No. 18-

IN THE
Supreme Court of the United States

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

Petitioners,

v.

MARK DAYTON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MINNESOTA, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, Plaintiffs-Appellants in the courts below, are: Teresa Bierman, Kathy Borgerding, Linda Brickley, Carmen Gretton, Beverly Ofstie, Scott Price, Tammy Tankersley, and Karen Yust. Kim Woehl was a Plaintiff-Appellant in the courts below but is not a Petitioner.

Respondents, Defendants-Appellees in the courts below, are: Mark Dayton, in his official capacity as Governor of the State of Minnesota, Emily Johnson Piper, in her official capacity as Commissioner of the Minnesota Department of Human Services, Todd Doncavage, in his official capacity as Commissioner of Minnesota's Bureau of Mediation Services, and SEIU Healthcare Minnesota.

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

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The Court recently held that a state "requir[ing] that a union serve as exclusive bargaining agent for its employees . . . [is] itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). This case presents that "other context." *Id.* It concerns whether Minnesota can compel individual Medicaid providers, who are not State employees, to accept an exclusive bargaining agent for speaking and contracting with the State over certain public policies.

The lower court held the State could designate an exclusive representative to speak for providers without satisfying heightened First Amendment scrutiny and for any rational basis. The court did so based on the misconception that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) held exclusive representation does not impinge on speech and associational rights.

This petition presents the Court with an opportunity to correct this growing and dangerous misapprehension amongst lower courts that *Knight* gives the government untrammeled authority to dictate which organization represents citizens in dealing with the government. Regimes of exclusive representation, like other mandatory expressive associations, are subject to a limiting constitutional principle: exacting First Amendment scrutiny. Whatever its merits in a public employment relationship, no compelling state interest justifies extending exclusive representation beyond that context to a citizen's relationship with government regulators. Any state interest in workplace "labor peace" does not reach that far. *See Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014). The petition should be granted and the lower court reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 900 F.3d 570, is reproduced in the appendix (Pet.App.1a), as is the Eighth Circuit's order denying a rehearing en banc (Pet.App.50a) and the district court's order granting defendants judgment on the pleadings (Pet.App.8a). The district court's order denying a preliminary injunction, and the Eighth Circuit's order denying as moot an interlocutory appeal from that order are reproduced at Pet.App.26a and 34a.

JURISDICTION

The Eighth Circuit entered judgment on August 14, 2018 (Pet.App.1a), and denied a rehearing en banc on September 17, 2018 (Pet.App.50a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Minnesota's Individual Providers of Direct Support Services Representation Act ("Representation Act"), ch. 128, art. 2, Minn. Laws 2173, codified as amended at Minn. Stat. §§ 179A.54 and 256B.0711, is reproduced at Pet.App.62a.

STATEMENT

1. "[T]he federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization." *Harris*, 134 S. Ct. at 2623. Participant-directed versions of these programs enable per-

sons with disabilities to hire and employ caregivers who assist them with activities of daily living. *See* Dept. of Health & Human Serv., *Understanding Medicaid Home & Comty. Serv.: A Primer*, 177-80

Notwithstanding that these caregivers are not government employees—they merely receive Medicaid payments for their services—in recent years several states have imposed exclusive union representatives upon them as if they were government employees. *See Harris*, 134 S. Ct. at 2625-27 (discussing Illinois' law); *infra* note 5 (citing state statutes). This includes Minnesota, which in May 2013 enacted a Representation Act that deems "individual providers" in several Medicaid programs to be "executive branch state employees" for "the purposes of the Public Employment Labor Relations Act [PELRA]." Minn. Stat. § 179A.54, subd. 2. The Act, however, "does not require the treatment of individual providers as public employees for any other purpose," *id.*, and recognizes "the rights of participants or participants' representatives to select, hire, direct, supervise, and terminate the employment of their individual providers." *Id.* subd. 4.

Minnesota's Representation Act authorizes the State to certify, based on a mail-ballot election, an "exclusive representative" of individual providers. *Id.* subd. 10. The Act vests a representative with legal authority to negotiate and contract for providers with the State over several Medicaid policies. *Id.* subd. 3. The resulting agreements are subject to legislative approval. *Id.* subd. 5.

The Act also authorized the deduction of compulsory union agency fees from payments made to individual providers. Minn. Stat. § 256B.0711 subd. 4(h). However, on June 30, 2014, before the Act was enforced against the providers, the Court in *Harris* held it unconstitutional for states to compel such Medicaid providers to support exclusive representatives financially. 134 S. Ct. at 2623.

Significantly, the Court found the "labor peace" interest that ostensibly justifies exclusive representation of employees inapplicable to these Medicaid providers. *Id*. at 2640. Undaunted by *Harris*, eight days later SEIU Healthcare Minnesota (SEIU) moved to collectivize Minnesota's individual providers by petitioning the State for a mail-ballot election. Pet.App.3a.

2. Petitioners are individual providers who provide care, in their homes, to a disabled son or daughter. Pet.App.52a-54a. Teresa Bierman, for example, provides care to her daughter, who has profound cognitive and motor disabilities due to cerebral palsy and other disorders. *Id*. On July 28, 2014, Petitioners filed a complaint alleging it unconstitutional under the First Amendment for the State to force them to associate with an exclusive representative and its speech. S*ee* Pet.App.51a (First Amended Complaint).

Petitioners moved to enjoin the election SEIU requested, but the district court refused. Pet.App.4a.[1]

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[1] An interlocutory appeal was denied as moot. Pet.App.33a.

Although only 13% of providers indicated support for SEIU in that election, the State certified SEIU as the "exclusive representative" of all individual providers in certain Medicaid programs, including Petitioners. Pet.App.56a-58a.

SEIU then exercised its authority to speak and contract for providers by negotiating and entering into an agreement with Minnesota's Department of Human Services. ECF No. 96, Collective Bargaining Agreement between SEIU & State of Minn., 2015-17. SEIU's agreement mandated that the State not meet and negotiate with any individual provider or other association of providers. *Id.* at Art. 1. It also required that the State collect membership dues from providers' Medicaid payments, distribute union membership applications and orientation materials to providers, and require new providers to attend an orientation with an SEIU/State Training and Orientation Committee. *Id.* at Art. 4 & 10. The agreement also established a minimum wage that persons with disabilities must pay their providers. *Id.* at Art. 8. On May 22, 2015, Minnesota's legislature ratified the agreement and authorized budgetary outlays to implement the minimum wage requirement. 2015 Minn. Law Ch. 71, Art. 7 §§ 52-53.

On January 3, 2017, the district court granted defendants judgment on the pleadings. Pet.App.9a. The court held that Minnesota's certification of an exclusive representative did not impinge on providers' First Amendment rights, and thus required no com-

pelling justification, only a mere rational basis. Pet.App.24a. Petitioners appealed.

While that appeal was pending, this Court issued *Janus* and held it unconstitutional for states to compel employees to subsidize exclusive representatives. 138 S. Ct. at 2486. *Janus* twice recognized that exclusive representation "substantially restricts" individual rights, *id*. at 2460, 2469, and specifically held it a "significant impingement on associational freedoms that would not be tolerated in other contexts," *id*. at 2478.

On August 14, 2018, the Eighth Circuit reached a different conclusion and held exclusive representation does *not* impinge on associational freedoms. Pet.App.6a-7a. The court agreed with the First and Seventh Circuits that *Knight* "foreclosed" such claims. *Id*. (citing *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017); *D'Agostino v. Baker*, 812 F.3d 240, 242-43 (1st Cir. 2016)).[2]

The lower court distinguished *Janus* on the grounds that it "never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue." Pet.App.7a. The court reasoned that, "where a precedent like *Knight* has direct application in a case, we should follow it, even if a later decision arguably undermines some of its rea-

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[2] The Second Circuit reached a similar conclusion in an unpublished, non-precedential order in *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (per curiam).

soning." *Id*. A petition for a rehearing en banc was subsequently denied. Pet.App.50a.

REASONS FOR GRANTING THE PETITION

If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government. This form of compelled speech and association not only infringes on individual liberties, but distorts the political process the First Amendment protects.

The Court should take the first question to end the misconception that *Knight* held the government can designate exclusive representatives to speak for unconsenting individuals for any rational basis, without satisfying First Amendment scrutiny. Pet.App.6a-7a (citing cases). *Knight* merely held it constitutional for a college to exclude employees from its nonpublic meetings with union officials. 465 U.S. at 292. *Knight* did not hold exclusive representation not to be a mandatory expressive association, much less rule that governments have carte blanche to compel any person into an exclusive-representative relationship. Exclusive representation inflicts a "significant impingement on associational freedoms." *Janus*, 138 S. Ct. at 2478. It therefore must satisfy exacting First Amendment scrutiny.

The Court should take the second question to resolve whether exclusive representation can "be tolerated in other contexts," *id*., namely outside of an employment relationship. It cannot. Under *Harris*, a state's interest in "labor peace" does not extend that

far. 134 S. Ct. at 2640. Whatever its merits in the context of an employment relationship, no compelling state interest justifies forcing individuals who are not state employees to accept an exclusive representative for speaking with a state.

I. First Question: Exclusive Representation Is Subject to Exacting First Amendment Scrutiny, Not Rational Basis Review.

A. The Eighth Circuit's Opinion Conflicts with *Janus* and Other Court Precedents That Concern Mandatory Expressive Associations and Exclusive Representation.

1. *Janus* should have made clear to lower courts that regimes of exclusive representation must satisfy First Amendment scrutiny. The Court not only held they inflict a "significant impingement on associational freedoms," 138 S. Ct. at 2478, but also that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." *Id*. at 2469.

Significant impingements on the "right to associate for expressive purposes" are subject to exacting scrutiny, under which a state must prove its conduct is justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984). The Court has required, in a variety of contexts, that mandatory associations must satisfy this scrutiny. *See Knox v. SEIU, Local 1000*, 567 U.S.

298, 310-11 (2012); *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658-59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577-78 (1995); *Rutan v. Republican Party,* 497 U.S. 62, 74 (1990); *Roberts*, 468 U.S. at 623 (citing seven earlier cases); *Elrod v. Burns,* 427 U.S. 347, 362-63 (1976) (plurality opinion). This includes where the government coerces non-employee contractors to affiliate with a political organization. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

Taken together, *Janus* and these precedents compel the conclusion that exacting scrutiny applies when a state thrusts unwilling individuals into an exclusive representative relationship. In fact, if any mandatory association should have to pass constitutional muster, it is this one. Exclusive representative status literally gives unions legal authority to speak and contract "on behalf" of unconsenting individuals. Minn. Stat. § 179A.03 subd. 8.

2. The Court recognized long before *Janus* that an exclusive representative is a mandatory association. The Court often refers to an exclusive representative as an "exclusive bargaining *agent*." *Janus,* 138 S. Ct. at 2478 (emphasis added); *see*, *e.g., ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991) (analogizing the agency relationship exclusive representation creates to that between trustees and beneficiaries and attorneys and clients). For good reason: this status vests a union with the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 138 S. Ct. at 2467, and the exclusive right to contract for them, *see*

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). This includes individuals who oppose the union's advocacy and agreements. *Id.*

An exclusive representative's authority is "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. 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." *Allis-Chalmers*, 388 U.S. at 180. Those "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can engage in advocacy that represented individuals oppose. *See Knox*, 567 U.S. at 310. They also can as individuals' proxies enter into binding contracts that harm their interests. *See Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 349-40 (1953). For example, an exclusive representative can waive unconsenting individuals' rights to bring discrimination claims in court. *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Given an exclusive representative's authority to speak and contract for unconsenting individuals, the Court has long recognized that this mandatory association restricts individual liberties. In *Vaca v. Sipes*, the Court held that exclusive representatives owe a fiduciary duty to represented individuals based, in part, on the fact that exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented." 386 U.S. 171, 182 (1967). In *American Communications Ass'n v. Douds*, the Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"; "[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." 339 U.S. 382, 401 (1950). More recently, in *14 Penn Plaza,* the Court held that exclusive representatives can waive individuals' legal rights because, among other reasons, "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands." 556 U.S. at 271.

3. The Eighth Circuit's conclusion that Minnesota did not impinge on providers' speech or associational rights by compelling them to accept SEIU as their exclusive representative cannot be squared with *Janus*, these other precedents, or with the extraordinary authority these mandatory agents possess. The lower court's conclusion is not even logical. Providers cannot be both represented by SEIU, but not associ-

ated with it. That makes as much sense as saying that principals are not associated with their agents.

SEIU's authority to speak for providers necessarily associates them with SEIU and its speech. Indeed, that is the point of the exclusive-representative designation: to establish that the union speaks not just for its members, but has the "exclusive right to speak for all the employees in collective bargaining." *Janus*, 138 S. Ct. at 2467; *see Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). For those who do not want that union speaking on their behalf, exclusive representation results in a "significant impingement on [their] associational freedoms," *Janus*, 138 S. Ct. at 2478. The Eighth Circuit erred by concluding otherwise.

B. The Circuit Courts Disagree Over Whether Exclusive Representation Impinges on Associational Rights.

This Court is not alone in recognizing that exclusive representation compels association. In *Mulhall v. Unite Here Local 355*, the Eleventh Circuit held an employee had "a cognizable associational interest under the First Amendment" in whether he is subjected to a union's exclusive representation. 618 F.3d 1279, 1286-87 (11th Cir. 2010). That court found the union's "status as his exclusive representative plainly affects his associational rights" because the employee would be "thrust unwillingly into an agency

relationship" with a union that may pursue policies with which he disagrees. *Id*. at 1287. Exclusive representation thus "amounts to 'compulsory association,'" though "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)).

Minnesota's imposition of an exclusive representative on individual providers amounts to compulsory association for the same reasons. However, unlike with employees, "labor peace" does not justify this infringement on providers' First Amendment rights. *See Harris*, 134 S. Ct. at 2640; pp. 24-26 *infra*.

