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

REBECCA HILL, RANETTE KESTELOOT, CARRIE LONG, JANE MCNAMES, GAILEEN ROBERTS, SHERRY SCHUMACHER, DEBORAH TEIXEIRA, and JILL ANN WISE,	)	
Plaintiffs,	)	No. 15-CV-10175
v.	)	Honorable Manish. S. Shah
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,	)	U.S. District Court Judge
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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This case concerns whether it is constitutional for the government to extend exclusive representation beyond employer-employee relationships to the relationship between government and citizen. Here, Illinois is compelling personal assistants and child care providers who receive benefits from certain public-aid programs to accept SEIU-HCII as their exclusive representative for petitioning the State over its operation of such programs. In effect, Illinois has designated a mandatory lobbyist to speak for these citizens.

This is unconstitutional. The First Amendment guarantees each individual a right to choose which organization, if any, he or she associates with to "petition the Government for a redress of grievances." U.S. Const. amend I. As such, the government cannot force citizens into associations for purposes of petitioning the government. The very concept turns basic precepts of democracy on their head. Thus, regardless of its propriety within an employer-employee relationship, exclusive representation has no place in the relationship between citizen and sovereign.

The Supreme Court's recent decision in *Harris v. Quinn* makes this clear. 134 S. Ct. 2618 (2014). *Harris* held it unconstitutional for Illinois to force personal assistants to financially support an exclusive representative. *Id.* at 2638. The Court did so because the state interests justifying the unionization of public employees do not apply to nonemployee service providers, *id.* at 2640–41, and because "it would be hard to see where to draw the line" if compulsory unionism were not limited to employment relationships, *id.* at 2638.

The same reasons require confining exclusive representation to employment relationships. No compelling interest justifies exclusive representation outside of the employer-employee relationship. And, if not confined to employees, there would be no limit to this mandatory association. If Illinois is allowed to impose an exclusive representative on citizens who care for loved ones in their own homes, or who operate a day care business in their own homes, then the State could force almost anyone to accept a mandatory agent for lobbying the State.

Apparently recognizing that collectivizing personal assistants and child care providers cannot survive constitutional scrutiny under *Harris*, Defendants base their motions to dismiss on the proposition that exclusive representation is not subject to any constitutional scrutiny because it does not compel association. This is untenable. Personal assistants and child care providers cannot be represented by SEIU-HCII and, at the same time, not be associated with the union. SEIU-HCII cannot speak and contract for personal assistants and child care providers and, at the same time, its speech and contracts not be imputed to those individuals. Defendants' position is incoherent, akin to arguing that a principal is not associated with his agent or with the actions his agent takes on his behalf. SEIU-HCII's power to exclusively represent personal assistants and child care providers necessarily associates those individuals with SEIU-HCII and its expressive activities. Defendants' motion to dismiss should be denied.

FACTS

On a motion to dismiss, the facts are those stated in the Complaint, which must be accepted as true and construed in Plaintiffs' favor. *E.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009). Plaintiffs comprise two groups of citizens who are being forced to accept exclusive SEIU-HCII representation: (1) personal assistants who 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); and (2) child care providers who serve families enrolled in the Illinois Child Care Assistance Program ("CCAP"), 305 ILL. COMP. STAT. 5/9A-11 (2015).

HSP is a Medicaid-waiver program "'[d]esigned to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State,' [and that] allows participants to hire a 'personal assistant' who provides homecare services tailored to the individual's needs." *Harris*, 134 S. Ct. at 2623–24 (quoting Ill. Admin. Code tit. 89 § 676.10(a)). Personal assistants are not employed by the State, but by persons enrolled in the HSP,

who are responsible for locating, hiring, training, supervising, evaluating, and terminating their personal assistants. Pls.' Am. Compl. ¶ 17 (ECF No. 10). The State merely subsidizes a program participant's costs of employing a personal assistant. *Id.* Many personal assistants are relatives of the person receiving care, and many provide care in their own homes. *Id.* at ¶ 18. Plaintiffs 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.* at ¶¶ 18–23.

