16-2327

United States Court of Appeals
for the Seventh Circuit

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

Plaintiffs-Appellants,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS, MICHAEL HOFFMAN, in his official capacity as Director of Illinois Department of Central Management Services, and JAMES DIMAS, in his official capacity as Secretary of Illinois Department of Human Services,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-CV-10175
Honorable Manish S. Shah

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The State and SEIU advance a remarkably expansive position in this case. Instead of suggesting a limiting principle for exclusive representation, the Appellees aver that the government can certify exclusive representatives to speak and contract for citizens in their relations with the government for any rational basis. State.Br. 17; SEIU.Br. 28–44. Appellees do not dispute that such a holding would give the government untrammeled authority to appoint mandatory advocates for any profession or industry. *See* App.Br. 29–32.

The State and SEIU claim exclusive representation is not subject to the constitutional scrutiny applicable to all other mandatory associations because it does not compel association. The Appellees, however, have failed to reconcile the contradictory propositions at their case's core: namely, that SEIU represents all providers, yet all providers are not associated with SEIU; and that SEIU speaks and contracts for providers, yet providers are not associated with SEIU's speech or contracts. Nor could the Appellees square these circles, for the propositions are irreconcilable.

Just as principals are associated with their agents, providers are necessarily associated with their exclusive representative and its conduct as their proxy. That conduct is expressive in nature, as it includes petitioning and contracting with the State over certain Medicaid and childcare policies. Consequently, this mandatory expressive association is subject to exacting constitutional scrutiny.

It is uncontested that this mandatory association fails exacting scrutiny, as the State and SEIU do not rebut Appellant Providers' positions that no compelling state

interest justifies Illinois's imposition of exclusive representation on personal assistants and childcare providers. *See* App.Br. 32–41. This includes the "labor peace" interest that justifies exclusive representation of employees, which *Harris v. Quinn* establishes has no application to providers. 134 S. Ct. 2618, 2639–40 (2014). Accordingly, this Court should hold it is unconstitutional for Illinois to extend exclusive representation beyond employment relationships.

ARGUMENT

A. Personal Assistants and Childcare Providers Do Not Work For The State, But Rather For Citizens Enrolled In Public Aid Programs.

It is telling that the State and SEIU devote few words to discussing the identity and nature of the personal assistants and childcare providers being subjected to exclusive representation. State.Br. 3–5; SEIU.Br. 1–8. Those few words create a misleading impression, as SEIU portrays providers as state servants when stating, "Illinois pays homecare and childcare providers to perform services to carry out state programs." SEIU.Br. 1. It is thus worth reiterating exactly whose First Amendment rights are at stake in this case.

Personal assistants Rebecca Hill, Jane McNames, Gaileen Roberts, Deborah Teixeira, and Jill Ann Wise are mothers who provide care to their disabled sons or daughters in their own homes. Am. Compl. ¶¶ 19–23 (App. 11). While Illinois's Home Services Program ("HSP") subsidizes this home-based care, since it is cost efficient and often best for the recipient, *see Harris*, 134 S. Ct. at 2623–24, these and other personal assistants do not work for the State to carry out its Medicaid program. They work for persons with disabilities. Am. Compl. ¶ 17 (App. 10).

Childcare providers Carrie Long and Sherry Schumacher operate home-based daycare businesses that serve some customers who are enrolled in Illinois Child Care Assistance Program ("CCAP"). Am. Compl. ¶¶ 36–38 (App. 13). Ranette Kesteloot provides home-based daycare to great-grandchildren who receive CCAP benefits. *Id*. at ¶ 35 (App. 13). These, and other, childcare providers do not perform daycare services on behalf of the State of Illinois any more than grocery stores that accept SNAP benefits as payment sell food on behalf of the government.

In short, personal assistants and childcare providers do not work for the State or on its behalf. They are not State employees, contractors, or servants. Providers are private citizens who perform services for other private citizens, often family members, who pay for those services with public-aid monies.

B. Many of the Appellant Providers' Points Are Uncontested.

The State and SEIU offer little or no rebuttal to several important aspects of the Appellant Providers' case. Namely, that:

- Mandatory expressive associations are subject to exacting constitutional scrutiny, which requires the association be justified by compelling state interests that cannot be achieved through means less restrictive of associational freedoms, App.Br. 11–12;
- SEIU's function as an exclusive representative is expressive in nature, as it concerns petitioning and contracting with the State over public policy matters, *id*. at 17–22;

- No compelling state interest justifies exclusive representation of personal assistants or childcare providers, *id*. at 32–39; and
- Finding constitutional Illinois's extension of exclusive representation to personal assistants and childcare providers would give the government free rein to appoint representatives to speak and contract for other professions and citizens in their relations with government, particularly if only a rational basis is required, *id*. at 29–32.