The Eleventh Circuit's recognition in *Mulhall* that exclusive representation impinges on First Amendment associational rights, and must be justified by countervailing state interests, conflicts with the opposite conclusions reached by the First, Seventh, and Eighth Circuits. Pet.App.6a-7a. The Court should grant the petition to resolve this conflict.

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

1. The First, Seventh, and Eighth Circuits believed *Knight* required that they find an exclusive representative not to be a mandatory association subject to First Amendment scrutiny. Pet.App.6a-7a; *Hill*, 850 F.3d at 864; *D'Agostino*, 812 F.3d at 242-43. This

interpretation of *Knight* is difficult to reconcile with *Janus* and other Supreme Court precedents that concern exclusive representation. Indeed, if that interpretation of *Knight* were correct, *Knight* would be an outlier in this Court's jurisprudence.

The lower courts' interpretation is not correct. *Knight* held only that *excluding* employees from nonpublic meetings with union officials did not infringe on employees' ostensible right to participate in those meetings. 465 U.S. at 273. The sole "question presented" in *Knight* was whether a "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id*. 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 Court disagreed, reasoning that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id*. at 283. Consequently, the Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy." *Id*. at 292.

Knight stands only for the proposition that government officials are constitutionally free to choose to whom they listen in nonpublic forums. That holding has no bearing here. Petitioners do not allege that Minnesota wrongfully excludes them from its meetings with SEIU. Nor do they assert a "constitu-

tional right to force the government to listen to their views," *id.* at 283.

Rather, Petitioners assert their constitutional right not to be compelled to associate with SEIU and its speech. Pet.App.59a-60a. *Knight*'s holding that the government can choose to whom it *listens* says little about the government's ability to dictate who *speaks* to the government for individuals.

2. The Eighth Circuit's reasons for a more expansive reading of *Knight,* which exempts exclusive representation from First Amendment scrutiny, are unfounded. The court points to an associational argument *Knight* addressed. Pet.App.6a. But that argument was that "Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative" indirectly pressured employees to join the union. 465 U.S. at 288 (emphasis added). That is not the argument here.

The Eighth Circuit also points to the summary affirmance of other parts of the district court's opinion in *Knight*. Pet.App.6a. But, the Court summarily affirmed only the district court's rejection of contentions that the "PELRA unconstitutionally delegated legislative authority to private parties" and "restrict[ed] to the exclusive representative . . . participation in the 'meet and negotiate' process.'" *Id.* at 279. No such claims are made here.

The district court's opinion in *Knight* makes clear that the case involved no compelled speech and expressive-association claim. *Knight v. Minn. Cmty.*

Coll. Faculty Ass'n, 571 F. Supp. 1, (D. Minn. 1982). There were three claims before that court: (1) exclusive representation violates the non-delegation doctrine, *id*. at 3-5; (2) agency fees compel employees to subsidize political activities, *id*. at 5-7; and (3) it is unconstitutional to bar employees from participating in union meet-and-negotiate and meet-and-confer sessions, *id*. at 7-12. Conspicuously absent is any claim that exclusive representation associates unconsenting employees with a union and its speech.

3. *Knight*'s rationales do not even make sense if applied to a compelled expressive-association claim. The Eighth Circuit held that under *Knight* Minnesota's Representation Act does not compel association because it "allows the homecare providers to form their own advocacy groups independent of the exclusive representative" and "does not require any provider to join the union." Pet.App.6a. Neither proposition is apposite, much less exculpatory.

The government is not free to compel individuals to associate with a particular organization or message so long as the individual is free to associate with other organizations or messages. Further, the government is not free to force individuals to associate with an advocacy organization so long as that compelled association falls short of full-fledged membership. As the Eleventh Circuit reasoned 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 [h]is views

. . . may be at variance with 'a wide variety of activities undertaken by the union in its role as exclusive representative.'" 618 F.3d at 1287 (citation omitted) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977), *overruled on other grounds by Janus*, 138 S. Ct. at 2486).

3. Finally, in a broader sense, it is simply inconceivable that this Court, when deciding in 1984 whether a college can exclude faculty members from union bargaining sessions, intended to rule that the First Amendment is no barrier whatsoever to states imposing an exclusive representative on individuals who are not public employees. State schemes to collectivize independent Medicaid providers did not even exist at that time. Yet, that is how broadly several lower courts now interpret *Knight*.

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

D. The First Question Is Important Because the Government Will Have Free Rein to Appoint Mandatory Advocates to Speak for Citizens If Exclusive Representation Is Subject Only to Rational Basis Review.

1. The constitutional significance of this case is made evident simply by describing what Minnesota has done. The State has granted an advocacy group (SEIU) statutory authority to speak and contract for

everyone in a profession (individual care providers) regarding certain state policies that affect them (aspects of the Medicaid programs). Bluntly stated, Minnesota is forcing certain citizens to accept a government-appointed lobbyist.

SEIU's function as an exclusive representative is quintessential "lobbying": meeting and speaking with public officials, as an agent of regulated parties, to influence government policies that affect those parties.[3] For example, if a professional association representing other Medicaid providers, such as doctors, met and spoke with state officials to advocate for higher Medicaid rates, those actions certainly would constitute "lobbying." SEIU's function as an exclusive representative is indistinguishable, except SEIU is not a voluntary advocacy group, but a compulsory one the government appointed.

The public policies over which SEIU petitions the State, such as minimum Medicaid payment rates, Minn. Stat. § 256B.0711, subd. 4(d), are matters of political concern. *See Harris*, 134 S. Ct. at 2642-43. This is constitutionally significant. "'[S]peech on pub-

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[3] *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) ("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"); *cf.* 2 U.S.C. § 1602(8)(A) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

lic issues occupies the highest rung of the hierarchy of First Amendment values,'" for it constitutes "'more than self-expression; it is the essence of self-government.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citations omitted).

Minnesota's Representation Act turns our system of government on its head. Instead of citizens choosing their representatives in government, here the government is choosing representatives for its citizens. This violates basic constitutional guarantees. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Consequently, a citizen's right to choose which organization, if any, lobbies the government for him or her is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981).

2. The First, Seventh, and Eighth Circuits have given the government free rein to violate this fundamental liberty by holding that the government can, on any rational basis, appoint exclusive representatives to speak and contract for individuals in their relations with the government. Pet.App.6a-7a; *Hill*, 850 F.3d at 864; *D'Agostino*, 812 F.3d at 243-44. The implications of these decisions are staggering.

Minnesota's conduct represents not the top of a slippery slope, but the bottom. The State has imposed an exclusive representative on parents who

provide care to their disabled sons or daughters in their own homes. The State also attempted to impose an exclusive representative on individuals who operate home-based daycare businesses that provide services to public-aid recipients. *See Parrish v. Dayton*, 761 F.3d 873, 874-75 (8th Cir. 2014).

This development is not anomalous, but part of a troubling trend that began in the early 2000s in which states began extending exclusive representation beyond employment relationships to individuals who merely receive government monies for their services.[4] Since then, fifteen states have authorized mandatory representation for Medicaid providers,[5]

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[4] *See* Maxford Nelsen, *Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity* (Freedom Found. 2018) (https://www.freedomfoundation.com/labor/getting-organized-at-home/).

[5] *See* Nelsen, *supra* (describing each state scheme in depth); Cal. Welf. & Inst. Code § 12301.6(c)(1) (West, Westlaw through Ch. 106 of 2018 Reg. Sess.); Conn. Gen. Stat. § 17b-706b (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp. Stat. 315/3(n) (2016) (West, Westlaw through 2018 Reg. Sess.); Md. Code Ann., Health-Gen. § 15-901 (West, Westlaw through 2018 Reg. Sess.); Mass. Gen. Laws ch. 118E, § 73 (West, Westlaw through Ch. 315 of 2018 2d). Mo. Rev. Stat. § 208.862(3) (West, Westlaw through 2018 2d Reg. Sess.); Or. Rev. Stat. § 410.612 (West, Westlaw through 2018 Reg. Sess.); Vt. Stat. Ann. tit. 21, § 1640(c) (West, Westlaw through Law 2017-18 Sess.); Wash. Rev. Code § 74.39A.270 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, §§ 741.01-06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2241 (repealed

eighteen states for home-based daycare businesses and other childcare providers,[6] and three states for individuals who operate foster homes for persons with disabilities.[7]

Local governments are also getting in on the act. In January 2016, the City of Seattle enacted an ordinance calling for the certification of an exclusive rep-

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2011); Pa. Exec. Order No. 2015-05 (Feb. 27, 2015); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

[6] Conn. Gen. Stat. § 17b-705 (West, Westlaw through 2018 Feb. Reg. Sess.); 5 Ill. Comp. Stat. 315/3(n); Mass. Gen. Laws ch. 15D, § 17 (West, Westlaw through Ch. 9 of 2017 1st Annual Sess.); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed 2011); Md. Code Ann., Educ. § 9.5-705 (West, Westlaw through 2018 Reg. Sess.); Minn. Stat. § 179A.52 (expired); N.M. Stat. Ann. § 50-4-33 (West, Westlaw through 2d Reg. Sess. 53rd Legislature); N.Y. Lab. Law § 695-a et seq. (West, Westlaw through L.2018, chs. 356); Or. Rev. Stat. § 329A.430 (West, Westlaw through 2018 Reg. Sess.); R.I. Gen. Laws § 40-6.6-1 et seq. (West, Westlaw through Ch. 353 of Jan. 2018 Sess.); Wash. Rev. Code § 41.56.028 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); Ohio H.B. 1, §§ 741.01-.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed); Iowa Exec. Order No. 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order No. 07-21 (July 18, 2007) (rescinded); N.J. Exec. Order No. 23 (Aug. 2, 2006); Pa. Exec. Order No. 2007-06 (June 14, 2007) (rescinded); Interlocal Agreement Between Mich. Dep't of Human Servs. & Mott Cmty. Coll. (July 27, 2006) (rescinded).

[7] Or. Rev. Stat. § 443.733 (West, Westlaw through 2018 Reg. Sess.); Wash. Rev. Code § 41.56.029 (West, Westlaw through Ch. 129 of 2018 Reg. Sess.); N.J. Exec. Order No. 97 (Mar 5, 2008).

resentative to represent independent-contractor drivers in their relations with both the city and ride-sharing technology companies (such as Uber and Lyft). Seattle, Wash., Code § 6.310.735 (2016); *see Clark v. City of Seattle*, 899 F.3d 802 (9th Cir. 2018).

These schemes affect or have affected hundreds of thousands of individuals. But they will be the narrow end of the wedge if government officials are allowed to appoint exclusive representatives to speak for individuals for any rational basis. Under that low level of scrutiny, government officials could politically collectivize any profession or industry under the aegis of a state-favored interest group. For example, Minnesota or any other state could mandate that other healthcare professionals (such as doctors or dentists) or businesses (such as hospitals or insurers) accept state-designated organizations as their mandatory representatives for petitioning the State over its regulation of their profession or industry.

3. These ramifications are intolerable. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976). "The First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). Consequently, "the government, even with the purest of motives, may not substitute its judgment as to how

best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Id*. at 791.

An unbounded government authority to appoint exclusive representatives to speak for citizens threatens not only individual liberties, but also the political process the First Amendment protects. These mandatory organizations are government imposed "factions": similarly-situated individuals forced together into an association to pursue self-interested policy objectives (here, seeking higher Medicaid rates). The problems caused by *voluntary* factions have been recognized since the nation's founding. *See The Federalist No. 10* (J. Madison). Far worse will be the problems caused by *mandatory* factions.

An advocacy group into which citizens are conscripted, and that has special privileges in dealing with the government that no others enjoy, will have political influence far exceeding citizens' actual support for that group's agenda. Allowing the government to create such artificially powerful factions will skew the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

It is for good reason that this Court has refused to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or to "'practically give *carte blanche* to any legislature to

put at least professional people into goose-stepping brigades.'" *Harris*, 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id.* at 884.

The Eighth Circuit's decision gives government *carte blanche* to regiment citizens into mandatory advocacy groups. The opinion below cannot be allowed to stand. The Court should grant the writ and hold that exclusive representation only is constitutional when it satisfies First Amendment scrutiny.

II. Second Question: No Compelling State Interest Justifies Extending Exclusive Representation Beyond the Context of an Employment Relationship.

1. If the Court takes the first question to resolve whether exclusive representation is subject to First Amendment scrutiny, it should also take the second question to resolve whether Minnesota's extension of exclusive representation to individual providers who are not public employees survives that scrutiny. The Court should find that it does not because, under *Harris*, a state's "labor peace" interest does not extend that far. 134 S. Ct. at 2640.

In *Abood*, the Court found that a public employer's interest in workplace labor peace justified exclusive representation of employees. 431 U.S. at 220-21, 224. According to *Abood*, that is an interest in avoiding workplace disruptions that could be caused by conflicting and competing demands from multiple un-

ions. *Id*. *Abood* borrowed the interest from cases construing private-sector labor laws, *id*. at 220-21, and applied it to the public sector without constitutional analysis, *id*. at 224. That lack of analysis was criticized at the time. *Id*. at 259-61 (Powell, J., concurring in judgment). The Court overruled *Abood* in *Janus*, but "assume[d]," without deciding, "that 'labor peace,' in this sense of the term, is a compelling state interest." 138 S. Ct. at 2465.

This case does not concern whether a compelling state interest justifies exclusive representation of public employees. Rather, it concerns whether any compelling state interest justifies extending exclusive representation to individuals who merely receive Medicaid payments for their services to others. Whatever its merits in the context of an employment relationship, the labor peace interest has no application outside of one.