CCAP is a public assistance program that subsidizes the child care expenses of qualified low-income families. 305 ILCS 5/9A-11; ILL. ADMIN. CODE tit. 89, § 50.101 et seq. The program 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. Most enrolled families also pay a designated co-payment to their day care providers. *See* ILL. ADMIN. CODE tit. 89, §§ 50.310, 50.320.

Families enrolled in CCAP can purchase day care services from any qualified child care provider, including, but not limited to, licensed day care homes and license-exempt providers (collectively "child care providers"). ILL. ADMIN. CODE tit. 89, § 50.410; 45 C.F.R. § 98.30. 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. They are considered businesses for tax and other purposes, and sometimes employ employees. Pls.' Am. Compl. ¶ 28. Plaintiffs Carrie Long and Sherry Schumacher operate day care homes. *Id.* at ¶¶ 36–37.

License-exempt providers include: (1) 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); (2) 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); and (3) individuals 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). *See* Pls.' Am. Compl. ¶ 30. Approximately 69.7% of license-exempt providers in fiscal year 2013 were relative care providers—i.e., were grandparents, aunts, and cousins caring for children to whom they are related. *Id.* at ¶ 31. Plaintiff Ranette Kesteloot is a relative care provider who provides care to great-grandchildren who receive CCAP assistance. *Id.* at ¶ 35.

Like personal assistants, child care providers are not employed by the State of Illinois. *Id.* at ¶ 38. Rather, they are either proprietors of private businesses who serve customers who partially pay for rendered services with public-aid monies, or grandparents, aunts, or cousins who receive public monies for caring for children to whom they are related. *Id.*

Notwithstanding this lack of an employment relationship, in 2003 and 2005 former Illinois Governor Rod Blagojevich issued executive orders calling for the State to treat personal assistants and child care providers as state employees under Illinois Public Labor Relations Act ("IPLRA"), 5 ILCS 315/1 *et seq.*; *see* Pls.' Am. Compl. ¶¶ 39–45. Governor Blagojevich designated SEIU-HCII to be the exclusive representative of these individuals. *Id.* at ¶¶ 42, 44. These executive orders were later effectively codified into law. *Id.* at ¶¶ 41, 45. Under current Illinois law, personal assistants and child care providers are deemed "public employees" solely for IPLRA purposes, but not for other purposes, and SEIU-HCII is deemed their "exclusive representative" for negotiating with the State over aspects of the HSP and CCAP. *Id.*; *see* 5 ILL. COMP. STAT. 315(f), 315(n).

Exclusive representative status grants SEIU-HCII legal authority to act as the agent of all personal assistants and child care providers for petitioning and contracting with the State over certain HSP and CCAP policies. Pls.' Am. Compl. ¶ 50, 59; *see* 5 ILL. COMP. STAT. 315/6(c)-(d). SEIU-HCII has exercised this agency authority by meeting, speaking with, and otherwise petitioning State policymakers concerning these public-aid programs. Pls.' Am. Compl. ¶ 61. SEIU-HCII has also used other expressive means to influence and pressure State policymakers, including members of the General Assembly, to accede to its demands. *Id.* at ¶ 62. This includes conducting public

demonstrations and protests; conducting television, radio, and print advertising campaigns; and engaging in other forms of political advocacy. *Id.* 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 concerning the HSP and CCAP programs. *Id.* at ¶ 63.

SEIU-HCII has entered into several contracts with Illinois as the exclusive representative of personal assistants and child care providers. *Id.* at ¶ 51. These contracts contained terms governing HSP and CCAP reimbursement rates, which are subject to legislative appropriation and federal regulation. *Id.* at ¶¶ 55–56, 66. The contracts also required Illinois to assist SEIU-HCII with increasing its membership ranks by, for example, causing personal assistants and childcare providers to attend membership-recruitment meetings with SEIU-HCII, *id.* at ¶ 52, and forcing personal assistants and childcare providers to pay compulsory fees to SEIU-HCII, *id.* at ¶ 53.

