

No. 18-766

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IN THE  
**Supreme Court of the United States**

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TERESA BIERMAN, *et al.*,

*Petitioners,*

*v.*

MARK DAYTON, GOVERNOR OF MINNESOTA, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE* CENTER  
OF THE AMERICAN EXPERIMENT IN  
SUPPORT OF PETITIONERS**

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**STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Center of the American Experiment (the “Center”) is a non-partisan educational organization dedicated to the principles of individual sovereignty, private property and the rule of law. It advocates for creative policies that limit government involvement in individual affairs and promotes competition and consumer choice in a free market environment. The Center is a non-profit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

This case concerns *amicus* because the Center has worked with home-based providers to prevent harm caused by a Minnesota law that declared them “state employees” but only for the purpose of collectively bargaining. Minnesota’s collective bargaining laws are designed for full-fledged public employees, not private sector providers of home-based care. These providers, operating under ill-fitting State labor laws, have been forced to defend themselves against a sophisticated and well-financed campaign waged by Governor Dayton and public-sector unions, and State agencies that regulate home-based care and union certification elections. Some providers are now compelled to accept the Service Employees International Union (the “SEIU”) as their exclusive agent but do not have meaningful recourse as “state employees” under State labor laws.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have received appropriate notice and have consented to the filing of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

To assist the Court in its decision, we offer relevant information about two groups of private-sector citizens subjected to public-sector unionization efforts: home-based child care providers (hereinafter “Providers”) and individual Medicaid providers known in Minnesota as “personal care attendants” or “PCAs”.

While Providers have defeated unionization, at least for now, PCAs were unionized in 2014. As a result, PCAs are compelled to accept an exclusive representative to speak with the State and other government entities on their behalf about public policies of substantial public concern.

The chronicle in Minnesota begins with the 2010 candidacy of Mark Dayton for governor. Picking up on a trend successfully launched in other states, then-candidate Dayton spoke about the need to improve wages and working conditions for “low-income workers.”<sup>2</sup> For several years prior to Dayton’s campaign, both the SEIU and the American Federation of State, County and Municipal Employees (“AFSCME”) had been canvassing in-home Providers and PCAs seeking support for a unionization plan.

During the 2010 campaign, Dayton and the Democratic Farmer Labor Party (DFL) received cash contributions, endorsements and campaign support from public-sector

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2. SEIU endorses Dayton, <http://seiumn.org/2010/10/04/seiu-endorses/>; AFSCME endorses Dayton: <http://www.startribune.com/afscme-endorses-dayton-s-bid-for-governor/65919357/>

unions such as the SEIU and AFSCME.<sup>3</sup> The certification of in-home provider unions, if successful, would yield significant new annual revenue for the SEIU and AFSCME in a cynical *quid pro quo*.<sup>4</sup>

## ARGUMENT

### I. CHILD CARE PROVIDERS DEFEAT UNIONIZATION BUT DECLINE IN NUMBERS

Shortly after taking office, Governor Dayton issued Executive Order 13-11 directing a mail-in ballot election for Providers, declaring: “Whereas, unions AFSCME and SEIU have claimed in writing that a majority of licensed family child care providers desire to be represented for the purposes of negotiating their relationship with the State.... regardless of whether there is an employer or employee relationship...”<sup>5</sup>

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3. SEIU Minn State Council Political Fund, “Report of Receipts and Expenditures for Political Committee or Political Fund,” Minnesota Campaign Finance and Public Disclosure Board, January 2010-December 2010. AFSCME, “Report of Receipts and Expenditures for Political Committees and Political Funds,” Minnesota Campaign Finance and Public Disclosure Board, January 2010-December 2010.

4. In 2014, BMS had a list of approximately 10,000 Providers and 27,000 PCAs. The SEIU in Minnesota set dues at 3% of gross wages up to \$948 a year. <http://www.seiuhealthcaremn.org/2015/07/24/frequently-asked-questions-about-membership-status/#uniondues>. Union dues were never set by AFSCME for Providers in Minnesota but in Washington they pay 2% of wages, up to \$50/month. State of Washington Department of Social and Health Services Child Care Subsidy Programs (CCSP), DSHS 14-417 (REV. 05/2016), Section 6.