Harris "confine[d] *Abood*'s reach to full-fledged state employees." 134 S. Ct. at 2638. *Harris* similarly confined the reach of the labor peace interest, *id*. at 2640, on the basis that: (1) "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes"; (2) "[f]ederal labor law reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace"; (3) "the specter of conflicting demands by personal assistants is lessened" given SEIU's limited authorities; and

(4) "State officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Id.*

The last point especially is salient. Neither Minnesota nor any other state has a legitimate interest in quelling conflicting demands from diverse groups of citizens. Such demands are the essence of democratic pluralism. "'[C]onflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Abood*, 431 U.S. at 261 (Powell, J., concurring in judgment).

Under *Harris*, no constitutionally sufficient state interest justifies forcing individuals who are not government employees to accept an exclusive representative for dealing with the government. That is why the "significant impingement on associational freedoms" employees suffer as a result of exclusive representation "would not be tolerated in other contexts." *Janus,* 138 S. Ct. at 2478.

It is important that the Court take the second question to establish this limiting principle for exclusive representation. Otherwise, states and local governments can and will designate mandatory representatives to speak for an ever growing number of professions. *See supra* pp. 19-22. The Court should draw a line past which regimes of mandatory representation vis-à-vis government may not be extended.

CONCLUSION

The government cannot be allowed to dictate, on any mere rational basis, which organization speaks for individuals in dealing with the government. The First Amendment reserves this choice to each individual. The Court should take this case to clarify its opinion in *Knight*, hold that states need a compelling interest to force individuals into an exclusive-representation relationship, and further hold that no such interest justifies extending exclusive representation to individuals who are not full-fledged public employees.

The writ of certiorari should be granted on both questions.

Respectfully submitted,

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December 13, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 17-1244

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

Plaintiffs-Appellants,

v.

GOVERNOR MARK DAYTON, in His Official Capacity as Governor of the State of Minnesota; JOSH TILSEN, in His Official Capacity as Commissioner of the Bureau of Mediation Services; EMILY JOHNSON PIPER, in Her Official Capacity as Commissioner of the Minnesota Department of Human Services[1]; SEIU HEALTHCARE MINNESOTA,

Defendants-Appellees.

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Appeal from United States District Court
for the District of Minnesota – Minneapolis

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Submitted: February 14, 2018
Filed: August 14, 2018

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[1] Appellee Piper is automatically substituted for her predecessor under Federal Rule of Appellate Procedure 43(c)(2).

Before SMITH, Chief Judge, MURPHY and COLLOTON, Circuit Judges.[*]

COLLOTON, Circuit Judge.

In 2013, Minnesota enacted a statute that extended the state's Public Employment Labor Relations Act ("PELRA") to persons who provide in-home care to disabled Medicaid recipients. *See* Individual Providers of Direct Support Services Representation Act, ch. 128, art. 2, 2013 Minn. Laws 2173 (codified as amended at Minn. Stat. §§ 179A.54, 256B.0711). PELRA authorizes covered employees to organize and to designate by majority vote an exclusive representative to negotiate employment terms with the state. Minn. Stat. § 179A.06, subdiv. 2

A group of parents who provide homecare services to their disabled children sued several state officials and a union, alleging that the 2013 Act violates the homecare providers' freedom of association under the First and Fourteenth Amendments. They complain that the Act unconstitutionally compels them to associate with the exclusive negotiating representative. The district court,[2] relying on *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), determined that the 2013 Act does not infringe on the providers' First Amendment rights. We agree with the application of *Knight*, and therefore affirm the judgment for the defendants.

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[*] This opinion is filed by Chief Judge Smith and Judge Colloton under Eighth Circuit Rule 47E.

[2] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

I.

PELRA allows public employees to organize by selecting an exclusive representative to "meet and confer" and "meet and negotiate" with the State regarding terms and conditions of employment. Minn. Stat. §§ 179A.06, 179A.07. If public employees select a representative, then the state employer must confer and negotiate exclusively with the representative union. *Id.* § 179A.07, subdivs. 2-3. Employees, however, need not join the union, *id.* § 179A.06, subdiv. 2, and they remain free to communicate with the State independent of the exclusive representative, so long as their activity "is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative." *Id.* § 179A.06, subdiv. 1.

In 2013, Minnesota extended PELRA to apply to those who provide in-home care to Medicaid recipients. Ch. 128, art. 2, 2013 Minn. Laws at 2173-78. Under the 2013 Act, Minnesota considers homecare providers to be public employees solely for purposes of PELRA. Minn. Stat. § 179A.54, subdiv. 2. The Act specifies, however, that no agreement reached between the State and the exclusive representative may interfere with certain rights of the Medicaid recipients—namely, "to select, hire, direct, supervise, and terminate the employment of their individual providers; to manage an individual service budget regarding the amounts and types of authorized goods or services received; or to receive direct support services from individual providers not referred to them through a state registry." *Id.* § 179A.54, subdiv. 4.

In June 2014, SEIU Healthcare Minnesota presented the Minnesota Bureau of Mediation Services with over 9,000 signed union authorization cards from

Minnesota homecare providers requesting that SEIU serve as their exclusive representative. These homecare providers then collectively submitted an official election petition. SEIU agreed that it would not seek mandatory fees from providers who did not join the union.

After receiving notice of the upcoming election, the plaintiff homecare providers sued the Governor, the Commissioner of the Bureau of Mediation Services, and the Commissioner of the Minnesota Department of Human Services, in their official capacities, and SEIU. They sought to enjoin Minnesota from conducting the election and certifying SEIU as their exclusive representative. The providers alleged that if Minnesota conducted the election and recognized SEIU as the exclusive representative, the State would violate their right not to associate under the First Amendment. The district court refused to enjoin the election, and the vote selected SEIU as the exclusive representative. The court then granted judgment on the pleadings for the defendants on the providers' First Amendment claim.

II.

The state defendants contend that there is no case or controversy before us, because the providers lack standing to sue. They argue that the homecare providers have not alleged a concrete injury in fact that satisfies the minimum requirements of Article III. The district court thought the State's argument impermissibly conflated standing analysis with the merits of the claim and concluded that the providers had standing. The court apparently reasoned that the fact that SEIU was certified as the exclusive representative for the homecare providers was a sufficient injury in fact.

Article III standing requires the homecare providers to establish that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To establish injury in fact, the homecare providers must show that they have suffered a concrete and particularized injury to a cognizable interest. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 563 (1992).

One injury that the providers have alleged is an impingement on the freedom of the providers not to associate with the exclusive representative. The State argues that there is no impingement, and thus no injury, so the providers lack standing. We do not think, however, that the alleged restraint on associational freedom is the only injury alleged. The complaint, fairly construed at the pleading stage, also asserts the providers are harmed by the practical effect of the State's decision to recognize an exclusive representative. As the Court recognized in *Knight*, the "unique status" of an exclusive representative "amplifies its voice" in the negotiating process. 465 U.S. at 288. By definition, the voices of those who disagree with the exclusive representative are correspondingly diminished. Whether or not this effect on the voices of the homecare providers violates a constitutional right, we conclude that it is sufficient to constitute an injury in fact for purposes of Article III.

On the merits, the homecare providers contend that PELRA creates a "mandatory agency relationship" between them and the exclusive representative that violates their right to free association under the First and Fourteenth Amendments. This argument, how-

ever, is foreclosed by *Knight*. There, community college faculty instructors objected to Minnesota's recognition of an exclusive representative for negotiations on subjects outside the scope of mandatory bargaining under a prior version of the PELRA. *Id.* at 274, 278. The Court concluded that the State "in no way restrained" the instructors' "freedom to associate *or not to associate* with whom they please, *including the exclusive representative*." *Id.* at 288 (emphases added). In concluding that the instructors' associational freedom was not impaired, the Court emphasized that they were "free to form whatever advocacy groups they like," and were "not required to become members of [the union]." *Id.* at 289.

There is no meaningful distinction between this case and *Knight*. The current version of PELRA similarly allows the homecare providers to form their own advocacy groups independent of the exclusive representative, *see* Minn. Stat. § 179A.06, subdiv. 1, and it does not require any provider to join the union. *Id.* § 179A.06, subdiv. 2. According to *Knight*, therefore, the State has "in no way" impinged on the providers' right not to associate by recognizing an exclusive negotiating representative. The homecare providers urge that *Knight* addressed only whether it was constitutional for a public employer to exclude employees from union meetings, but a fair reading of *Knight* is not so narrow. The Court summarily affirmed the constitutionality of exclusive representation for subjects of mandatory bargaining. 465 U.S. at 279. And the Court discussed more broadly the fact that the State treated the position of the exclusive representative as the official position of the faculty, even though not every instructor agreed, *id.* at 276, but nonetheless ruled that the exclusive representation did not impinge on the right of association. *Id.* at 288-90; *see*

Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 864 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) (per curiam); *D'Agostino v. Baker*, 812 F.3d 240, 242-43 (1st Cir. 2016).

Recent holdings in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), do not supersede *Knight*. Under those decisions, a State cannot compel public employees and homecare providers, respectively, to pay fees to a union of which they are not members, but the providers here do not challenge a mandatory fee. *Janus* did characterize a State's requirement that a union serve as an exclusive bargaining agent for its employees as "a significant impingement on associational freedoms that would not be tolerated in other contexts," 138 S. Ct. at 2478, but the decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue. Of course, where a precedent like *Knight* has direct application in a case, we should follow it, even if a later decision arguably undermines some of its reasoning. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

* * *

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 14-3021 (MJD/LIB)

TERESA BIERMAN, *et al.*,

Plaintiffs,

v.

GOVERNOR MARK DAYTON, in his official capacity as Governor of the State of Minnesota, *et al.*,

Defendants.

MEMORANDUM OF LAW & ORDER

Aaron B. Solem and William L. Messenger, National Right to Work Legal Defense Foundation, and Craig S. Krummen, Winthrop & Weinstine, PA, Counsel for Plaintiffs.

Alan I. Gilbert and Jacob D. Campion, Minnesota Attorney General's Office, Counsel for Defendants Governor Mark Dayton, Josh Tilsen, and Emily Johnson Piper.

Peder J.V. Thoreen and Scott A. Kronland, Altshuler Berzon LLP, and Brendan D. Cummins and Justin D. Cummins, Cummins & Cummins, PLLP, Counsel for Defendant SEIU Healthcare Minnesota.

I. INTRODUCTION

This matter is before the Court on State Defendants' Motion for Judgment on the Pleadings [Docket No. 88] and Defendant SEIU Healthcare Minnesota's Motion for Judgment on the Pleadings [Docket No. 92]. Because Minnesota's certification of SEIU did not infringe on Plaintiffs' First Amendment rights, Defendants' motions are granted.

II. BACKGROUND

A. Factual Background

1. Minnesota's Homecare Program

The State of Minnesota has several programs through which it pays homecare providers to deliver vital "direct support services" to individuals with disabilities or the elderly. *See* Minn. Stat. § 256B.0711, subd. 1(b). These support services include assisting with the "activities of daily living," such as "grooming, dressing, bathing, transferring, mobility, positioning, eating, and toileting," and the "instrumental activities of daily living," such as "meal planning and preparation; basic assistance with paying bills; shopping for food, clothing, and other essential items . . . and traveling, including to medical appointments and to participate in the community." Minn. Stat. § 256B.0711, subd. 1(c); § 256B.0659, subd. 1(b), (i).

The recipients of homecare, the participants, have the authority to choose and supervise their own providers; but the Minnesota Commissioner of the Department of Human Services ("DHS") retains the authority to set the economic terms of employment for the individual providers. Minn. Stat. § 256B.0711, subd. 1(d), subd. 4. The Commissioner has authority to establish "compensation rates," "payment terms

and practices," "benefit terms," "orientation programs," "training and educational opportunities," a "public registry" of individual providers available for work, and "other appropriate terms and conditions of employment governing the workforce of individual providers." Minn. Stat. § 256B.0711, subd. 4(c).

2. The Public Employment Labor Relations Act

Minnesota's Public Employment Labor Relations Act ("PELRA") gives public employees "the right by secret ballot to designate an exclusive representative to negotiate . . . the terms and conditions of employment with their employer." Minn. Stat. § 179A.06, subd. 2. If a union presents the Commissioner of the Bureau of Mediation Services ("BMS") with a petition representing that at least 30 percent of the proposed bargaining unit desire representation by that union, then the union may obtain a certification election. Minn. Stat. § 179A.12, subd. 3. If the union then receives a majority of the votes cast in the certification election, the BMS Commissioner will certify that union as the exclusive representative of all employees in that bargaining unit. *Id*., subd. 10.

Once a union is certified under PELRA, the public employer "has an obligation to meet and negotiate in good faith with the exclusive representative . . . regarding . . . the terms and conditions of employment." Minn. Stat. § 179A.07, subd. 2. For state employees, any agreement reached must be presented to the Minnesota legislature for approval or rejection. Minn. Stat. § 179A.22, subd. 4.

If a union is certified under PELRA, the employees in the bargaining unit are not required to become members of the union: PELRA gives employees "the

right not to . . . join such organizations" and makes it an "unfair labor practice" for public employers or employee organizations to "restrain[] or coerce[]" employees in the exercise of that right or for public employers to "discriminat[e] in regard to hire or tenure to encourage or discourage membership in an employee organization." Minn. Stat. § 179A.06, subd. 2; § 179A.13, subds. 1, 2(1), 2(3), 3(1). Also, the appointment of a PELRA exclusive representative does

> not affect the right of any public employee or the employee's representative to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative.

Minn. Stat. § 179A.06, subd. 1.

Under PELRA, unions are permitted, but not required, to assess fair share fees to non-members. Minn. Stat. § 179A.06, subd 3.

3. The Individual Providers of Direct Support Services Representation Act

On May 24, 2013, Defendant Governor Mark Dayton signed the Individual Providers of Direct Support Services Representation Act (the "Act"). 2013 Minn. Law Ch. 128, Art. 2, *codified at* Minn. Stat. §§ 179A.54, 256B.0711. The Act provides that, "[f]or the purposes of [PELRA], individual [homecare] providers shall be considered . . . executive branch state employees. . . . This section does not require the treatment of individual providers as public employees for any other

purpose." Minn. Stat. § 179A.54, subd. 2; *see also* Minn. Stat. §§ 179A.54, subd. 1(b); 256B.0711, subd. 1(d).

