honoring its unexpired bargaining agreements.

In May 2012, SEIU filed a federal lawsuit against Gov. Richard Snyder and other state officials. *SEIU Healthcare Michigan v. Snyder*, Case No. 12-cv-12332 (E.D. Mich. 2012). The primary issue addressed was whether enforcement of Public Act 76 of 2012 constituted an impairment of a contract — the collective bargaining agreement with its extension until February 2013 — under U.S. Const., art I, § 10. The SEIU stressed its political interests when arguing for a continuation of the dues withholdings: "Any delay in receiving those funds will be ruinous for the Union, which will have to lay off a significant portion of its staff and will be unable to represent the providers and to protect their interests, whether in collective bargaining, in upcoming legislative matters, during the impending general election, or otherwise[.]" (emphasis added). Supplemental Br. in Supp.

32. Full Text of Proposed Constitutional Amendment Proposal 12-4, Michigan Secretary of State, *available at* http://goo.gl/Lnsr0P.

of Pl.'s Mot. for Prelim. Inj., *SEIU Healthcare Michigan v. Snyder*, Case No. 12-cv-12332 (E.D. Mich. 2012).[33] In June 2012, Judge Nancy G. Edmunds issued an Opinion and Order granting the union a temporary restraining order and preliminary injunction that required that the Mich. DCH continue deducting union dues and agency fees until February 28, 2013, the termination date of the contract extension.

In November 2012, Michigan voters defeated Proposal 12-4, which would have amended the constitution to authorize collective bargaining for home help providers, by a 56-44 margin.[34]

In December 2012, the MQCCC board announced that its contract with SEIU would end Feb. 28, 2013. The board further announced that the MQCCC would officially be dissolved as of April 14, 2013.[35]

The Michigan experience shows that the relationship between the "employer" of home help providers and the providers themselves lacked the indicia of a true employment relationship. The public employer was not responsible for hiring providers, placing providers with care recipients, supervising, directing or terminating the providers. The employer had no oversight of providers

33. *Available at* http://goo.gl/7Ujim.

34. 2012 Official Michigan General Election Results, Michigan Secretary of State (Jan. 4, 2013 3:09 PM), http://goo.gl/UpIdJn.

35. Jack Spencer, *SEIU 'Dues Skim' Days Are Numbered*, Michigan Capitol Confidential (Dec. 18, 2012), http://goo.gl/FJ4NkB.

on the premises of a place of employment. Apart from a compelled association for the purpose of petitioning the Legislature for changes in compensation, home help providers were not considered public employees. Michigan's experiment with the unionization of in-home care provider resulted in the transfer of tens of millions of dollars from care providers and their needy clients to a special interest group that, when pressed, stressed its reliance on the arrangement for political and legislative gains.

III. The Compelled Association of Home Help Providers, Who Are Not Public Employees, Cannot be Justified by the State's Interest in Labor Peace Among Its Employees

A detailed examination of one state's experiment with compelled unionization of home help providers, as well as a review of similar programs in other states, demonstrates that these arrangements share consistent attributes: the classification of private caregivers as public employees for the sole purpose of collective bargaining and the lack of "employer" control over the hiring, supervision or termination of home help providers.

The strategic importance of the new labor market of home help providers is evident. Organized labor's membership losses in the private sector have necessitated the identification of new "public sector" employees to organize. Home-based care providers who receive some or all of their compensation through state assistance programs represent one such opportunity. In fact, home care workers have served as a lifeline for organized labor, with some of most significant membership gains occurring

in that sector. SEIU's successful 1999 effort to organize 74,000 home care workers in Los Angeles was described as the "largest union victory in the United States since 1941[.]" Smith, *supra*, 55 U. Kan. L. Rev. at 360. The unionization of 49,000 home-based child care providers in Illinois in 2005 was the second largest organizing drive since 1941. *Id*. at 363. As noted above, Michigan provided 40,000 home help providers upon initial unionization.

As discussed above, the Seventh Circuit extended this Court's holding in *Abood* to workers who provide homecare services through a public assistance program. The Seventh Circuit, however, absolved the State of Illinois of the burden of demonstrating a compelling interest that would justify the impingement of the associational and expressive rights of home help providers.

This Court has recognized that "government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). Similarly, the freedom of individuals to associate (or not to associate) is protected. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Closely related to compelled speech and compelled association is "compelled funding of the speech of other private speakers or groups." *Knox*, 132 S. Ct. at 2288. Infringements on the right of association must serve "compelling state interests" that cannot be achieved through "significantly" less restrictive means. *Roberts*, 468 U.S. at 623.

This Court has repeatedly acknowledged that compelling a worker to financially support a union as a condition of employment is a "significant impingement on

First Amendment rights." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 455 (1984). Nevertheless, the decisions of this Court have tolerated the impingement in order to further the interest in "labor peace." *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986).

Two years ago this Court observed that permitting unions to collect fees from nonmembers in order to eliminate "free-riders" and to further labor peace is "an anomaly." *Knox*, 132 S. Ct. at 2290. Yet the Seventh Circuit relies on the labor peace justification to extend *Abood* to workers who are not employees of the State of Illinois. The home help workers affected by this policy interact with the state in the delivery of homecare assistance to Medicaid recipients, but the Seventh Circuit's novel theory of joint employment falls apart when the details of unionization in Illinois and other states are reviewed.

Organized labor's new initiative to organize the home help providers is a "strategic intervention of the union in the formation of a new labor market," which is designed to establish "a new form of industrial relations." Delp & Quan, *supra* at 18. In their current form, these arrangements are unconstitutional in that they impinge on the home help providers' First Amendment rights.

CONCLUSION

For the reasons stated above the Seventh Circuit's judgment should be reversed.

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