5. Executive Order 13-11 [https://mn.gov/governor/assets/EO%2011-31%20Childcare%20Providers\\_tcm1055-357945.pdf](https://mn.gov/governor/assets/EO%2011-31%20Childcare%20Providers_tcm1055-357945.pdf);



The Executive Order limited the unionization effort to Providers who had recently contracted with a parent receiving a welfare subsidy known as “CCAP.”<sup>6</sup> That meant about 3,400 Providers were eligible to vote while another 6,700 would be excluded.

Though convoluted because *the parent*, not the care provider under CCAP, *is the person receiving the state subsidy*, the theory is that by accepting partial payment from CCAP participants for services rendered, the Provider was now subject to unionization as a public employee. (This is like declaring that dentists who accept welfare patients are “state employees.”)

One problem with excluding Providers who did not meet the voting criteria, was that the union or unions, if certified, would be exclusively speaking to the State on behalf of one group of Providers on matters of concern to *all* Providers.<sup>7</sup>

As explained in a news report:

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6. Ibid. paragraph 1

7. Ibid. paragraph 4, “If [a union is certified, the union and state] shall meet and confer...regarding issues of mutual concern, including quality standards and quality rating systems; the availability of training opportunities and funding; reimbursement rates; access to benefits; . . . the monitoring and evaluating of family child care providers; and any other matters that the parties agree would improve recruitment and retention of qualified licensed registered family child care providers and the quality of the programs they provide.

If child-care providers opt for collective bargaining, the unions would operate differently from other labor organizations. That's because the unions would not be authorized to negotiate wages for child-care workers. Instead the unions argue that they would provide leverage to workers in negotiating higher state subsidies, quality standards, training opportunities and other benefits.<sup>8</sup>

The union could not negotiate “wages” because these so-called “workers” are not workers at all. They are independent business owners who set the price for services based on market prices, often negotiated with parents according to many factors, including the number and ages of children served. Providers also set wages and work rules for *their own employees*.

Before the election could take place, the Executive Order was successfully challenged by a group of Providers.<sup>9</sup> Providers had been on alert to the threat of unionization due to canvassing efforts by the SEIU and AFSCME; union organizers showed up in Providers' yards and knocked on their doors while they were busy caring for children.<sup>10</sup> In response, Providers launched websites, contacted one another on social media, appeared in the media and retained legal counsel.<sup>11</sup>

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8. <https://minnlawyer.com/2011/11/15/dayton-calls-for-union-election-among-child-care-providers/>

9. *Swanson v Dayton*, No. A-12-1368, 2013 WL 1707674 (Minn. Ct. App. 22, 2013).

10. <http://www.childcareunioninfo.com/minnesota.html>

11. See, <http://www.minnesotafamilychildcare.com/contact.html>; see also, <http://www.childcareunioninfo.com>

The Ramsey County District Court found that the Executive Order usurped the Legislature’s authority and thus violated the separation of powers under the Minnesota Constitution. If Governor Dayton wanted Providers to be unionized, he would have to convince the Legislature to decree that an employer-employee relationship existed.

That opportunity arose in 2013. The Legislature was then controlled by Governor Dayton’s DFL party; in a dramatic 17-hour debate, said to be the longest in State history, the Senate narrowly adopted a bill amending the Public Employee Labor Relations Act (known as “PELRA” with the amendment referred to hereinafter as the “Act”)<sup>12</sup> to promote the unionization of Providers by declaring them “state employees.”<sup>13</sup> The Minneapolis Star Tribune’s Editorial Board commented:

It’s fitting that much of the Senate’s debate took place in the dark of night. But DFL lawmakers are fooling themselves if they doubt that Minnesotans see this overreaching legislation for what it is: the collection of a campaign IOU by labor interests who worked on the party’s behalf in 2012.<sup>14</sup>

The Act, which Governor Dayton signed into law, made it clear that these new “state employees” would be

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12. The “Family Child Care Providers Representation Act” Minn. Stat. §§ 179A.50-179A.54.

13. <http://www.startribune.com/child-care-unions-bill-passes-after-17-hour-debate-over-2-days/207477391/>

14. *DFL’s day care overreach*, Star Tribune (May 16, 2013), <http://www.pressreader.com/usa/star-tribune/20130516/281797101516081>.

excluded from benefits such as health care coverage or pensions, or the right to strike.