If an exclusive representative is certified under the procedures set forth in PELRA, the State and exclusive representative's "mutual rights and obligations . . . to meet and negotiate regarding terms and conditions shall extend to[:]" "compensation rates, payment terms and practices, and any benefit terms;" "required orientation programs;" "relevant training and educational opportunities;" "the maintenance of a public registry of individuals who have consented to be included;" and "other appropriate terms and conditions of employment governing the workforce of individual providers." Minn. Stat. § 179A.54, subd. 3; § 256B.0711, subd. 4(c). If a contract results from the negotiations, it must be approved or disapproved by the legislature. Minn. Stat. § 179A.54, subd. 5; § 256B.0711, subd 4(d).

> No provision of any agreement reached between the state and any exclusive representative of individual providers. . . shall interfere with the rights of participants or participants' representatives to select, hire, direct, supervise, and terminate the employment of their individual providers; to manage an individual service budget regarding the amounts and types of authorized goods or services received; or to receive direct support services from individual providers not referred to them through a state registry.

Minn. Stat. § 179A.54, subd. 4.

Any employee organization wishing to represent homecare providers may seek exclusive representative

status under PELRA. Minn. Stat. § 179A.54, subd. 10. The appropriate unit is defined as "individual providers who have been paid for providing direct support services to participants within the previous 12 months." *Id*.

4. The Election

On June 30, 2014, the United States Supreme Court issued its decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The Court held that it was a violation of the First Amendment for the State of Illinois to require homecare providers to pay fair share fees to a union representative. *Id*. at 2644.

On July 8, 2014, Defendant SEIU Healthcare Minnesota ("SEIU") submitted an official petition to BMS requesting an election to certify it as the exclusive representative for Minnesota homecare providers. (Am. Compl. ¶ 31; State Def. Ans. ¶ 25; SIEU Ans. ¶ 31.)

On August 1, BMS started the election by mailing ballots to the approximately 27,000 providers who are eligible to vote. (Am. Compl. ¶¶ 31-32; State Def. Ans. ¶ 25; SEIU Ans. ¶¶ 31-32.) On August 26, 2014, BMS tabulated the ballots and certified SEIU as the exclusive representative. (*Id*.) *See also* Minn. Stat. § 179A.12, subd. 10.

5. Plaintiffs

Plaintiffs are nine persons who provide in-home care to a son or daughter with disabilities in Minnesota. The family members to whom Plaintiffs provide care are participants in State Medicaid programs that pay for in-home care and other services that allow persons with disabilities to live in their homes instead of in institutions. Plaintiffs do not want SEIU to be their

certified exclusive representative. (*See* Am. Compl. ¶¶ 4-13, 33.) Under Minnesota law, Plaintiffs are "individual provider[s]," defined as "individual[s] selected by and working under the direction of a participant in a covered program, or a participant's representative, to provide direct support services to the participant." Minn. Stat. § 256B.0711, subd. 1(d).

B. Procedural History

On July 28, 2014, Plaintiffs filed a Complaint in this Court against Governor Mark Dayton; BMS Commissioner Josh Tilsen; DHS Commissioner Lucinda Jesson; and SEIU. Emily Johnson Piper, the current DHS Commissioner, was automatically substituted for Jesson under Federal Rule of Civil Procedure 25(d). Dayton, Tilsen, and Piper are collectively referred to as the "State Defendants."

The Complaint asserted Count I: State certification of an exclusive representati[ve] for Individual Providers will violate 42 U.S.C. § 1983 and the United States Constitution; Count II: Subjecting Plaintiffs' First Amendment rights to a majority vote violates 42 U.S.C. § 1983 and the United States Constitution; and Count III: Compulsory financial support for an exclusive representative will violate 42 U.S.C. § 1983 and the United States Constitution.

On July 30, Plaintiffs filed a Motion for an Expedited Preliminary Injunction, requesting that the Court enjoin Defendants from implementing or enforcing the Act. The motion was based on Counts I and II of the Complaint. Specifically, Plaintiffs requested that the Court enjoin Defendants from conducting the certification election and from certifying SEIU as the exclusive representative of Plaintiffs and other individual providers. On August 20, 2014, this Court issued an Order

denying Plaintiffs' motion. [Docket No. 50]; *Bierman v. Dayton*, No. Civ. 14-3021 (MJD/LIB), 2014 WL 4145410 (D. Minn. Aug. 20, 2014). The Court denied the motion as to Count I because the claim was unripe and premature. The Court denied the motion as to Count II as unlikely to succeed on the merits.

As previously noted, on August 26, 2014, BMS tabulated the election results and certified SEIU as the exclusive representative. On September 2, Plaintiffs filed an Amended Complaint against the same Defendants, asserting: Count I: State certification of an exclusive representati[ve] for individual providers will violate 42 U.S.C. § 1983 and the United States Constitution; and Count II: Subjecting Plaintiffs' First Amendment rights to a majority vote violates 42 U.S.C. § 1983 and the United States Constitution. On August 27, 2014, Plaintiffs' filed a Motion to Renew Their Motion for an Expedited Preliminary Injunction based solely on Count I of the Amended Complaint. [Docket No. 52] On October 22, 2014, the Court denied the renewed motion for a preliminary injunction on the grounds that Plaintiffs were unlikely to prove an infringement of their First Amendment Rights. [Docket No. 69]; *Bierman v. Dayton*, No. Civ. 14-3021 (MJD/LIB), 2014 WL 5438505, at *9 (D. Minn. Oct. 22, 2014). Plaintiffs appealed the denial of their renewed motion, and the Eighth Circuit Court of Appeals dismissed the appeal as moot because the State had already conducted the election and certified the union. *Bierman v. Dayton*, 817 F.3d 1070 (8th Cir. 2016).

On March 11, 2015, the Minnesota Legislature was informed that Minnesota Management and Budget and DHS had reached an agreement with SEIU for the period July 1, 2015 through June 30, 2017. (Garcia Decl., Ex. C.) Under the collective bargaining agree-

ment ("CBA") providers would receive a minimum wage of $11 per hour and paid time off, a new orientation program was established, a grievance procedure was established, and an online registry would be developed to match providers and clients. (*Id*. at 4.) The CBA did not require nonmembers of the union to pay any dues or fees. (Garcia Decl., Exs. B-C.) The Minnesota legislature ratified the CBA. On May 22, 2015, Governor Dayton signed the bill ratifying the CBA and increasing funding for the State's homecare programs. (Garcia Decl. ¶ 2.) 2015 Minn. Law Ch. 71, Art. 7 §§ 52-53.

Defendants have now filed a motion for judgment on the pleadings on the grounds Plaintiffs lack standing and that Plaintiffs fail to state a claim upon which relief may be granted.

III. STANDING

A. Standing Standard

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (citations omitted). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id*. (citations omitted). "To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a

favorable decision." *S.D. v. U.S. Dept. of Interior*, 665 F.3d 986, 989 (8th Cir. 2012) (citations omitted).

B. Standing Discussion

Defendants argue that Plaintiffs lack standing because their associational rights have not, in fact, been infringed, so Plaintiffs lack a judicially cognizable injury.

The Court rejects Defendants' invitation to decide the merits of the case within a standing analysis. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. It is crucial . . . not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Hutterville Hutterian Brethren, Inc. v. Sveen*, 776 F.3d 547, 554 (8th Cir. 2015) (citations omitted).

Plaintiffs claim that they are injured by the fact that SEIU has been certified as the exclusive representative for their bargaining unit. The alleged injury to their First Amendment freedom of association is caused by the State's certification. Finally, a favorable decision by this Court, barring certification would address the alleged injury. The Court concludes that Plaintiffs have standing to assert their claims set forth in the Amended Complaint.

IV. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standard for Motion for Judgment on the Pleadings

"A motion for judgment on the pleadings will be granted only where the moving party has clearly established that no material issue of fact remains and the moving party is entitled to judgment as a matter

of law." *Waldron v. Boeing Co.*, 388 F.3d 591, 593 (8th Cir.2004) (citation omitted). The Court "accept[s] all facts pled by the nonmoving party as true and draw[s] all reasonable inferences from the facts in favor of the nonmovant." *Id*. (citation omitted). In deciding a motion for judgment on the pleadings, the Court considers the pleadings and "some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings," such as "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Greenman v. Jessen*, 787 F.3d 882, 887 (8th Cir. 2015) (citations omitted).

SEIU requests that the Court take judicial notice of three documents attached to the Declaration of Kristin Garcia: 2015 Minnesota Laws Chapter 71, SF 1458 (ratifying the CBA between SEIU and the State); the CBA; and the March 11, 2015 Report to the Subcommittee on Employee Relations, Legislative Coordinating Commission, State of Minnesota (summarizing terms of the CBA). ([Docket No. 96] Garcia Decl., Exs. A-C.) Plaintiffs do not oppose the request for judicial notice. (Opp. Brief at 1.)

Under Federal Rule of Evidence 201(b), a "court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Each of the documents at issue is an official public record of the Minnesota Legislature and is relevant to the motion before the Court. SEIU's request for judicial notice is granted.

B. Count 1: Whether Certification of an Exclusive Representative, Absent Fair Share Fees, Infringes Plaintiffs' First Amendment Right to Association to Petition the Government

a) The Right Not to Associate

The First Amendment guarantees each individual the right to associate for expressive purposes, including a right to associate for purposes of petitioning the government and influencing public policy. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981). "[P]olitical association is speech in and of itself," because "[i]t allows a person to convey a message about some of his or her basic beliefs." *Republican Party of Minn. v. White*, 416 F.3d 738, 762 (8th Cir. 2005) (en banc). And the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (citation omitted).

b) Whether Exclusive Representation Compels Association

Plaintiffs assert that State certification of an exclusive representative for homecare providers affiliates Plaintiffs with SEIU's petitioning, speech, and policy positions. They raise substantially the same arguments that they did in support of their renewed motion for an expedited preliminary injunction.

As the Court previously explained, although SEIU has been certified as the exclusive representative, Plaintiffs are not forced to associate with SEIU. They are not required to join SEIU. *See* Minn. Stat. § 179A.06, subd. 2. They are not required to financially contribute to SEIU. They remain free to petition the State on all issues related to the homecare programs

and to vociferously criticize SEIU. *See* Minn. Stat. § 179A.06, subd. 1; Minn. Stat. § 179A.54, subd. 2.

Simply because the State has chosen to listen to SEIU on issues that are related to Plaintiffs' employment does not mean that Plaintiffs are being forced to associate with SEIU. Instead, as the Supreme Court recognized in *Minnesota State Board for Community Colleges v. Knight*, the State of "Minnesota has simply restricted the class of persons to whom it will listen in its making of policy." 465 U.S. 271, 282 (1984). In this case, the State has chosen to listen to the entity that received the majority of votes in a secret-ballot election of all individual homecare providers. Plaintiffs "have no constitutional right to force the government to listen to their views. They have no such right as members of the public [or] as government employees. . . ." *Id*. at 283. "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Id*. at 288 (footnote omitted). The Supreme Court has expressly stated that the amplification of the exclusive representative's voice through its "unique" role in both the meet and confer and the meet and negotiate sessions does not impair the nonmembers' First Amendment rights. *Id*. As in *Knight*, Plaintiffs' associational freedom is not impaired because they can "form whatever advocacy groups they like" and are "not required to become members" of SEIU. *Id*. at 289.

The very system by which bargaining unit members select a PELRA exclusive representative through majority vote makes clear that not all bargaining unit members necessarily support the representative's positions. *See Knight*, 465 U.S. at 276 ("The State Board considers the views expressed by the state-wide faculty 'meet and confer' committees to be the faculty's

official collective position. It recognizes, however, that not every instructor agrees with the official faculty view on every policy question.") (addressing PELRA). Not only does the Act itself permit Plaintiffs to voice opinions directly to the State, but also, established Supreme Court precedent holds that bargaining unit members are free to criticize the positions of their union representative and make clear that they disagree with its positions. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 (1977); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976). There is no violation of Plaintiffs' First Amendment associational rights when they "are free to associate to voice their disapproval of [SEIU's] message; nothing about the statute affects the composition of [any group formed by Plaintiffs] by making group membership less desirable." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69-70 (2006). Nor does *Mulhall v. UNITE HERE Local 355* require a different conclusion. 618 F.3d 1279, 1287 (11th Cir. 2010). *Mulhall* only addressed standing, not the merits of the employee's claim, and only addressed a Labor Management Relations Act claim, not a First Amendment claim. *Id.* at 1286.

The Court remains mindful of its role as a federal court being asked to interfere with a state's policy decision of how to gather information in order to make Medicaid policy. The Supreme Court recognized the "federalism and separation-of-powers concerns [that] would be implicated in the massive intrusion into state . . . policymaking that recognition of the claimed right [to be listened to by the government] would entail." *Knight*, 465 U.S. at 285.

Despite Plaintiffs' continued insistence, cases such as *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.* have no application here. 515 U.S. 557, 560 (1995). *Hurley* involved state action forcing a private party to alter its expressive activity to include a viewpoint with which it disagreed. Here, the State does not require Plaintiffs to allow SEIU to participate in Plaintiffs' own speech or other expressive activity. Plaintiffs are free to speak to and petition the State on all issues, whether individually or as part of some group other than SEIU.