Plaintiffs oppose being forced to accept SEIU-HCII as their exclusive representative for petitioning and contracting with the State. *Id.* at ¶ 70. They do not want to be forced into an agency relationship with this advocacy group. *Id.* Nor do Plaintiffs want to be associated and affiliated with SEIU-HCII's petitioning, contracts, and other expressive activities. *Id.* They bring this suit to vindicate their First Amendment right to individually choose which organization, if any, speaks for them in their relationship with the State.

ARGUMENT

I. Illinois is Compelling Personal Assistants and Child Care Providers to Associate with SEIU-HCII and Its Expressive Activities.

The First Amendment guarantees "a right to associate for the purpose of engaging in those activities protected by the First Amendment," such as "speech" and "petition[ing] for the redress of grievances." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). That right includes a right to associate with advocacy groups to lobby the government. *See, e.g., Citizens Against Rent Control v.*

City of Berkeley, 454 U.S. 290, 294–95 (1981). Given that "[f]reedom of association . . . plainly presupposes a freedom not to associate," *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quoting *Roberts*, 468 U.S. at 623), it is well established that compelling association for expressive purposes infringes on First Amendment rights. *See Knox*, 132 S. Ct. at 2288–89.

Consequently, 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.'" *Id.* at 2289 (quoting *Roberts*, 468 U.S. at 623). Defendants, however, do not argue that compelling personal assistants and childcare providers to accept exclusive SEIU-HCII representation satisfies this scrutiny. And nor could they given *Harris*'s holding that the "labor peace" rationale justifying employee unionization does not apply to non-employees. 134 S. Ct. at 2640–41. Rather, Defendants argue that exclusive representation is not a mandatory association at all and is thus not subject to any constitutional scrutiny. Defendants are mistaken because exclusive representation (1) forces personal assistants and childcare providers into a mandatory agency relationship with SEIU-HCII, and (2) affiliates providers with SEIU-HCII's expressive activities, for (3) the purpose of petitioning, or lobbying, the State.[1]

A. Exclusive Representation Forces Personal Assistants and Child Care Providers Into a Mandatory Agency Relationship with SEIU-HCII.

Exclusive representatives are often called "exclusive bargaining agents." *See, e.g., Harris*, 134 S. Ct. at 2640. 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). This mandatory

[1] Defendants' arguments track the out-of-circuit decisions in *D'Agostino v. Baker*, __ F.3d __ (1st Cir. Feb. 5, 2016) (ECF No. 34); *Jarvis v. Cuomo*, 5:14-1459, 2015 WL 1968224 (N.D.N.Y. Apr. 30, 2015); and *Bierman v. Dayton*, No. 14-3021, 2014 WL 5438505 (D. Minn. Oct. 22, 2014), on appeal, No. 14-3468 (8th Cir.). These opinions are unpersuasive for the reasons stated in this brief.

agency relationship is akin to "the relationship . . . between attorney and client," and to that between trustee and beneficiary. *ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991).

However, unlike with other agency relationships, "an individual employee lacks direct control over a union's actions." *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990). The reason is that 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). "The powers of the bargaining representative are 'comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944)).

As a result, exclusive representatives can, and often do, pursue agendas that do not benefit individuals subject to their mandatory representation. *See Knox*, 132 S. Ct. at 2289; *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977). Exclusive representatives can also enter into contracts that bind everyone subject to their representation, irrespective of whether they approve, and that contain terms that represented individuals oppose and that harm their interests. *E.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (union precluded employees from bringing ADEA discrimination suits in court by agreeing to subject their age-discrimination complaints to arbitration). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers Mfg.,* 388 U.S. at 180.

Unsurprisingly, the Supreme Court has long recognized that exclusive representation impacts and restricts employees' individual liberties. *See Pyett*, 556 U.S. at 271 (holding "[i]t was Congress' verdict that the benefits of organized labor outweigh *the sacrifice of individual liberty* that this system necessarily demands" (emphasis added)); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual em-

ployee to the collective interests of all employees in a bargaining unit"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (holding "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and that "[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").