AFSCME sought representation status by submitting election cards to the Bureau of Mediation Services (BMS); a mail-in ballot election was set early in 2016.<sup>15</sup> The election received significant state and national news coverage.<sup>16</sup>

When the mail-in ballots were counted on March 1, 2016, the attempt by AFSCME and Governor Dayton to unionize these independent business owners was defeated 1,014 to 392.<sup>17</sup>

While the Providers were victorious, their story concludes with a sad irony. The Executive Order signed by Governor Dayton in 2011 cited the importance of quality child care options and the recent decline in the number of Providers as a reason to allow unionization: “Whereas, despite their important services to Minnesota’s families, there has been a troubling decline in the number of licensed family child care providers operating in the State of Minnesota....”<sup>18</sup>

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15. Providers argued it was unconstitutional that AFSCME should be empowered to speak for all Providers on matters of public policy even though not all Providers were eligible to vote. That equal protection concern was raised during the challenge to the Executive Order, but the issue was not reached by the court in *Swanson v. Dayton*.

16. News stories can be found on the Child Care Union Info website <http://www.childcareunioninfo.com/news.html>; and on the Minnesota Family Child Care website <http://www.minnesotafamilychildcare.com/media.html>

17. <http://www.childcareunioninfo.com/minnesota.html>

18. Executive Order 13-11

Rather than reversing the trend of Providers closing their doors, the number of in-home Providers, especially CCAP Providers, *rapidly declined* during the unionization effort:

Since Dayton began this campaign, the number of registered CCAP providers has fallen from 13,764 in 2010 to just 4,750 in 2015. And the total number of licensed providers has dropped, too. This means all working parents who prefer in-home child care have fewer options. This is especially hard for CCAP moms who have fewer options, period....<sup>19</sup>

Subsequent legislative attempts to further regulate Providers with, for example, fingerprinting,<sup>20</sup> followed by a sensational series of front-page news articles about children dying in home-based care<sup>21</sup>, the shift of pre-school age children to public pre-Kindergarten programs championed by Governor Dayton (forcing Providers to compete with “free” government child care), and fatigue from fighting off a union campaign, have all been cited as reasons for Minnesota’s sharp decline in child care options.<sup>22</sup>

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19. Kim Crockett <http://www.startribune.com/sneaky-vote-to-unionize-child-care-providers-would-hijack-public-dollars/369355391/>

20. See, <https://www.twincities.com/2017/10/27/minnesota-child-care-providers-balk-at-fingerprinting-their-kids/>

21. See for example, <http://www.startribune.com/napping-baby-dies-at-coon-rapids-home-day-care/139444683/>; and <http://www.startribune.com/the-day-care-threat/370203871/>

22. Preschool Policy Brief by NIER <http://nieer.org/wp-content/uploads/2016/08/22.pdf>; Local perspective by child care providers and how Pre-Kindergarten is hurting option for low-income children <https://www.minnpost.com/community-voices/2018/02/universal-pre-k-would-make-minnesota-s-child-care-shortage-much-worse/>

## II. THE SEIU IS EMPOWERED TO SPEAK FOR ALL PCAS FOLLOWING LOW-VOTER-TURNOUT IN ELECTION MARKED BY FRAUD

The Act also covered PCAs, in-home providers of Medicaid services to the disabled, under a program known in Minnesota as “PCA Choice.” Like the Providers, PCAs were declared “state employees” to collectively bargain but “not for any other purpose.” But the PCA story developed very differently from the Providers’ story.

The union campaigned on the promise of better pay and benefits normally associated with “state employees” even though the Act explicitly excludes those possibilities from this convoluted “employment” relationship.<sup>23</sup> This is because Congress designed this Medicaid program to give the disabled participant or the participant’s legal guardian *maximum control over the benefit*; that means hiring, firing and training providers of care in the beneficiary’s personal residence. PCAs are often family members or trusted friends, not “workers.”<sup>24</sup>

To make it clear that family members, however, would be treated as “workers” under PELRA, which normally excludes such persons from bargaining, the Act said, “Individual providers who are related to their participants or their participant’s representative shall not for such reason be excluded from the appropriate unit.”<sup>25</sup>

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23. Supra note 12, 179A.54. Subd.2

24. 179A.54 Subd. 8 of the Act spells out the rights of disabled program participants to continue in their role *as the employer of PCAs*.