Appellant Providers will rest on their opening brief with respect to these points, and address the point on which there is disagreement: whether the State has associated providers with SEIU and its expressive activities. If this Court concludes that it has, then this mandatory association must be found unconstitutional.

C. Illinois Associates Providers With SEIU and Its Expressive Activities.

SEIU acknowledges that an exclusive "representative is 'responsible for representing the interests of all public employees in the unit'"; that "any collective bargaining agreement must 'contain a grievance procedure which shall apply to all employees in the bargaining unit[,]'" SEIU.Br. 2 (quoting Ill. Comp. Stat. 315/6(d), 315/8); and that "any resulting contract applies to the entire bargaining unit, without regard to whether individuals choose to become union members," *id*. at 12. SEIU further asserts that "the personal assistant workforce chose representation by the Union," *id*. at 5; and that "the childcare provider workforce chose representation by SEIU-HCII," *id*. at 8. Yet, SEIU persists in maintaining that these providers are not associated with their "chose[n]" representative, notwithstanding its authority to

represent and enter into contracts on the providers' behalf. As discussed below, SEIU's grounds for so doing are unpersuasive.

1. *Providers' Disagreement With SEIU's Conduct As Their Mandatory Representative Proves First Amendment Injury and Is Not Exculpatory.*

SEIU's primary argument for why providers are not associated with it is that "outsiders would not reasonably believe that every individual in the bargaining unit endorses or agrees with the Union's positions, so the Union's expressive activities are not attributed to Plaintiffs in the sense that matters for purposes of the First Amendment." SEIU.Br.11–12; *see id*. at 14, 26, 39, 40 (similar). SEIU's acknowledgement that some providers do not endorse or agree with its positions is not a defense, but a self-indictment. The First Amendment prohibits states from affiliating individuals with messages that they oppose. *E.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573–74 (1995).[1] SEIU itself admits "it is true that the government 'may not compel citizens to affiliate with messages with which they disagree.'" SEIU.Br. 27 (quoting App.Br. 19). Yet, that is what the State is doing to providers. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (holding the union's "status as [an employee's] exclusive representative plainly affects his associational rights" because the employee's views "may be at variance with 'a wide variety of activities undertaken by the union in its role

[1] That is not to say that proof of disagreement is required to find a First Amendment violation. It is not, for the First Amendment also protects an individual's right to remain silent and "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573–74. Illinois's imposition of mandatory SEIU representation on providers violates the First Amendment rights not only of providers who disagree with SEIU, such as the Appellant Providers, but also the rights of providers who did not affirmatively choose to associate themselves with SEIU and its expressive activities.

as exclusive representative.'" (quoting *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977))).

This compelled association is no less offensive to the First Amendment simply because outsiders may realize that many providers are being compelled to accept SEIU's representation against their will. Public knowledge of a constitutional violation does not mitigate the injury to a citizen's constitutional rights. For example, the fact that this lawsuit made it public knowledge that each Appellant Provider opposes SEIU and its expressive activities, *see* Am. Compl. ¶ 70 (App. 21), does not alter the fact that Illinois is forcing Appellant Providers to associate with SEIU and its expressive activities in violation of their First Amendment rights.

SEIU's theory that the government does not compel association, if outsiders recognize that individuals do not endorse or agree with the government-compelled message or association, makes little logical sense. The theory is also contrary to case law. It was readily apparent in most compelled association cases that the plaintiffs were being compelled to associate with messages they did not endorse. For example, in *Boy Scouts America v. Dale*, the Boy Scouts made clear they did not want to associate with gay scoutmasters, as they had a written policy on the matter and filed a highly publicized lawsuit challenging the requirement. 530 U.S. 640, 651–52 (2000). In *Wooley v. Maynard*, the public surely recognized that not every motorist agreed with the motto New Hampshire required on state-issued license plates. 430 U.S. 705 (1977). In compulsory union fee cases, such as *Harris*, where individuals who were not union members were forced by the government to support

a union's activities without their consent, 134 S. Ct. at 2626, outsiders would realize that these individuals did not choose to endorse the union's activities. Yet, a constitutional violation was found in each instance. If SEIU's theory were correct, these cases would all have different outcomes.