The impingement that exclusive representation inflicts on *employee* associational rights, however, has been deemed justified by government's overriding interest in so-called "labor peace." *See Abood*, 431 U.S. at 220–21. But that does not change the fact relevant here: that exclusive representation infringes on associational rights and thus must be justified by heightened government interests, just like any other mandatory association. And unlike with employees, the labor peace rationale does not justify exclusive representation of personal assistants or child care providers. *See Harris,* 134 S. Ct. at 2640–41.[2]

On point is *Mulhall v. UNITE HERE Local 355*, which 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. 618 F.3d 1279, 1286–87 (11th Cir. 2010). The Eleventh Circuit recognized 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 . . . its status as his exclusive representative plainly af-

[2] The cases SEIU-HCII cites for the proposition that exclusive representation requires only a rational basis do not support that proposition. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937), and *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 553–54 (1937), involved substantive due-process claims and not First Amendment claims. *Babbit v. United Farm Workers*, 442 U.S. 289, 312–14 (1979), and *Laborers Local 235 v. Walker*, 749 F.3d 628, 634–37 (7th Cir. 2014), upheld state laws limiting a *union's* ability to become, or act as, an exclusive representative because *unions* have no constitutional right to be exclusive representatives. These cases do not address whether imposing an exclusive representative on an individual against their will impinges that individual's First Amendment rights.

fects his associational rights." *Id.* However, 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)). The same analysis governs here, except that the labor peace interest does justify unionizing non-employee personal assistants and child care providers. *Harris,* 134 S. Ct. at 2640–41.

If anything, the associational injury that exclusive representation inflicts on personal assistants and child care providers is far worse than the infringement at issue in *Mulhall.* That case addressed subjecting employees to exclusive representation for dealing with a private employer over workplace issues. This case involves forcing parents and small business operators to accept an exclusive representative for petitioning the *government* over its operation of *public aid programs*, namely HSP and CCAP. Plaintiffs are being forced to associate with SEIU-HCII for purposes of engaging in a core First Amendment activity—lobbying the government. *See infra* pp. 11-12.

B. Exclusive Representation Associates Providers with SEIU-HCII's Expressive Activities.

"T]he purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union." *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987). Consequently, SEIU-HCII's exclusive representative status associates personal assistants and child care providers not only with SEIU-HCII as an entity, but also with the expressive activities SEIU-HCII engages in as their proxy. That includes petitioning and contracting with Illinois' policymakers over the operation and funding of the HSP and CCAP. *See* Pls.' Am. Compl. ¶¶ 61-63.

A contrary conclusion is logically impossible. SEIU-HCII cannot speak and contract for personal assistants and child care providers without those individuals being affiliated with SEIU-HCII's speech and contracts on their behalf. That would be like saying that an agent speaks for his

principal, but the principal is not spoken for by his agent. Just as an agent's actions are imputed to its principal, so too are SEIU-HCII's actions necessarily imputed to those it exclusively represents.

SEIU-HCII argues that state officials and the public recognize that many personal assistants and child care providers may disagree with the positions SEIU-HCII takes on their behalf. SEIU-HCII Br. 11 (ECF No. 30). But this just proves the constitutional injury—i.e., that these individuals are being affiliated with messages *with which they disagree*. So it was in *Boy Scouts of America v. Dale,* in which the Boy Scouts made abundantly clear that it disagreed with the message of gay rights activists it was compelled to associate with by maintaining a written policy against accepting gay scoutmasters and by filing a highly publicized lawsuit challenging the requirement. 530 U.S. 640, 651–52 (2000). This act of compelled association was nonetheless held unconstitutional.

In any event, SEIU-HCII's exclusive representative status creates both the legal reality and the public perception that SEIU-HCII's agenda reflects those of the individuals that it represents. It creates the legal reality because, *as a matter of State law,* SEIU-HCII speaks and contracts for all personal assistants and child care providers. *See* 5 ILL. COMP. STAT. 315/6(c)-(d). It creates the public perception because people will impute a union's speech and agenda to those it represents. For example, the public will generally affiliate a teachers' union's bargaining demands to the teachers that union represents. By making SEIU-HCII the exclusive representative of all personal assistants and child care providers, Illinois has affiliated those individuals with SEIU-HCII's expressive activities in the eyes of both the law and the public.[3]

[3] SEIU-HCII's reliance on *Rumsfeld v. FAIR, Inc.,* 547 U.S. 47, 70 (2006), and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990), is misplaced, as those cases held that merely allowing military recruiters and student groups, respectively, to use school property did not associate the schools with the individuals' messages. A school allowing individuals to use its property is nothing like a state making an advocacy group the mandatory agent of citizens for lobbying the state over public policies, which is what Illinois did here.