Similarly, Plaintiffs are not required to display particular messages on their personal property. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713, 717 (1977) (holding that state may not require citizens to display ideological message on his private property in the manner of a license plate stating "Live Free or Die"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974) (holding that a Florida statute requiring newspapers to grant political candidates equal space to answer criticism in the newspaper was unconstitutional, even though "the statute in question here has not prevented the Miami Herald from saying anything it wished"). And the State is not requiring Plaintiffs to join SEIU, financially support SEIU, or otherwise associate with SEIU as a condition of continuing their relationship with the State. *Cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716, 726 (1996) (addressing whether termination of a government contractor based on its refusal to actively politically support election campaign violated the First Amendment); *Branti v. Finkel*, 445 U.S. 507, 517, 520 (1980) (holding First Amendment prohibits discharge of assistant public defenders "solely for the reason that they were not affiliated with or sponsored by the Democratic Party"); *Elrod v. Burns*, 427 U.S. 347, 355-

56, 373 (1976) (addressing whether political patronage dismissals violated freedom of association when plaintiffs were fired from their jobs unless they took active steps to support the victorious political party; they "were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives").

Additionally, the fact that, because it has been certified, SEIU owes a fiduciary-like duty to Plaintiffs "fairly and equitably to represent all employees . . ., union and non-union, within the relevant unit," *Abood*, 431 U.S. at 221, does not infringe Plaintiffs' rights. Plaintiffs owe no corresponding duty to SEIU. Plaintiffs cite no authority for the proposition that the imposition of a legal duty on an entity impermissibly burdens the rights of the beneficiaries of that duty. In any event, the duty of fair representation imposed on the union actually protects bargaining unit members' rights not to associate with the union. It bars the union from discriminating against them when bargaining and administering a collective bargaining agreement. *See*, *e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part).

Finally, the Court holds that *Harris v. Quinn* has no application in this case. 134 S. Ct. 2618 (2014). In *Harris*, the plaintiffs did not "challenge the authority of the SEIU–HII to serve as the exclusive representative of all the personal assistants in bargaining with the State. All they s[ought] is the right not to be forced to contribute to the union, with which they broadly disagree." 134 S. Ct. at 2640. The Supreme Court

solely decided that it was a violation of the First Amendment for a state to require homecare providers to pay fair share or agency fees to a union. *Id*. at 2644. The *Harris* Court further made clear that a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id*. at 2640. *Harris* does not dictate a finding for Plaintiffs by this Court.

The Court concludes that the State's certification of SEIU as the exclusive representative under the Act and PELRA does not infringe on Plaintiffs' First Amendment rights. *See also Jarvis v. Cuomo*, No. 16-441-CV, 2016 WL 4821029, at *1, – F. App'x – (2d Cir. Sept. 12, 2016); *D'Agostino v. Baker*, 812 F.3d 240, 245 (1st Cir. 2016); *Mentele v. Inslee*, No. C15-5134-RBL, 2016 WL 3017713, at *4 (W.D. Wash. May 26, 2016); *Hill v. Serv. Employees Int'l Union*, No. 15 CV 10175, 2016 WL 2755472, at *3 (N.D. Ill. May 12, 2016).

Because the First Amendment is not violated, the State "need not demonstrate any special justification" for its law. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 (1990). Count 1 is dismissed.

C. Count 2: Whether Holding an Election Regarding Whether to Certify a Union Violates the First Amendment

In the Amended Complaint, Plaintiffs assert that "Defendants are violating Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment . . ., by putting to a majority vote the individual right of each Plaintiff and Individual Provider to choose which organization, if any, he or she associates with for petitioning the State over its Medicaid policies." (Am. Compl. ¶ 40.) Plaintiffs argue that their First Amendment "rights may not be submitted to vote; they depend on the

outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

As the Court previously explained in ruling on Plaintiffs' motion for an expedited preliminary injunction, the Court finds no support for Plaintiffs' assertion that their constitutional rights are violated by the mere fact that a vote is occurring, which may or may not result in an action that Plaintiffs claim would violate their constitutional rights. In any case, the Court has now ruled that the certification of an exclusive representative for homecare providers did not unconstitutionally affiliate Plaintiffs with SEIU's petitioning, speech, and policy positions. Because recognition of a democratically elected PELRA representative does not infringe on Plaintiffs' First Amendment rights, holding the representative election did not infringe those rights. Either outcome of the election complied with the Constitution, so there can be no violation of the First Amendment. Thus, Count 2 is dismissed.

Accordingly, based upon the files, records, and proceedings herein, IT IS HEREBY ORDERED:

1. State Defendants' Motion for Judgment on the Pleadings [Docket No. 88] is GRANTED.
2. Defendant SEIU Healthcare Minnesota's Motion for Judgment on the Pleadings [Docket No. 92] is GRANTED.
3. Plaintiffs' First Amended Complaint is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 3, 2017

/s/ Michael J. Davis
Michael J. Davis
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-3468

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

Plaintiffs-Appellants

v.

GOVERNOR MARK DAYTON, in His Official Capacity as Governor of the State of Minnesota; JOSH TILSEN, in His Official Capacity as Commissioner of the Bureau of Mediation Services; EMILY JOHNSON PIPER, in Her Official Capacity as Commissioner of the Minnesota Department of Human Services; SEIU HEALTHCARE MINNESOTA

Defendants-Appellees

Appeal from United States District Court
for the District of Minnesota – Minneapolis

Submitted: October 21, 2015
Filed: March 22, 2016

Before RILEY, Chief Judge, SMITH and SHEPHERD, Circuit Judges.

RILEY, Chief Judge.

Nine individual providers of direct support services (collectively, homecare providers) challenge the constitutionality of a Minnesota statute designating them state employees for the purpose of unionization. *See* Minn. Stat. § 179A.54. The homecare providers timely filed this interlocutory appeal from the district court's[1] denial of their renewed motion preliminarily to enjoin the state from holding an election and certifying an exclusive representative. *See* 28 U.S.C. § 1292(a)(1). We dismiss this present appeal as moot.

I. BACKGROUND

On May 24, 2013, Minnesota Governor Mark Dayton signed the Individual Providers of Direct Support Services Representation Act (Act). *See* Minn. Stat. § 179A.54. The Act designates individual providers of direct support services (individual providers) as state employees solely for the purpose of the Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179A. *Id*., subdiv. 2.

PELRA authorizes Minnesota public employees to form and join a union and to elect an exclusive representative for the purpose of collective bargaining with the state government. *See* §§ 179A.03, subdiv. 6, 179A.12. Under the Act, a union that wishes to become the exclusive representative of individual providers may petition the commissioner of the Bureau of Mediation Services (BMS) to conduct a mail ballot election pursuant to the process directed by PELRA. *See* §§ 179A.54, subdiv. 10, 179A.12, subdiv. 3. If a union

[1] The Honorable Michael J. Davis, then Chief Judge, United States District Court for the District of Minnesota.

receives the majority of the votes cast, the BMS commissioner certifies it as the exclusive representative. *See* § 179A.12, subdiv. 10.

On July 8, 2014, Services Employees International Union Healthcare Minnesota (SEIU) petitioned the BMS commissioner to initiate an election under the Act. The BMS mailed ballots to individual providers on August 1, 2014, with instructions to return the ballot by August 25, 2014.

On July 28, 2014, the homecare providers brought this action under 42 U.S.C. § 1983 against Governor Dayton, BMS Commissioner Josh Tilsen, the Minnesota Department of Human Services (DHS) Commissioner,[2] (collectively, state) and SEIU, challenging the constitutionality of the Act. In Count I, the homecare providers claimed the election of an exclusive representative under the Act violates their First Amendment right to freedom of association because it compels them to associate with a union. In Count II, the homecare providers alleged submitting their right to freedom of association to a "majority vote" violated the First Amendment. Two days after the homecare providers filed suit, they moved for an expedited preliminary injunction. In their motion, the homecare providers asked the district court to "enjoin[] the Defendants from implementing or enforcing the [Act] . . . . In particular, Plaintiffs move the Court to enjoin the Defendants from conducting an election to certify, and from certifying [SEIU] as the exclusive representative of Plaintiffs and other individual providers."

[2] DHS Commissioner Emily Johnson Piper has been substituted for former DHS Commissioner Lucinda Jesson. *See* Fed. R. App. P. 43(c)(2).

Reviewing the motion, the district court decided the homecare providers' claim on Count I was not ripe for review because the homecare providers suffered "no hardship" while the "outcome of the election [was] uncertain." The district court explained, "If SEIU does not receive a majority of the votes cast, then Count I will be moot. If SEIU does receive a majority of the votes cast, then Plaintiffs may renew their motion as to Count I." The district court concluded Count II was "not likely to succeed on the merits."

Out of nearly 27,000 eligible individual providers, the BMS received 5,849 valid ballots—3,543 of which were votes for SEIU. On August 26, 2014, the BMS commissioner certified SEIU as the exclusive representative of individual providers. On August 27, 2014, the homecare providers renewed their motion for an expedited preliminary injunction as to Count I, as the district court suggested. The district court nonetheless denied the motion, deciding the homecare providers were unlikely to succeed on the merits because the Act does not infringe the homecare providers' First Amendment rights. The homecare providers appeal the district court's denial of their renewed motion for a preliminary injunction.

II. DISCUSSION

Although the denial of a preliminary injunction is immediately appealable, *see* 28 U.S.C. § 1292(a)(1), "the appeal of an order denying a preliminary injunction becomes moot if the act sought to be enjoined has occurred." *Bacon v. Neer*, 631 F.3d 875, 877 (8th Cir. 2011); *see Minn. Humane Soc'y v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999) (explaining that without a "live case or controversy," a case becomes moot and we no longer have jurisdiction over the matter). "As mootness relates to justiciability and our power to hear a

case, 'we must consider it even [if] the parties have not raised it.'" *Bacon*, 631 F.3d at 877-78 (quoting *Olin Water Servs. v. Midland Research Labs., Inc.*, 774 F.2d 303, 306 n.3 (8th Cir. 1985)).

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *cf. CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 620 (1st Cir. 1995) ("[T]he impetus behind the statutory exception to the 'final judgment' rule that allows an immediate appeal of an order refusing a preliminary injunction is to prevent irreparable harm to a litigant who, otherwise, might triumph at trial but be left holding an empty bag.").

At this point, reversal of the denial of preliminary injunctive relief would not adequately address the harm the homecare providers sought to prevent when moving for a preliminary injunction. The event the homecare providers attempted to stop—the election and subsequent certification of SEIU as the exclusive representative—has already occurred. Therefore, we must dismiss this appeal as moot. *See Indep. Party of Richmond Cty. v. Graham*, 413 F.3d 252, 256-57 (2d Cir. 2005) ("Where the event giving rise to the necessity of preliminary injunctive relief has passed, the 'harm-preventing function cannot be effectuated by the successful prosecution of an interlocutory appeal from the denial of interim injunctive relief.'" (quoting *CMM Cable Rep., Inc.*, 48 F.3d at 621)); *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007) (deciding injunctive relief seeking to prevent a proposal from reaching the ballot was moot because the election had since taken place, the proposal was approved, and the Michigan constitution

had been amended); *cf. Pope v. County of Albany*, 687 F.3d 565, 570 (2d Cir. 2012) ("Courts may understandably hesitate to void elections that have already been conducted as a form of *preliminary* equitable relief, preferring to take such action only upon a final determination that plaintiffs are entitled to *permanent* relief.").[3]

During oral argument, the homecare providers proposed, as a matter of law, their initial request for relief encompasses the decertification of SEIU. In *Stevenson v. Blytheville School District No. 5*, we rejected a similar argument in which the plaintiffs attempted to evade the mootness doctrine by arguing their "request for preliminary injunctive relief [was] not limited to a past event but includes 'all other just and proper relief.'" *Stevenson v. Blytheville Sch. Dist. No. 5*, 762 F.3d 765, 770 (8th Cir. 2014). Observing the plaintiffs' motion pertained only to a particular resolution applying in one school year, we rejected plaintiffs' argument on the "clear terms of the motion." *Id.* In the present case, the homecare providers' motion for a preliminary injunction applied, on its face, to the then-ongoing mail ballot election. The homecare providers explicitly requested in their motion that the district court "enjoin the Defendants from conducting an election to certify, and from certifying [SEIU] as

[3] We also note, between the time the homecare providers filed notice of this interlocutory appeal and oral argument, the state and SEIU reached a collective bargaining agreement, which was approved by the Minnesota legislature and went into effect on July 1, 2015. In their reply brief, the homecare providers emphasized "[t]heir claim is not based on the favorability or unfavorability of the terms of any potential contract negotiated by the SEIU." Rather, the homecare providers allege the certification of the exclusive provider, "in and of itself," violates their First Amendment rights.

the exclusive representative of Plaintiffs and other individual providers," both of which the state has since done.

Considering the district court's treatment of the homecare providers' motions, deciding the preliminary injunction was not ripe until *after* the election and certification happened, *but cf., Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (dissolving an injunction pending appeal for lack of ripeness when no union had petitioned to become an exclusive representative and "[t]he election of an exclusive representative [was] not certainly impending"), at which point we now decide it is moot, we recognize the temptation to apply the mootness doctrine exception for issues that are "'capable of repetition, yet evading review.'" *Minn. Humane Soc'y*, 184 F.3d at 797 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). This exception applies "only in exceptional situations," *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), where "(1) the challenged action is of too short a duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Minn. Humane Soc'y*, 184 F.3d at 797.

The applicability of this exception "can depend on the posture of the case on appeal." *Fleming v. Gutierrez*, 785 F.3d 442, 446 (10th Cir. 2015). *See generally Indep. Party of Richmond Cty.*, 413 F.3d at 256 ("To apply the 'capable of repetition yet evading review' exception to otherwise moot appeals of preliminary injunctions would, moreover, impermissibly evade the ordinary rule, pursuant to 28 U.S.C. § 1291, that appellate courts review only 'final decisions' of a lower court.").