25. Supra note 12, 179A.54. Subd.8

Providers in Minnesota are the only child care providers to defeat unionization, except for providers in Vermont.<sup>26</sup> Minnesota PCAs, like all other PCAs in the country faced with a statewide election, were not able to organize in time to defeat unionization, which happened very quickly.<sup>27</sup>

PCA leaders like Petitioner Teresa Bierman and Kris Greene<sup>28</sup> challenged the scheme through separate litigation. In 2016, Catherine Hunter<sup>29</sup> and others joined Kris Greene to form a coalition called “MNPCA” to decertify the SEIU. Kris Greene explained her involvement as follows:

Five years ago, I joined a Minnesota program and became a personal care assistant (PCA) to my daughter. Though I had been caring for her for her entire life, joining this PCA program allowed us to receive a modest Medicaid subsidy to assist in her care. It also allowed Meredie to live at home, instead of in a government-run institution.

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26. <https://vtdigger.org/2014/12/10/anti-union-childcare-workers-beat-aft-union-vote/>

27. The only PCAs in the country who have defeated a union in an election were led by Pam Harris (see, *Harris v. Quinn*) in Illinois. It was a local election, not a statewide election. <https://illinoisreview.typepad.com/illinoisreview/2009/10/parents-say-no-to-quinns-unionization.html>

28. Kris Greene was the lead plaintiff in *Greene v. Dayton*, 806 F.3d 1146 (8th Cir. 2015), challenging the Act.

29. Catherine J. Hunter is a plaintiff in *Greene v. Minn. Bureau Mediation Servs.*, No. 62-cv-16-5981 (Ramsey Cnty. Dist. Ct. Jul. 30, 2018) *appeal docketed*, No. A18-1981 (Minn. Ct. App. Dec. 5, 2018).

My husband and I consider this public support a generous gift that we have not taken for granted and for which we are very grateful. Meredie continues to live at home with us, where we know she is happy and safe under our care, instead of with a stranger who may or may not have her best interests at heart.

Unfortunately, this wonderful program is being looted by a third party that has no business intruding in the affairs of my family: the Service Employees International Union (SEIU).<sup>30</sup>

Unlike full-fledged state employees, *PCAs have no common workplace* or even a virtual meeting place on social media where they could discuss whether they wanted to be represented by a union, or to hear about important matters such as an upcoming union election.

The only “notice” PCAs had was a knock at the front door by a union organizer in search of signed union cards. “SEIU showed up to my home at least five times in March 2014,” Sara Madill of Duluth, Minnesota said. “The last time they showed up, I ended up having to threaten to call the police for them to leave me alone.” Madill, who cared for her sister, described the treatment she received at the hands of SEIU as “harassment and bullying.”<sup>31</sup>

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30. Kris Greene, <http://www.mnpca.org/why-pcas-should-beat-back-the-union/>.

31. <https://alphanewsmn.com/personal-care-attendants-demand-dayton-decertify-union/>



Once the union had enough cards, it stopped canvassing and filed for an election. Most PCAs only heard about the union from MNPCA *after the union was certified*.<sup>32</sup>

Most PCAs are family members or close friends, but a small portion are just trying to make a living. MNPCA estimates that about 80 to 85 percent of Choice PCAs are family members of participants; most but not all PCAs related to the disabled participant oppose unionization whereas most PCAs who support unionization are not related to the participant.<sup>33</sup>

Even though the Act explicitly excludes PCAs from normal public sector pay and benefits, the pitch from union organizers that a provider could become a “state employee” with the promise of higher pay and benefits including health insurance and retirement benefits,<sup>34</sup> must have been very appealing to some of the PCAs contacted by the union. As discussed below, however, it is still very much in doubt, that a majority of PCAs ever wanted the SEIU to speak for them. Tellingly, over 13,000 PCAs have

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32. Source, see the Center (*amicus*), legal counsel to MNPCA and others with knowledge from working on the legal challenge and decertification.