SEIU's theory also leads to absurd results. Namely, the government could compel association simply by being open about the fact it is compelling association. Under SEIU's theory, Illinois' Governor could constitutionally require all state employees to affiliate with the Republican Party as a condition of their employment simply by making the requirement publicly known, for then outsiders would know that not every state employee truly endorsed or agreed with the Republican party's platform, but was affiliated with it only by government fiat. Of course, that is not the law. *See Elrod v. Burns*, 427 U.S. 347 (1976) (holding it unconstitutional for Illinois to condition employment on political affiliation). So too here, the State is not free to force providers to affiliate with SEIU as a condition of receiving HSP or CCAP monies merely because outsiders may realize that many providers do not actually want to associate with SEIU or endorse its expressive activities.

2. The State and SEIU Rely On Arguments Immaterial to Appellant Providers' Compelled Association Claim.

The State and SEIU advance several arguments that do not directly address the Appellant Providers' cause of action, but rather straw-man positions of the Appellees' own creation. As discussed below, each argument misses the mark.

a. Agency. The law establishes that exclusive representation creates a mandatory agency relationship. *See* App.Br. 13–16; *Mulhall,* 618 F.3d at 1287. The Supreme

Court likens the relationship "to that between attorney and client," and to that between trustee and beneficiaries. *ALPA v. O'Neill*, 499 U.S. 65, 74 (1991). Nevertheless, the State and SEIU assert that an exclusive representative is unlike an agent in the sense that represented individuals do not completely control the union's conduct. State.Br. 15; SEIU.Br. 27. But the fact remains that SEIU is the providers' agent in the relevant sense that SEIU represents providers and is empowered to speak and contract for them. This agency authority to act for providers associates providers with SEIU and its actions as their representative.

b. Duty of Fair Representation. SEIU contends that its duty to represent providers without discrimination does not infringe on their associational rights. SEIU.Br. 22–25. But it is SEIU's *agency authority* to act for providers that associates them with SEIU, not SEIU's corresponding duty not to discriminate against providers when acting as their agent. Indeed, the reason exclusive representatives owe this fiduciary duty is because the "exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.'" *O'Neill*, 499 U.S. at 74 (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944)). The fact that SEIU has been "granted power to act in behalf of others," *id.*, namely providers, shows that those providers have been associated with SEIU and its actions.

c. Membership and Fees. Addressing another immaterial point, the State and SEIU argue that providers are no longer forced to join or financially support SEIU. *See* State.Br. 9–14; SEIU.Br. 37–39. But that is not the compelled association of

which the Appellant Providers complain. Nor is it relevant. As the Eleventh Circuit held in *Mulhall*, "regardless of whether [an individual] can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights" because the individual is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which the individual disagrees. 618 F.3d at 1287.

d. Contracts. SEIU also argues that requiring providers to abide by SEIU-negotiated contract terms does not infringe on providers' expressive rights. SEIU.Br. 25–27. But it is the fact that SEIU negotiates and enters into contracts as *the providers' proxy* that creates the associational link, not the outcome that resulting terms are applicable to all. For example, no one would say that a state compels doctors to associate with the American Medical Association ("AMA") merely by paying the doctors Medicaid rates that were lobbied for by the AMA. But all would agree that a state *would* compel association if it granted the AMA authority to lobby and contract with the State on behalf of all doctors over their Medicaid payment rates. The same principle applies here.

e. Freedom to Speak. Finally, the State and SEIU argue that Illinois's imposition of exclusive representation on providers does not restrict their ability individually to speak, petition the State, or associate with other advocacy groups. State.Br. 9–14; SEIU.Br. 15–18. As explained on pages 26–27 of the opening brief, this contention is immaterial, even if true, because 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 others. In compelled association cases in which constitutional violations were found, the victims almost always were otherwise free to speak. *See* App.Br. 26–27 (discussing cases); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting argument that it was constitutional for the government to compel a newspaper to publish certain articles because "'the statute in question here has not prevented the Miami Herald from saying anything it wished'").

SEIU comes close to conceding the point when acknowledging that where individuals "were required to speak, display, publish, or financially support a disfavored message, their First Amendment rights were restrained even though they were free to make clear in other ways their disapproval of that message." SEIU.Br. 39 n.12. The same is true where, as here, the government is associating individuals with a disfavored advocacy organization and its expressive activities.