Here, the resulting harm from the certification of SEIU as the exclusive representative is not capable of repetition because SEIU has already been certified, and the underlying legal issues do not evade review because the homecare providers' challenge to the Act is still pending before the district court. *See Fleming*, 785 F.3d at 446 (distinguishing the application of this exception to an interlocutory appeal relating to a since-completed election from "the question of whether th[e] suit as a whole is capable of repetition, yet evading review"); *Stevenson*, 762 F.3d at 770 (explaining the underlying legal issues implicated in the motion for a preliminary injunction will not "evade review" because appellants' requests for permanent relief "remain pending before the district court" (internal citation omitted)); *Doe No. 1 v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012) (providing examples of cases involving inherently limited durations, including challenges relating to pregnancy, prior restraint on free speech, and cases "that only present live controversies in brief periods before an election"). Upon careful consideration, this exception does not apply to the homecare providers' appeal. The appeal is moot and should be dismissed. *See Stevenson*, 762 F.3d at 770; *Fleming*, 785 F.3d at 449.

III. CONCLUSION

We dismiss this appeal for lack of jurisdiction.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 14-3021 (MJD/LIB)

TERESA BIERMAN, *et al.*,

Plaintiffs,

v.

GOVERNOR MARK DAYTON, in his official capacity as Governor of the State of Minnesota, *et al.*,

Defendants.

MEMORANDUM OF LAW & ORDER

Aaron B. Solem and William L. Messenger, National Right to Work Legal Defense Foundation, and Craig S. Krummen, Winthrop & Weinstine, PA, Counsel for Plaintiffs.

Alan I. Gilbert and Jacob D. Campion, Minnesota Attorney General's Office, Counsel for Defendants Governor Mark Dayton, Josh Tilsen, and Lucinda Jesson.

Peder J.V. Thoreen and Scott A Kronland, Altshuler Berzon LLP, and Brendan D. Cummins, and Justin D. Cummins, Cummins & Cummins, PLLP, Counsel for Defendant SEIU Healthcare Minnesota.

I. INTRODUCTION

This matter is before the Court on Plaintiffs' Motion for an Expedited Preliminary Injunction. [Docket No. 10] The Court heard oral argument on August 19, 2014. For the reasons that follow, Plaintiffs' motion is denied.

II. SUMMARY OF THE DECISION

The Court will not interfere with an ongoing election based on Plaintiffs' fear about what the outcome of that election might be. Based on a legally enacted Minnesota law, homecare providers have the right to vote in the current secret ballot election to determine whether a majority desire SEIU to be their exclusive representative. The individual homecare providers are independent actors who will exercise their own free will to decide how to vote. This Court cannot predict how 27,000 individuals will choose to vote. Under the law, the election must proceed.

If, after all the votes are counted, the SEIU is certified as the exclusive representative, Plaintiffs may renew their challenge to that certification to this Court. At this time, their challenge is premature.

III. BACKGROUND

A. Factual Background

1. Minnesota's Homecare Program

The State of Minnesota has several programs through which it pays homecare providers to deliver vital "direct support services" to individuals with disabilities or the elderly. *See* Minn. Stat. § 256B.0711, subd. 1(b). These support services include assisting with the "activities of daily living," such as "grooming, dressing, bathing, transferring, mobility, positioning, eating, and toileting," and the "instrumental activities of daily living," such as "meal planning and preparation; basic assistance

with paying bills; shopping for food, clothing, and other essential items . . . and traveling, including to medical appointments and to participate in the community." Minn. Stat. § 256B.0711, subd. 1(c); § 256B.0659, subd. 1(b), (i).

The recipients of homecare, the participants, have the authority to choose and supervise their own providers; but the Minnesota Commissioner of the Department of Human Services retains the authority to set the economic terms of employment for the individual providers. Minn. Stat. § 256B.0711, subd. 1(d), subd. 4. The Commissioner has authority to establish "compensation rates," "payment terms and practices," "benefit terms," "orientation programs," "training and educational opportunities," a "public registry" of individual providers available for work, and "other appropriate terms and conditions of employment governing the workforce of individual providers." Minn. Stat. § 256B.0711, subd. 4(c).

2. The Public Employment Labor Relations Act

Minnesota's Public Employment Labor Relations Act ("PELRA") gives public employees "the right by secret ballot to designate an exclusive representative to negotiate . . . the terms and conditions of employment with their employer." Minn. Stat. § 179A.06, subd. 2. If a union presents the Commissioner of the Bureau of Mediation Services ("BMS") with a petition representing that at least 30 percent of the proposed bargaining unit desire representation by that union, then the union may obtain a certification election. Minn. Stat. § 179A.12, subd. 3. If the union then receives a majority of the votes cast in the certification election, the BMS Commissioner will certify that

union as the exclusive representative of all employees in that bargaining unit. *Id*., subd. 10.

Once a union is certified under PELRA, the public employer "has an obligation to meet and negotiate in good faith with the exclusive representative . . . regarding . . . the terms and conditions of employment." Minn. Stat. § 179A.07, subd. 2. For state employees, any agreement reached must be presented to the Minnesota legislature for approval or rejection. Minn. Stat. § 179A.22, subd. 4.

If a union is certified under PELRA, the employees in the bargaining unit are not required to become members of the union: PELRA gives employees "the right not to . . . join such organizations" and makes it an "unfair labor practice" for public employers or employee organizations to "restrain[] or coerce[]" employees in the exercise of that right. Minn. Stat. § 179A.06, subd. 2; § 179A.13, subds. 1, 2(1), 3(1). Also, the appointment of a PELRA exclusive representative does

> not affect the right of any public employee or the employee's representative to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative.

Minn. Stat. § 179A.06, subd. 1.

Under PELRA, unions are permitted, but not required, to assess fair share fees to non-members. Minn. Stat. § 179A.06, subd 3.

3. The Individual Providers of Direct Support Services Representation Act

On May 24, 2013, Defendant Governor Mark Dayton signed the Individual Providers of Direct Support Services Representation Act (the "Act"). 2013 Minn. Law Ch. 128, Art. 2, *codified at* Minn. Stat. § 179A.54, § 256B.0711. The Act provides that, "[f]or the purposes of [PELRA], individual [homecare] providers shall be considered . . . executive branch state employees. . . . This section does not require the treatment of individual providers as public employees for any other purpose." Minn. Stat. § 179A.54, subd. 2; *see also* Minn. Stat. §§ 179A.54, subd. 1(b); 256B.0711, subd. 1(d).

If an exclusive representative is certified under the procedures set forth in PELRA, the State and exclusive representative's "mutual rights and obligations . . . to meet and negotiate regarding terms and conditions shall extend to[:]" "compensation rates, payment terms and practices, and any benefit terms;" "required orientation programs;" "relevant training and educational opportunities;" "the maintenance of a public registry of individuals who have consented to be included;" and "other appropriate terms and conditions of employment governing the workforce of individual providers." Minn. Stat. § 179A.54, subd. 3; § 256B.0711, subd. 4(c). If a contract results from the negotiations, it must be approved or disapproved by the legislature. Minn. Stat. § 179A.54, subd. 5; § 256B.0711, subd 4(d).

> No provision of any agreement reached between the state and any exclusive representative of individual providers. . . shall interfere with the rights of participants or participants' representatives to select, hire, direct, supervise, and terminate the employment of their individual providers; to manage an individual

> service budget regarding the amounts and types of authorized goods or services received; or to receive direct support services from individual providers not referred to them through a state registry.

Minn. Stat. § 179A.54, subd. 4.

Any employee organization wishing to represent homecare providers may seek exclusive representative status under PELRA. Minn. Stat. § 179A.54, subd. 10. The appropriate unit is defined as "individual providers who have been paid for providing direct support services to participants within the previous 12 months." *Id*.

4. The Ongoing Election

In June 2014, Defendant SEIU Healthcare Minnesota ("SEIU") presented over 9,000 union authorization cards signed by homecare providers to BMS seeking to designate SEIU as their exclusive bargaining representative. (Gulley Decl. ¶ 15.) On July 8, 2014, SEIU submitted an official petition to BMS requesting an election to certify it as the exclusive representative for Minnesota homecare workers. (Gulley Decl. ¶ 15.)

On June 30, 2014, the United States Supreme Court issued its decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The Court held that it was a violation of the First Amendment for the State of Illinois to require homecare providers to pay fair share fees to a union representative. *Id*. at 2644. After the *Harris* decision, SEIU informed both BMS and the Commissioner of the Department of Human Services that it would not require any fair share fee if individual homecare providers designated it as their exclusive representative. (Gulley Decl. ¶ 19; Gulley Decl., Ex. A.) On July 11, BMS mailed notice of the election, the "Mail Ballot

Election Order," to the approximately 27,000 homecare providers eligible to vote in the election and also posted the Mail Ballot Election Order on its website. (Tilsen Aff. ¶ 4.)

On August 1, BMS started a secret-ballot election by mailing ballots to the 26,972 providers who are eligible to vote. (Gulley Decl. ¶ 16; Solem Decl., Ex. 2, Mail Ballot Election Order.) Providers' ballots must be received by BMS by August 25, 2014. (Mail Ballot Election Order.) On August 26, 2014, BMS will tabulate the ballots and certify the results. (Mail Ballot Election Order.) *See also* Minn. Stat. § 179A.12, subd. 10. Then, "[a]ny party to the proceedings may, within seven days from . . . said certification order . . . file . . . objections to the certification," which BMS must resolve. Minn. R. 5505.1400.

5. Plaintiffs

Plaintiffs are nine persons who provide in-home care to a son or daughter with disabilities in Minnesota. (*See* Pls.' Decl. ¶¶ 1-3.) The family members to whom Plaintiffs provide care are participants in State Medicaid programs that pay for in-home care and other services that allow persons with disabilities to live in their homes instead of in institutions. (*Id*. ¶ 3.) Plaintiffs do not want SEIU, or any other organization, to be certified as their exclusive representative, and they do not want the election to proceed. (*Id*. ¶ 6.)

B. Procedural History

On July 28, 2014, Plaintiffs filed a Complaint in this Court against Governor Mark Dayton; BMS Commissioner, Josh Tilsen; Commissioner of the Minnesota Department of Human Services, Lucinda Jesson; and SEIU. The Complaint asserts Count I: State certification of an exclusive representati[ve] for

Individual Providers will violate 42 U.S.C. § 1983 and the United States Constitution; Count II: Subjecting Plaintiffs' First Amendment rights to a majority vote violates 42 U.S.C. § 1983 and the United States Constitution; and Count III: Compulsory financial support for an exclusive representative will violate 42 U.S.C. § 1983 and the United States Constitution.

On July 30, Plaintiffs filed the current Motion for an Expedited Preliminary Injunction, requesting that the Court enjoin Defendants from implementing or enforcing the Act. The motion is based on Counts I and II of the Complaint. Specifically, Plaintiffs request that the Court enjoin Defendants from conducting the certification election and from certifying SEIU as the exclusive representative of Plaintiffs and other individual providers.

IV. STANDING AND RIPENESS

A. Ripeness

1. Legal Standard for Ripeness

The ripeness doctrine requires that, before a court may assume jurisdiction over a case, there must be "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Minn. Pub. Utils. Comm'n v. F.C.C.*, 483 F.3d 570, 582 (8th Cir. 2007) (citation omitted).

> The judicially created doctrine of ripeness flows from both the Article III 'cases' and 'controversies' limitations and also from

> prudential considerations for refusing to exercise jurisdiction. Ripeness is peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review. A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Both of these factors are weighed on a sliding scale, but each must be satisfied to at least a minimal degree.

Iowa League of Cities v. E.P.A., 711 F.3d 844, 867 (8th Cir. 2013) (citations omitted).

"The fitness prong safeguards against judicial review of hypothetical or speculative disagreements. The hardship prong asks whether delayed review inflicts significant practical harm on the plaintiffs." *Parrish v. Dayton*, – F.3d –, 2014 WL 3747601, at *1 (8th Cir. July 31, 2014) (citations omitted).

2. Fitness of the Issues for Judicial Decision

a) Count I

The fitness of the issues prong focuses on "a court's ability to visit an issue [and] whether it would benefit from further factual development." *Pub. Water Supply Dist. No. 10 v. City of Peculiar, Mo.*, 345 F.3d 570, 573 (8th Cir. 2003) (citations omitted). "The case is more likely to be ripe if it poses a purely legal question and is not contingent on future possibilities." *Id*. (citation omitted). Count I of the Complaint, based on the claim that certification of an exclusive representative will violate Plaintiffs' First Amendment rights, rests on an important future contingency – the outcome of the ongoing election. Plaintiffs' motion for a preliminary

injunction based on Count I is not fit for judicial review because a threshold factual element of their claim is uncertain, and factual development within the next week may obviate the need for the Court to rule at all.

The fact that Plaintiffs feel the need to expend resources to influence the outcome of the election in order to prevent SEIU from prevailing, does not make their claim under Count I ripe:

> The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent.

Harris v. Quinn, 656 F.3d 692, 700-01 (7th Cir. 2011) (citation omitted), *aff'd in relevant part* 134 S. Ct. 2618, 2644 n.30 (2014).

Plaintiffs' motion, to the extent it is based on Count I, is dependent on a future event that "may not occur as anticipated, or indeed may not occur at all." *Parrish*, 2014 WL 3747601, at *2 (citation omitted).

b) Count II

To the extent that Plaintiffs' motion is based on Count II, the claim that the mere holding of an election violates their First Amendment rights, the issue is fit

for judicial decision. The election is already underway. There are no relevant future contingencies that would affect the Court's ability to rule.

3. Hardship to the Parties of Withholding Court Consideration

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. "The plaintiffs need not wait until the threatened injury occurs, but the injury must be certainly impending." *Pub. Water Supply Dist. No. 10 of Cass County, Mo.*, 345 F.3d at 573 (citation omitted).

a) Count I

Plaintiffs face no hardship from this Court's decision to deny review at this time. The Act, in and of itself, does not require Plaintiffs to associate with SEIU in any manner. The outcome of the election is uncertain and beyond the Court's power of prediction. If SEIU does not receive a majority of the votes cast, then Count I will be moot. If SEIU does receive a majority of the votes cast, then Plaintiffs may renew their motion as to Count I, and this Court is fully informed and equipped to swiftly rule on the merits of such a motion for a preliminary injunction. There is no hardship to the parties in withholding court consideration until after the outcome of the election.

b) Count II

As the Court has noted, Plaintiffs' claimed injury in Count II has already happened based solely on the fact that the certification election is occurring. Based on Plaintiffs' theory, they will suffer continuing hardship

each day that the Court fails to address their motion and allows the election to continue.