C. Personal Assistants and Child Care Providers Are Being Forced to Associate with SEIU-HCII for Lobbying the State Over Matters of Public Policy.

SEIU-HCII's expressive activities as an exclusive representative are to meet and speak with State policymakers over their operation and funding of HSP and CCAP. *See* 5 ILL. COMP. STAT. 315/7; Pls.' Am. Comp. ¶¶ 61–65. In other words, SEIU-HCII "petition[s] the Government for a redress of grievances" under the First Amendment—i.e., engages in "expression directed to the government." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). This petitioning concerns matters of political and public concern, as the HSP and CCAP programs affect vulnerable populations and significantly impact Illinois' strained budget. Pls.' Am. Comp. ¶¶ 64–65; *see Harris*, 134 S. Ct. at 2642–43 (holding SEIU-HCII's bargaining over the HSP to be speech regarding "a matter of great public concern"). The political nature of SEIU-HCII's representational activities is constitutionally significant, because "[p]etitions to the government assume an added [constitutional] dimension when they seek to advance political, social, or other ideas of interest to the community as a whole," *Guarnieri*, 131 S. Ct. at 2498, and

There is also another word to describe SEIU-HCII's function as an exclusive representative: "lobbying." *See* Merriam-Webster's Collegiate Dictionary 730 (11th ed. 2011) (to "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"). SEIU-HCII's function is quintessential "lobbying": meeting and speaking with public officials, as an agent of interested parties, to influence the administration of a public program. Seen for what it is, Illinois is forcing personal assistants and child care providers to accept a mandatory lobbyist.

An example proves the point. If a voluntary association representing doctors met and spoke with State officials seeking changes to a Medicaid program, or if a voluntary association of day care centers petitioned State policymakers to increase CCAP reimbursement rates, those actions would

certainly constitute "petitioning" and "lobbying." SEIU-HCII's function as an exclusive representative is no different, except that it is not a voluntary lobbying association, but a compulsory one. And if the First Amendment prohibits anything, it is that the government cannot dictate who speaks for citizens in their relations with the government.

II. It is Immaterial to Plaintiffs' Compelled Association Claim Whether Exclusive Representation Also Restricts Individuals' Rights to Petition the State.

Plaintiffs claim that Illinois is violating their First Amendment rights by *compelling* them to associate with SEIU-HCII and its expressive activities. Nevertheless, Defendants continually address a straw-man issue not present here: whether Illinois unconstitutionally *restricts* Plaintiffs' right to speak or petition the State. SEIU-HCII Br. 7; State Br. 8 (ECF No. 32). That is not the constitutional injury of which Plaintiffs complain. Nor is it relevant to their cause of action.[4] The government is not free to compel citizens to associate with advocacy groups so long as those citizens are otherwise free to speak or associate with other groups. As Justice Scalia put it when addressing a similar contention in *Harris*, "I suppose the fact that you're entitled to speak against abortion would not justify the government in requiring you to give money to Planned Parenthood." Transcript of Oral Argument at 17, *Harris*, 134 S. Ct. 2618 (No. 11-681).

The Supreme Court's compelled association and speech cases prove the point. In *Dale*, the Boy Scouts were free to speak against the positions of the activists with which it was compelled to associate. In *Wooley v. Maynard*, motorists were free to express messages different from the motto inscribed on the license plates they were required to bear. 430 U.S. 705 (1977). And, in *Miami*

[4] To the extent relevant, exclusive representation interferes with a personal assistant and/or childcare provider's ability to speak and petition because it: (1) prohibits State officials from dealing with them, or any association thereof, over subjects of bargaining, *see Bd. of Educ. of Sesser-Valier Cmty. Unit Sch. Dist. No. 196 v. Ill. Educ. Labor Relations Bd.*, 250 Ill. App. 3d 878, 883–84, 620 N.E.2d 418, 421–22 (1993); (2) means that individual grievances must be resolved in a manner consistent with SEIU-HCII's contract, *see* 5 ILL. COMP. STAT. 315/3(b); and (3) results in personal assistants and childcare providers having to argue against the speech of their *own agent* if they wish to voice dissenting messages.