D. Precedent Supports Holding That Exclusive Representation of Providers Impinges On Their First Amendment Rights.

1. Precedent Concerning Exclusive Representation of Employees Recognizes That It Impinges On Individual Liberties.

The Supreme Court has repeatedly recognized that an exclusive representative's power to speak and contract for everyone in a bargaining unit, whether they approve or not, impinges on individual liberties. *See* App.Br. 13–15 (discussing cases). This includes most recently *14 Penn Plaza LLC v. Pyett* in which the Court, while holding exclusive representatives can waive employees' right to bring discrimination claims even if the employees disapprove, acknowledged "the sacrifice of individual liberty that this system necessarily demands." 556 U.S. 247, 271 (2009).

SEIU's response is that "[t]hose cases have nothing to do with First Amendment rights." SEIU.Br. 30 n.9. That is inaccurate, as *American Communications Association v. Douds* addressed whether union officials could be required, under the First Amendment, to attest to not being members of the Communist Party. 339 U.S. 382, 385–86 (1950). The Court held that they could because, among other things, of the power federal law gives exclusive representatives over employee rights. *Id.* at 401–03. In any event, irrespective of whether the cases involved constitutional rights, they support the propositions for which they were cited, *see* App.Br. 14–15, such as the fact that "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, *Am. Commc'ns Ass'n*, 339 U.S. at 401; and that exclusive representation results in a "corresponding reduction in . . . individual rights," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

By contrast, the cases SEIU cites to for the proposition that exclusive representation is not subject to First Amendment scrutiny do not support that proposition. SEIU.Br. 29–31. *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 by employers, not First Amendment claims by employees. *Babbitt v. United Farm Workers*, 442 U.S. 289, 312–14 (1979), and *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 355 (Wis. 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. Those cases say nothing about whether imposing exclusive union representation on indi-

viduals impinges on their First Amendment rights and must be justified by heightened government interests.

The apposite case on that point is *Abood*, which held that exclusive representation of employees is justified by the government's overriding interest in labor peace. 431 U.S. at 220–21, 224; *see* App.Br. 15–17. Exclusive representation thus "amounts to 'compulsory association,'" but under *Abood*, "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." *Mulhall*, 618 F.3d at 1287 (quoting *Acevedo–Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002)).

The State and SEIU cannot rely on *Abood* because *Harris* held the case and the labor peace interest inapplicable to non-employee providers. *Harris*, 134 S. Ct. at 2638–40. So, SEIU attempts to distinguish *Abood* by arguing that it concerned only compulsory fees. SEIU.Br. 34. But that argument ignores that *Abood* passed on the propriety of exclusive representation when evaluating whether employees could be compelled to support it financially. 431 U.S. at 220–21, 224. The Supreme Court recognized as much in *Chicago Teachers Union v. Hudson*, where it held that *Abood* "rejected the claim that it was unconstitutional for a public employer to designate a union as the exclusive collective-bargaining representative of its employees." 475 U.S. 292, 301 (1986); *see Harris*, 134 S. Ct. at 2631 (stating that *Abood* found that "exclusive representation" of employees serves the labor peace interest of freeing employers from the possibility of facing conflicting demands from different unions).

This makes sense given that compulsory fees to support a mandatory association are constitutional only if the underlying mandatory association satisfies constitutional scrutiny. As the Court explained in *Knox v. SEIU Local 1000*, a compulsory fee "cannot be sustained unless two criteria are met." 132 S. Ct. 2277, 2289 (2012).

> First, there must be a comprehensive regulatory scheme involving a "*mandated association*" among those who are required to pay the subsidy. [*United States v. United Foods*, 533 U.S. 405, 414 (2001)]. Such situations are exceedingly rare because, as we have stated elsewhere, *mandatory associations* are permissible only when they serve a "compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms." [*Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)]. Second, even in the rare case *where a mandatory association can be justified*, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association." [*United Foods*, 533 U.S. at 414].

Id. (emphasis added). The mandatory association in *Abood* was exclusive representation of employees, which the Supreme Court found to be justified by the state's labor peace interest. *Id.* at 2990. The mandatory association in *Harris* was exclusive representation of personal assistants, which the Supreme Court found *not* to be justified by the labor peace interest. *Harris*, 134 S. Ct. at 2640.