4. Conclusion as to Ripeness

The Court concludes that, to the extent Plaintiffs' motion for a preliminary injunction is based on Count I of their Complaint, the motion is not ripe and must be denied. To the extent Plaintiffs' motion is based on Count II of their Complaint and the allegation that the mere occurrence of the election violates their First Amendment rights, their motion is ripe. The Court now turns to the question of standing with regard to Count II.

B. Standing: Count II

"To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *S.D. v. U.S. Dept. of Interior*, 665 F.3d 986, 989 (8th Cir. 2012) (citations omitted).

Here, Plaintiffs have standing to bring their motion with regard to Count II. There are no remaining contingencies regarding this claim. Plaintiffs claim that they are injured by the mere holding of the election, and the election is already underway. The alleged injury is caused by the continuation of the election. Finally, a favorable decision by this Court, halting the election, would address the alleged injury. The Court now turns to the merits of Plaintiffs' motion for a preliminary injunction based solely on Count II of the Complaint.

V. MOTION FOR A PRELIMINARY INJUNCTION

A. Standard for a Preliminary Injunction

The Eighth Circuit Court of Appeals has established the standard for considering preliminary injunctions. *Dataphase Sys. Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). This Court must consider (1) the threat of irreparable harm to the moving party if an injunction is not granted, (2) the harm suffered by the moving party if injunctive relief is denied as compared to the effect on the non-moving party if the relief is granted, (3) the public interest, and (4) the probability that the moving party will succeed on the merits. *Id*.

> [A] party seeking a preliminary injunction of the implementation of a state statute must demonstrate more than just a "fair chance" that it will succeed on the merits. We characterize this more rigorous standard, drawn from the traditional test's requirement for showing a likelihood of success on the merits, as requiring a showing that the movant is likely to prevail on the merits. [A] more rigorous standard reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly. If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors.

Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 731-32 (8th Cir. 2008) (en banc) (citations and footnote omitted). This heightened standard is intended "to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id*. at 733.

B. Likelihood of Success of the Merits

The Court concludes that Plaintiffs are not likely to succeed on the merits of their claim in Count II.

The First Amendment guarantees each individual the right to associate for expressive purposes, including a right to associate for purposes of petitioning the government and influencing public policy. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981). "[P]olitical association is speech in and of itself," because "[i]t allows a person to convey a message about some of his or her basic beliefs through such associations." *Republican Party of Minn. v. White*, 416 F.3d 738, 762 (8th Cir. 2005) (en banc). And the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (citation omitted).

Here, in Count I, Plaintiffs claim that, if SEIU receives the majority of votes in the current election and is certified as the exclusive representative, they will be required to associate with SEIU in violation of their First Amendment rights. In Count II, Plaintiffs argue that, regardless of the outcome, the ongoing certification election is, itself, unconstitutional because the election allows the possibility that the majority will impose their will on the minority and force them to associate with SEIU. They assert that, for the State

to put to a majority vote each Plaintiff's individual right to choose which organization he or she picks to lobby the government is antithetical to the First Amendment freedom of association.

The Court finds no support for Plaintiffs' assertion that their constitutional rights are violated by the mere fact that a vote is occurring, which may or may not result in an action that Plaintiffs claim would violate their constitutional rights. Legislative bodies often vote on measures that, if adopted by the majority, might violate the First Amendment; in many states, citizens also vote on such measures. However, there is no legal authority for the proposition that merely holding a vote on such a measure that may violate the First Amendment is, in and of itself, a violation of the First Amendment. Were the law otherwise, federal courts would be full of cases seeking to prevent votes on such measures. As the Supreme Court noted in *Clapper v. Amnesty Int'l USA*, the mere fact that Plaintiffs feel compelled to expend energy and resources to attempt to prevent a harm that may occur – certification of SEIU – does not allow them to manufacture a current injury. 133 S. Ct. 1138, 1151 (2013). The Court concludes that Plaintiffs cannot show a likelihood of success on their claim that the holding of the certification election violates their First Amendment rights.

C. Remaining *Dataphase* Factors

Because Plaintiffs cannot show a likelihood of success on the merits of their First Amendment claim in Count II, no presumption of irreparable harm follows. *See*, *e.g.*, *Educ. Minn. Lakeville v. Indep. Sch. Dist. No. 194*, 341 F. Supp. 2d 1070, 1080 (D. Minn. 2004) ("Under the Eighth Circuit's interpretation of *Elrod*, irreparable harm exists '[i]f [the plaintiffs] *are*

correct and their First Amendment rights have been violated.'") (emphasis in original) (quoting *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1140–41 (8th Cir. 1996)). Additionally, because Plaintiffs have failed to show a likelihood of success on the merits of their claim under Count II, the Court need not address the remaining *Dataphase* factors. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008).

Accordingly, based upon the files, records, and proceedings herein, IT IS HEREBY ORDERED:

Plaintiffs' Motion for an Expedited Preliminary Injunction [Docket No. 10] is DENIED.

Dated: August 20, 2014

/s/ Michael J. Davis
Michael J. Davis Chief Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1244

TERESA BIERMAN, *et al.*,

Appellants,

v.

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

Appellees.

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:14-cv-03021-MJD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 17, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No.: 14-cv-03021-MJD-LIB

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

Plaintiffs,

v.

GOVERNOR MARK DAYTON, in His Official Capacity as Governor of the State of Minnesota, JOSH TILSEN, in His Official Capacity as Commissioner of the Bureau of Mediation Services, and LUCINDA JESSON, in Her Official Capacity as Commissioner of the Minnesota Department of Human Services, SEIU HEALTHCARE MINNESOTA,

Defendants.

FIRST AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs are individuals who provide home-based care to family members enrolled in Minnesota Medicaid programs. They bring this action to enjoin and declare unconstitutional the "Individual Providers of Direct Support Services Representation Act," 2013 Minn. Law. Ch. 128, codified at Minn. Stat.

§§ 179A.54, 256B.0711 ("the Act"), which calls for State certification of an organization to act as homecare providers' exclusive representative for petitioning the State over aspects of its Medicaid programs. The Act compels association of an expressive purpose, violating Plaintiffs' rights under the First Amendment to the United States Constitution, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to individually choose with whom they associate to petition the Government for a redress of grievances.

JURISDICTION AND VENUE

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

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

PARTIES

4. Plaintiffs are individuals who reside in Minnesota and provide homecare services to disabled individuals enrolled in a Minnesota Medicaid program that pays for homecare services. More specifically:

5. Plaintiff Teresa Bierman provides homecare services to her daughter, who participates in the Consumer Directed Community Supports program. Her daughter requires constant care and supervision due to cerebral palsy, and other disorders that result in profound cognitive and motor disabilities.

6. Plaintiff Linda Brickley provides homecare services to her son, who participates in the Consumer Directed Community Supports program. Her son requires constant care and supervision due to his severe autism.

7. Plaintiff Kathy Borgerding provides homecare services to her daughter, who participates in the Consumer Directed Community Supports program. Her daughter requires constant care and supervision due to her autism, epilepsy, and other developmental disabilities.

8. Plaintiff Carmen Gretton provides homecare services to her son, who participates in the Consumer Directed Community Supports program. He requires constant care and supervision due to her autism and other disorders that result in profound cognitive and motor disabilities.

9. Plaintiff Beverly Ofstie provides homecare services to her son, who participates in the Consumer Directed Community Supports program. Her son requires constant care and supervision due to Rubenstein-Taybi syndrome and several other disorders.

10. Plaintiff Scott Price provides homecare services to his daughter, who participates in the Consumer Directed Community Supports program. His daughter requires constant care and supervision due to her Cerebral Palsy and other disorders.

11. Plaintiff Tammy Tankersley provides homecare services to her son, who participates in the Consumer Directed Community Supports program. Her son requires constant care and supervision due to his autism, attention deficit hyperactivity disorder, and epilepsy.

12. Plaintiff Kimberly Woehl provides homecare services to her son, who participates in the Consumer Directed Community Supports program. Her son requires constant care and supervision due to his autism.

13. Plaintiff Karen Yust provides homecare services to her son, who participates in the Consumer Support Grant program. Her son requires constant care and supervision due to his cerebral palsy, seizures, and global developmental delay.

14. Defendant Mark Dayton is the Governor of the State of Minnesota and its chief executive officer, and is sued in his official capacity.

15. Defendant Josh Tilsen is the Commissioner of the Minnesota Bureau of Mediation Services ("BMS"), and is sued in his official capacity.

16. Defendant Lucinda Jesson is the Commissioner of the Minnesota Department of Human Services ("DHS"), and is sued in her official capacity.

17. Defendant SEIU Healthcare Minnesota ("SEIU") is a labor union that transacts business and has one of its two main offices in this judicial district.

FACTUAL ALLEGATIONS

I. Homecare Programs

18. Minnesota operates several Medicaid programs that subsidize the cost of home-based services for persons with disabilities in order to prevent their unnecessary institutionalization. As relevant here, these programs include, but are not limited to the: (1) Consumer Directed Community Supports Program; (2) Personal Care Assistance Choice program; (3) Consumer Support Grant Program; and (4) Community First

Services and Supports program. *See* Minn. Stat. § 256B.0711, subd. 1(b).

19. Participants in these Medicaid programs may employ an "Individual Provider" to assist them with household tasks, personal care, and certain health care procedures. An "Individual Provider" is defined by statute as "an individual selected by and working under the direction of a participant in a covered program, or a participant's representative, to provide direct support services to the participant, but does not include an employee of a provider agency, subject to the agency's direction and control commensurate with agency employee status." Minn. Stat. § 256B.0711, subd. 1(d); *see also id.* at § 179A.54, subd. 1(b).

20. Individual Providers are employed by program participants or their guardians. Conversely, program participants or their guardians act as the employers of Individual Providers, sometimes with the assistance of private fiscal intermediary organizations. Among other things, program participants or their guardians recruit, select, hire, direct, supervise, train, and fire their Individual Providers.

21. Individual Providers are not employed by the State of Minnesota. The State merely subsidizes a program participant's costs of hiring Individual Providers through its Medicaid programs.

22. There are approximately 26,000 Individual Providers employed by participants in the relevant Medicaid programs at this time, including the Plaintiffs. Like the Plaintiffs, many Individual Providers are family members of program participants.

II. The State Seeks to Compel Individual Providers to Accept a State-Appointed Exclusive Representative.

23. On May 24, 2013, Governor Dayton signed the Act into law. The Act deems Individual Providers to be state employees solely for purposes of unionization.

24. More specifically, the Act provides that "[fJor the purposes of the Public Employment Labor Relations Act ("PELRA"), under chapter 179A, individual providers shall be considered, by virtue of this section, executive branch state employees employed by the commissioner of management and budget or the commissioner's representative." Minn. Stat. § 179A.54, subd. 2. However, the "section does not require the treatment of individual providers as public employees for any other purpose." *Id*.

25. The Act calls for the State to certify an "exclusive representative" of Individual Providers based on the results of a mail ballot election conducted by BMS. *See* Minn. Stat. § 179A.54, subd. 10.

26. Exclusive representation is a fiduciary relationship. Thus, State certification of an exclusive representative will thrust Plaintiffs and all other Individual Providers into a mandatory fiduciary relationship with their State-appointed representative.

27. Under the Act, a State-certified exclusive representative is vested with the statutory right to "meet and negotiate" with the State as the representative of all Individual Providers over certain issues of public policy. Minn. Stat. § 179A.54, subd. 3. This includes "compensation rates, payments terms and practices, and any benefit terms . . . required orientation programs" and "other appropriate terms and conditions of employment governing the workforce of individual

providers." *Id*. at § 256B.0711, subd. 4(c). A State-certified exclusive representative is also vested with the authority to enter into contracts with the State on behalf of all Individual Providers regarding these policy matters. *See id*. at § 179A.54, subd. 5.

28. The Act thereby contemplates forcing Plaintiffs and all other Individual Providers to accept a mandatory, exclusive representative for petitioning and contracting with the State over certain Medicaid policies that may affect them.

29. State certification of an exclusive representative will affiliate Plaintiffs and all other Individual Providers with the petitioning, speech, and policy positions of their State-appointed exclusive representative.

30. The Act also authorizes the State to force Individual Providers to financially support a certified exclusive representative by making applicable to Individual Providers Minnesota Statute § 179A.06, subd. 3, which provides that "[a]n exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative." *See also id.* at 256B.0711, subd. (h) (authorizing the Commissioner of DHS to require the extraction of compulsory fees for an exclusive representative from payments made to Individual Providers).

31. On July 8, 2014, SEIU Healthcare Minnesota ("SEIU") submitted a petition to BMS seeking a mail ballot election under the Act. BMS will mail ballots to Individual Providers on August 1, 2014. The mail ballots must be returned by August 25, 2014.

32. BMS tabulated the votes in returned ballots on August 26, 2014. Out of 26,977 providers, only 5,849 cast valid ballots, of which 3,543 voted for SEIU

representation. On the same date, BMS certified the SEIU as the exclusive representative of all Individual Providers, to include the Plaintiffs..

33. Plaintiffs strongly oppose being forced to accept the SEIU as their exclusive representative for petitioning and contracting with the State. They do not want to be forced into a fiduciary relationship with this advocacy group, do not want to affiliate with its expressive activities, and do not want to be forced to financially support the SEIU. Plaintiffs also do not want their individual right to choose with whom they associate to petition government subjected to a majority vote. Plaintiffs want to retain their individual right, guaranteed by the First Amendment to the United States Constitution, to choose with whom they associate to lobby the State.