Herald Publishing Co. v. Tornillo, newspapers were free to publish any article they wished in addition to the government article they were required to publish. 418 U.S. 241, 256–57 (1974). Yet each instance of compelled association or speech was held unconstitutional. So too here, Plaintiffs' ability to express a different message than SEIU-HCII does not somehow make it constitutional for Illinois to forcibly associate Plaintiffs with SEIU-HCII and its expressive activities.

Minnesota State Board v. Knight is inapposite for this reason. 465 U.S. 271 (1984). That case addressed only whether exclusive representation unconstitutionally *restricts* an individual's right to petition the government. *Id.* That is how the *Knight* Court framed the issue before it: "[t]he question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* at 273. The "appellees' principal claim [was] 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. The Supreme Court disagreed, holding "[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.[5]

Knight has no bearing here because Plaintiffs do not allege that Illinois wrongfully excludes them from its bargaining sessions with SEIU-HCII. Nor do they assert a "constitutional right to force the government to listen to their views." *Id.* Rather, Plaintiffs assert their constitutional right not to be forced to associate with SEIU-HCII. Their claim that exclusive representation *compels* association is different from the alleged *restriction* on speech at issue in *Knight*.

III. Exclusive Representation Must be Confined to Employment Relationships.

One of *Harris*'s primary reasons for confining compulsory unionism to employment relationships is because, otherwise, "a host of workers who receive payments from a governmental entity

[5] The portion of the lower court's decision in *Knight* that the Supreme Court summarily affirmed likewise "rejected the constitutional attack on PELRA's *restriction* to the exclusive representative of *participation* in the 'meet and negotiate' process." 465 U.S. at 279 (emphasis added).

for some sort of service would be candidates for inclusion within *Abood's* reach." 134 S. Ct. at 2638. The Supreme Court reasoned that "[i]f we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line." *Id.* The same reasoning requires confining exclusive representation to true employees. If not so confined, the government could designate exclusive bargaining agents to represent any profession or industry in its relations with the government.

This case illustrates not the top of a slippery slope, but its bottom. Illinois is forcing parents who provide home-based care to disabled sons and daughters, Pls.' Am. Compl. ¶¶ 19–23, individuals whose operate home-based businesses, *id.* at ¶¶ 36–37, and grandparents who provide day-care to their grandchildren, *id.* at ¶ 35, to accept an exclusive representative because they receive public-aid monies for their services. Illinois recently extended its net of mandatory representation to ensnare nurses and therapists who provide home-based care to Medicaid recipients, even those who work through managed care organizations. *Id.* at ¶¶ 47–48. If Illinois' actions are deemed constitutional, then the State and other governments could impose mandatory representatives on almost anyone who accepts public-aid monies for their services.

Worse, if this Court were to accept Defendants' position that exclusive representation requires no constitutional justification at all, but only a rational basis, then service providers are not the only ones at risk. The government could politically collectivize any group of citizens.

In *Harris*, the Supreme Court reiterated its reluctance 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.'" 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.*

Adopting Defendants' position would give the government "carte blanche" to appoint mandatory representatives to speak for almost any profession and industry. Accordingly, consistent with *Harris*, Defendants' boundless position must be rejected. Exclusive representation must be confined to employee-employer relationships, which is the only situation where it is justified by government's overriding labor peace interest, and not extended to a citizen's relationship with government where no compelling interest justifies the mandatory association.

Defendants' respective motions to dismiss should be DENIED.

Dated: February 19, 2016

Respectfully submitted,

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Certificate of Service

I hereby certify that on 19 February 2016, I electronically filed the Response to Defendants' Motions to Dismiss with the Clerk of Court using the CM/ECF system, which will send notification of such filing to participants identified on the Notice of Electronic Filing.

By /s/ William L. Messenger
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