SEIU and the State are thus wrong that exclusive representation is not subject to constitutional scrutiny. It is subject to the same scrutiny applicable to all other mandatory expressive associations. While exclusive representation of employees is considered justified by the labor peace interest, *Abood*, 431 U.S. at 224,[2] exclusive representation of non-employee providers is not, *Harris*, 134 S. Ct. at 2640–41. Con-

[2] *Virgin Atlantic Airways, Ltd. v. National Mediation Board* is inapposite for this reason. 956 F.2d 1245, 1251–52 (2d. Cir. 1992). The court's holding that the First Amendment does not require that exclusive representatives have the support of a majority of employees is predicated on the fact that such representation is deemed justified by labor peace irrespective of whether a majority support the union. *Id.*

sequently, it is unconstitutional for Illinois to extend this mandatory association beyond the context of employment relationships.

2. Knight *Did Not Consider the Issue Presented in This Case.*

The foregoing makes it evident that the State and SEIU are stretching *Minnesota State Board v. Knight*, 465 U.S. 271 (1984), far beyond its breaking point when claiming *Knight* holds that exclusive representation does not impinge on associational rights. State.Br. 9–14; SEIU.Br. 15–20. As previously discussed, *Knight* only addressed the narrow issue of whether it is constitutional for a public employer to *exclude* employees from union meetings in which the employees want to participate. *See* App.Br. 22–27. The decision flatly says as much at both its beginning and its end. *See* 465 U.S. at 273 (stating "[t]he question presented in this case is whether this restriction on participation in this nonmandatory exchange process violates the constitutional rights of professional employees . . ."); *id*. at 292 (concluding "[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").

The State tries to paper over this fact by repeatedly quoting, without proper context, snippets of language from an associational argument *Knight* touched upon. State Br. 9–12. But the associational argument *Knight* addressed was whether denying employees' access to the union meetings pressured them to the join the union. *See Knight,* 465 U.S. at 289-90; *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)). That is not the argument here.

Knight did not address whether it was constitutional to compel employees to associate with an exclusive representative because *Abood* resolved that issue years earlier. *See* pp. 12–13, *supra*; App. 22–23. The Supreme Court in *Knight* implicitly recognized this when summarily affirming that portion of the district court's opinion that "rejected appellees' attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood*." 465 U.S. at 278; *see Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 15 (D. Minn. 1982) (stating "*Abood* squarely upheld the constitutionality of exclusive representation bargaining in the public sector").

Most importantly, *Knight* did not address the question presented here: whether government can impose exclusive representation on Medicaid providers and child-care businesses. The Appellees misinterpret *Knight*, and place upon it far more weight than that decision can possibly bear.

3. Compelled Association Cases Support the Appellant Providers' Claims.

a. The thrust of the Supreme Court and this Court's compelled association cases is that the First Amendment prohibits the government from associating individuals with expressive organizations or activities they did not choose to associate with. *See* App.Br. 11–14. That is what Illinois is doing here. SEIU's attempt, on pages 35–42 of its brief, to distinguish these cases is unavailing.

Dale, *Hurley*, *Roberts*, and *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), are not distinguishable, as SEIU claims, because those cases involved the government forcing expressive organizations to associate with individuals. This case involves the converse activity: the government forcing individuals to associate

with an expressive organization. If the former action violates the First Amendment, as those cases hold, then so too does the latter action.[3]

Illinois inherently alters providers' expressive activity, as in *Hurley*, by associating them with SEIU and its messages against their will. The reason is that the First Amendment protects not only a citizen's freedom to actively engage in speech, but also his freedom to remain silent and "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573–74. Thus, to prove a constitutional violation, Appellant Providers do not need to show that SEIU's advocacy interferes with affirmative advocacy by individual providers' (though it does, as providers have to argue against their own agent). It is sufficient under the First Amendment that many providers did not choose to affiliate themselves with SEIU and its advocacy, and yet are now affiliated with this advocacy group and its message by government fiat.[4]

Political patronage cases, such as *Elrod*, are not distinguishable because individuals in those cases were required to take actions that affiliated themselves with a political party. Illinois has made acceptance of SEIU representation *a condition* of becoming and remaining a personal assistant or childcare provider. Given the political nature of SEIU's function as an exclusive representative—i.e., to lobby the

[3] A hypothetical proves the point. If the government forced individuals to affiliate with the Boy Scouts, a parade, or a religious student group, that compelled association would be just as unconstitutional as the converse activity held unlawful in *Dale*, *Hurley*, and *Walker*, respectively.