34. Plaintiffs and other Individual Providers have had their associational rights put to a majority vote on August 1, 2014, and will now be forced to associate with the SEIU for purposes of petitioning and contracting with the State.

CLAIMS FOR RELIEF

35. Plaintiffs reallege and incorporate by reference the paragraphs set forth above in each Count of their Complaint.

36. The First Amendment to the United States Constitution guarantees each citizen an individual right to choose whether, how, and with whom he or she associates to "petition the Government for a redress of grievances" and engage in "speech." A state infringes on these First Amendment rights when it compels citizens to associate with or financially support an organization for these expressive purposes.

COUNT I

(State certification of an exclusive representation for Individual Providers will violate 42 U.S.C. § 1983 and the United States Constitution)

37. By and through the Act, Defendants are compelling Plaintiffs and other Individual Providers to associate with the SEIU as their exclusive representative for petitioning and contracting with the State. By so doing, Defendants are violating Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, to not associate with the SEIU for expressive purposes and to not associate with the SEIU's expressive activities. No compelling or otherwise sufficient state interest justifies this infringement on First Amendment rights.

38. Plaintiffs will suffer the irreparable harm and injury inherent in a violation of First Amendment rights, for which there is no adequate remedy at law, when forced to associate with the SEIU, and will thereafter continue to suffer irreparable harm and injury until the Act is enjoined by this Court.

39. The Act is unconstitutional both on its face and as applied to Plaintiffs.

COUNT II

(Subjecting Plaintiffs First Amendment rights to a majority vote violates 42 U.S.C. § 1983 and the United States Constitution)

40. The First Amendment protects individual liberties, to include freedom of association, from majority rule. Defendants are violating Plaintiffs' First Amendment rights, as secured against state infringement by

the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, by putting to a majority vote the individual right of each Plaintiff and Individual Provider to choose which organization, if any, he or she associates with for petitioning the State over its Medicaid policies.

41. Plaintiffs are suffering the irreparable harm and injury inherent in a violation of First Amendment rights, for which there is no adequate remedy at law, as a result of the Defendants subjecting their First Amendment rights to a majority vote.

42. The election being conducted under the Act, and all elections authorized under the Act, are unconstitutional both on their face and as applied to Plaintiffs.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that this Court:

A. Issue a declaratory judgment that the Act is unconstitutional under the First Amendment, as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, and null and void;

B. Issue preliminary and permanent injunctions that enjoin enforcement of the Act, either in whole or in part;

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

D. Grant such other and additional relief as the Court may deem just and proper.

Date: August 27, 2014

WINTHROP & WEINSTINE, P.A.

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APPENDIX G

Minnesota Statutes Annotated
Labor, Industry (Ch. 175-189)
Chapter 179A. Public Employment Labor Relations
M.S.A. § 179A.54

Effective: May 25, 2013
Currentness

M.S.A. § 179A.54. Individual providers of direct support services

Subdivision 1. Definitions. For the purposes of this section:

(a) "Direct support services" has the meaning given to it under section 256B.0711, subdivision 1, paragraph (c).

(b) "Individual provider" has the meaning given to it under section 256B.0711, subdivision 1, paragraph (d).

(c) "Participant" has the meaning given to it under section 256B.0711, subdivision 1, paragraph (e).

(d) "Participant's representative" has the meaning given to it under section 256B.0711, subdivision 1, paragraph (f).

Subd. 2. Rights of individual providers and participants. For the purposes of the Public Employment Labor Relations Act, under chapter 179A, individual providers shall be considered, by virtue of this section, executive branch state employees employed by the commissioner of management and budget or the commissioner's representative. This section does not require the treatment of individual providers as public employees for any other purpose. Individual providers are not state employees for purposes of section 3.736. Chapter 179A shall apply to individual providers except as otherwise provided in this section. Notwith-

standing section 179A.03, subdivision 14, paragraph (a), clause (5), chapter 179A shall apply to individual providers regardless of part-time or full-time employment status.

Subd. 3. Scope of meet and negotiate obligation. If an exclusive representative is certified pursuant to this section, the mutual rights and obligations of the state and an exclusive representative of individual providers to meet and negotiate regarding terms and conditions shall extend to the subjects covered under section 256B.0711, subdivision 4, paragraph (c), but shall not include those subjects reserved to participants or participants' representatives by subdivision 4.

Subd. 4. Rights of covered program participants. No provision of any agreement reached between the state and any exclusive representative of individual providers, nor any arbitration award, shall interfere with the rights of participants or participants' representatives to select, hire, direct, supervise, and terminate the employment of their individual providers; to manage an individual service budget regarding the amounts and types of authorized goods or services received; or to receive direct support services from individual providers not referred to them through a state registry.

Subd. 5. Legislative action on agreements. Any agreement reached between the state and the exclusive representative of individual providers under chapter 179A shall be submitted to the legislature to be accepted or rejected in accordance with sections 3.855 and 179A.22.

Subd. 6. Strikes prohibited. Individual providers shall be subject to the prohibition on strikes applied to essential employees under section 179A.18.

Subd. 7. Interest arbitration. Individual providers shall be subject to the interest arbitration procedures applied to essential employees under section 179A.16.

Subd. 8. Appropriate unit. The only appropriate unit for individual providers shall be a statewide unit of all individual providers. The unit shall be treated as an appropriate unit under section 179A.10, subdivision 2. Individual providers who are related to their participant or their participant's representative shall not for such reason be excluded from the appropriate unit.

Subd. 9. List access. Beginning September 1, 2013, upon a showing made to the commissioner of the Bureau of Mediation Services by any employee organization wishing to represent the appropriate unit of individual providers that at least 500 individual providers support such representation, the commissioner of the Bureau of Mediation Services shall provide to such organization within seven days the most recent list of individual providers compiled under section 256B.0711, subdivision 4, paragraph (f), and three subsequent monthly lists upon request. The commissioner of the Bureau of Mediation Services shall provide lists compiled under section 256B.0711, subdivision 4, paragraph (f), upon request, to any exclusive representative of individual providers. To facilitate operation of this section, the commissioner of human services shall provide all lists to the commissioner of the Bureau of Mediation Services, upon the request of the commissioner of the Bureau of Mediation Services. When the list is available to an employee organization under this subdivision, the list must be made publicly available.

Subd. 10. Representation and election. Beginning October 1, 2013, any employee organization wishing to

represent the appropriate unit of individual providers may seek exclusive representative status pursuant to section 179A.12. Certification elections for individual providers shall be conducted by mail ballot, and such election shall be conducted upon an appropriate petition stating that among individual providers who have been paid for providing direct support services to participants within the previous 12 months, a number of individual providers equal to at least 30 percent of those eligible to vote wish to be represented by the petitioner. The individual providers eligible to vote in any such election shall be those individual providers on the monthly list of individual providers compiled under section 256B.0711, subdivision 4, paragraph (f), most recently preceding the filing of the election petition. Except as otherwise provided, elections under this section shall be conducted in accordance with section 179A.12.

Minnesota Statutes Annotated
Public Welfare and Related Activities (Ch. 245-267)
Chapter 256B. Medical Assistance for Needy Persons
M.S.A. § 256B.0711

Effective: August 1, 2014
Currentness

M.S.A. § 256B.0711. Quality self-directed services workforce

Subdivision 1. Definitions. For purposes of this section:

(a) "Commissioner" means the commissioner of human services unless otherwise indicated.

(b) "Covered program" means a program to provide direct support services funded in whole or in part by the state of Minnesota, including the Community First Services and Supports program; Consumer Directed Community Supports services and extended state plan personal care assistance services available under programs established pursuant to home and community-based service waivers authorized under section 1915(c) of the Social Security Act,1 and Minnesota Statutes, including, but not limited to, sections 256B.0915, 256B.092, and 256B.49, and under the alternative care program, as offered pursuant to section 256B.0913; the personal care assistance choice program, as established pursuant to section 256B.0659, subdivisions 18 to 20; and any similar program that may provide similar services in the future.

(c) "Direct support services" means personal care assistance services covered by medical assistance under section 256B.0625, subdivisions 19a and 19c; assistance with activities of daily living as defined in section 256B.0659, subdivision 1, paragraph (b), and

instrumental activities of daily living as defined in section 256B.0659, subdivision 1, paragraph (i); and other similar, in-home, nonprofessional long-term services and supports provided to an elderly person or person with a disability by the person's employee or the employee of the person's representative to meet such person's daily living needs and ensure that such person may adequately function in the person's home and have safe access to the community.

(d) "Individual provider" means an individual selected by and working under the direction of a participant in a covered program, or a participant's representative, to provide direct support services to the participant, but does not include an employee of a provider agency, subject to the agency's direction and control commensurate with agency employee status.

(e) "Participant" means a person who receives direct support services through a covered program.

(f) "Participant's representative" means a participant's legal guardian or an individual having the authority and responsibility to act on behalf of a participant with respect to the provision of direct support services through a covered program.

Subd. 2. Operation of covered programs. All covered programs shall operate consistent with this section, including by affording participants and participants' representatives within the programs of the option of receiving services through individual providers as defined in subdivision 1, paragraph (d), notwithstanding any inconsistent provision of section 256B.0659.

Subd. 3. Use of employee workforce. The requirement under subdivision 2 shall not restrict the state's ability to afford participants and participants' representatives within the covered programs who choose

not to employ an individual provider, or are unable to do so, the option of receiving similar services through the employees of provider agencies, rather than through an individual provider.

Subd. 4. Duties of the commissioner of human services. (a) The commissioner shall afford to all participants within a covered program the option of employing an individual provider to provide direct support services.

(b) The commissioner shall ensure that all employment of individual providers is in conformity with this section and section 179A.54, including by modifying program operations as necessary to ensure proper classification of individual providers, to require that all relevant vendors within covered programs assist and cooperate as needed, including providers of fiscal support, fiscal intermediary, financial management, or similar services to provide support to participants and participants' representatives with regard to employing individual providers, and to otherwise fulfill the requirements of this section, including the provisions of paragraph (f).

(c) The commissioner shall:

(1) establish for all individual providers compensation rates, payment terms and practices, and any benefit terms, provided that these rates and terms may permit individual provider variations based on traditional and relevant factors otherwise permitted by law;

(2) provide for required orientation programs within three months of hire for individual providers newly hired on or after January 1, 2015, regarding their employment within the covered programs through which they provide services;

(3) have the authority to provide for relevant training and educational opportunities for individual providers, as well as for participants and participants' representatives who receive services from individual providers, including opportunities for individual providers to obtain certification documenting additional training and experience in areas of specialization;

(4) have the authority to provide for the maintenance of a public registry of individuals who have consented to be included to:

(i) provide routine, emergency, and respite referrals of qualified individual providers who have consented to be included in the registry to participants and participants' representatives;

(ii) enable participants and participants' representatives to gain improved access to, and choice among, prospective individual providers, including by having access to information about individual providers' training, educational background, work experience, and availability for hire; and

(iii) provide for appropriate employment opportunities for individual providers and a means by which they may more easily remain available to provide services to participants within covered programs; and

(5) establish other appropriate terms and conditions of employment governing the workforce of individual providers.

(d) The commissioner's authority over terms and conditions of individual providers' employment, including compensation, payment, and benefit terms, employment opportunities within covered programs, individual

provider orientation, training, and education opportunities, and the operation of public registries shall be subject to the state's obligations to meet and negotiate under chapter 179A, as modified and made applicable to individual providers under section 179A.54, and to agreements with any exclusive representative of individual providers, as authorized by chapter 179A, as modified and made applicable to individual providers under section 179A.54. Except to the extent otherwise provided by law, the commissioner shall not undertake activities in paragraph (c), clauses (3) and (4), prior to July 1, 2015, unless included in a negotiated agreement and an appropriation has been provided by the legislature to the commissioner.

(e) The commissioner shall cooperate in the implementation of section 179A.54 with the commissioner of management and budget in the same manner as would be required of an appointing authority under section 179A.22 with respect to any negotiations between the executive branch of the state and the exclusive representative of individual providers, as authorized under sections 179A.22 and 179A.54. Any entity providing relevant services within covered programs, including providers of fiscal support, fiscal intermediary, financial management, or similar services to provide support to participants and participants' representatives with regard to employing individual providers shall assist and cooperate with the commissioner of human services in the operations of this section, including with respect to the commissioner's obligations under paragraphs (b) and (f).

(f) The commissioner shall, no later than September 1, 2013, and then monthly thereafter, compile and maintain a list of the names and addresses of all individual providers who have been paid for providing

direct support services to participants within the previous six months. The list shall not include the name of any participant, or indicate that an individual provider is a relative of a participant or has the same address as a participant. The commissioner shall share the lists with others as needed for the state to meet its obligations under chapter 179A as modified and made applicable to individual providers under section 179A.54, and to facilitate the representational processes under section 179A.54, subdivisions 9 and 10. In order to effectuate this section and section 179A.54, questions of employee organization access to other relevant data on individual providers relating to their employment or prospective employment within covered programs shall be governed by chapter 179A and section 13.43, and shall be treated the same as labor organization access to personnel data under section 13.43, subdivision 6. This shall not include access to private data on participants or participants' representatives. Nothing in this section or section 179A.54 shall alter the access rights of other private parties to data on individual providers.

(g) The commissioner shall immediately commence all necessary steps to ensure that services offered under all covered programs are offered in conformity with this section, to gather all information that may be needed for promptly compiling lists required under this section, including information from current vendors within covered programs, and to complete any required modifications to currently operating covered programs by September 1, 2013.

(h) Beginning January 1, 2014, the commissioner of human services shall specifically require that any fiscal support, fiscal intermediary, financial management, or similar entities providing payroll assistance

services with respect to individual providers shall make all needed deductions on behalf of the state of dues check off amounts or fair-share fees for the exclusive representative, as provided in section 179A.06, subdivisions 3 and 6. All contracts with entities for the provision of payroll-related services shall include this requirement.