[4] A hypothetical also proves this point. If the government forced a man to wear a shirt saying "Save the Whales," he would not have to show that the shirt interfered with his active advocacy for whaling to prove a First Amendment violation. He would only need to show that he did not choose to be affiliated with that message. The same principle applies here.

State over aspects of a Medicaid and childcare program, *see* App.Br. 19–21—Illinois's action is just as unconstitutional as if the State required all providers to accept the Democratic Party as their representative for petitioning the State over public policies that affect their professions.

For similar reasons, compelled speech cases are on point notwithstanding the fact that the Appellant Providers are not required to literally utter or financially support disagreeable speech. The First Amendment equally prohibits the government from forcibly affiliating individuals with unwanted messages. *See Wooley*, 430 U.S. at 714–15. Given that it is unconstitutional for Illinois to compel providers to support SEIU and its expressive activities financially, *see Harris*, 134 S. Ct. at 2638–41, it follows that it is also unconstitutional for Illinois to affiliate unconsenting providers with SEIU and its expressive activities.

b. Cases in which a compelled association violation was not found do not help SEIU. Bar association cases are inapposite for the reason *Harris* found them inapposite: state bar requirements are justified by a state's vital interest in regulating the practice of law in its courts, which does not apply here. 134 S. Ct. at 2643–44. Cases concerning property use, such as *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)—which held that merely allowing military recruiters and student groups, respectively, to use school property did not associate the schools with the individuals' messages—have no bearing here. 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.

SEIU is also nothing like an alumni association, to which the union tries to compare itself. SEIU.Br. 39. Alumni associations do not have legal authority to speak and enter into contracts for dissenting individuals. Nor is the mission of an alumni association to petition states over public policies, such as monies their members receive from state programs. SEIU, by contrast, has this authority and mission as an exclusive representative. That is why SEIU is most akin to a mandatory lobbyist or compulsory trade association. *See* App.Br. 20–21. And if the First Amendment prohibits anything, it prohibits the government from dictating who speaks for individuals in their relations with the government.

4. Harris Rejected the Potential Justifications for Extending Exclusive Representation Beyond Employment Relationships.

The State and SEIU argue *Harris* involved no direct challenge to exclusive representation. *See* State.Br. 13–14; SEIU.Br. 11, 20–22. Appellant Providers never said that it did. Instead, *Harris* is controlling here for two reasons.

First, *Harris* held that the precedent and state interest that justifies exclusive representation of public employees, namely *Abood* and its labor peace interest, do not apply outside of employment relationships. 134 S. Ct. at 2638–40. This is important because it is the reason the government's ability to appoint a representative for its employees does not extend beyond that context. *See* App.Br. 33–35. The State and SEIU implicitly recognize this impact of *Harris* by their silence, as neither par-

ty attempts to argue that *Abood* or the labor peace interest justifies imposing exclusive representation on providers.

Second, *Harris* limited compulsory union fee requirements to "full-fledged public employees" because, without that limit, "a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach." 134 S. Ct. at 2638. The Court's concern about "just where to draw the line," *id.*, is equally applicable to exclusive representation.

The State and SEIU, however, disregard the *Harris* Court's prudent concerns, and advocate for *no limits* on the government's authority to certify exclusive representatives to speak and contract for individuals vis-à-vis the government. In so doing, Appellees invite the Court 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,'" *Harris*, 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 844 (1961) (Douglas, J., dissenting).

The Court should decline the State and SEIU's invitation for the reasons stated on pages 29–32 of the opening brief. Mandatory associations must remain "exceedingly rare," and be permitted "only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts*, 468 U.S. at 623). While exclusive representatives of employees may be "the rare case where a mandatory association can be justified," *id.*, this is not such a rare case. Unlike with employees, no overriding state interest justifies imposing an exclusive representative on individu-

als who care for disabled family members or operate daycare businesses. Consistent with *Harris*, the Court should find it unconstitutional for Illinois to extend exclusive representation to personal assistants and childcare providers.

CONCLUSION

The district court's order dismissing the Complaint should be reversed.

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Dated: October 11, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 5,308 words in 12-point proportionately-spaced Century Schoolbook font.

/s/ William L. Messenger
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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will send notification of such filing to participants identified on the Notice of Electronic Filing.

/s/ William L. Messenger
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