33. *Ibid.*

34. “The home care Unions that have won the strongest standards (affordable health insurance, wage floors as high as \$15 an hour, paid training opportunities, even retirement benefits) pay dues of 3% or higher.” *Frequently Asked Questions about membership status*, SEIU Healthcare Minn. (July 24, 2015), <http://www.seihealthcaremn.org/2015/07/24/frequently-asked-questions-about-membership-status/#uniondues>.

signed a request calling for an election so that PCAs can choose whether to decertify the SEIU.<sup>35</sup>

According to a union affidavit, the SEIU submitted 9,072 authorization cards to BMS<sup>36</sup> for the original election to win representation status in 2014.<sup>37</sup> Since there is no “workplace” in which to hold a union election for these fictional “state employees,” mail-in ballots were utilized to reach PCAs at their homes over several weeks in August of 2014. When that mail-in ballot from BMS arrived at the homes of PCAs, one can only guess what happened to the ballots. Fewer than 25 percent were returned in time to be counted. Even PCAs who knew there was a unionization effort underway might not have known what the “Bureau of Mediation Services” was or that the envelope had something to do with the PCA Choice program.

Despite a showing of 9,072 cards with an almost 27,000 alleged eligible voters, the resulting low-voter turnout election produced *only 3,543 votes* cast in favor of unionization (about 13 percent) with *just 5,849 total*

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35. The decertification is in litigation, see Memorandum in Support of Relators’ Motion to Supplement the Record at 4, *Certain Emps. v. SEIU Healthcare Minn.*, No. A18-0661 (Minn. Ct. App. filed Dec. 6, 2018).

36. See, Gully Affidavit #15 (page 8). CASE 0:14-cv-03021-MJD-LIB, Document 38, Filed 08/07/14 (Page 1 of 13).

37. MNPCA, after discovering fraudulently obtained union cards and union cards signed under duress, has asked BMS to allow legal counsel to review the union cards submitted in the showing in 2014, or to investigate, but BMS has refused. Brief for Relators at 5, *Certain Emps. v. SEIU Healthcare Minn.*, No. A17-0798, 2018 WL 414363 (Minn. Ct. App. Jan. 16, 2018).

*votes counted* (21.7 percent of PCAs). But since PELRA only requires a *simple majority* of votes cast to win,<sup>38</sup> the SEIU was certified as the exclusive representative of all PCAs in the Choice and related programs.<sup>39</sup>

The PCA contact list used by the SEIU to gather cards, and used by BMS to mail ballots to PCAs, was supposed to be compiled and updated monthly by the Department of Human Service (“DHS”) which administers the PCA programs.<sup>40</sup> Subsequent litigation revealed that DHS, by its own admission, failed to update that list after the SEIU succeeded in certifying the unit. This has had a severe impact on the ability of PCAs to meaningfully exercise their rights as “state employees” under PELRA to decertify the SEIU and illustrates the sham nature of labor relations for PCAs under the Act.<sup>41</sup>

#### **A. WHY *HARRIS* AND *JANUS* ARE NOT ENOUGH: THE IMPACT OF EXCLUSIVE UNION REPRESENTATION ON PCAS**

Since the Court’s decision in *Harris*, even some harsh critics of the PCA unionization scheme concluded that *Harris* resolved the objections of PCAs who did not want to be represented by the SEIU: if PCAs did not have to join

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38. Supra note 12, 179A.12 Subd. 10.

39. August 26, 2014 BMS Certification, State of Minnesota, Minnesota Management & Budget (Department of Human Services), St. Paul, Minnesota -and MN Health Care Union SEIU Local 113, St. Paul, Minnesota ; BMS Case No. 15PCE001.

40. Supra note 12, 179A.54.Subd.9

41. *Certain Emps. v. SEIU Healthcare Minn.*, No. A17-0798, 2018 WL 414363, at 6-7 (Minn. Ct. App. Jan. 16, 2018).

or financially support the SEIU, but still got “the benefit” of union representation, PCAs, they argue, have nothing to complain about. This conclusion assumes PCAs find the representation a “benefit” and ignores that the SEIU speaks on behalf of all PCAs at the Legislature and before State agencies on matters of public concern whether PCAs pay dues or not, or consent to representation.

The SEIU set dues for member PCAs at an astonishing 3% of gross wages up to \$948 a year.<sup>42</sup> Since *Harris* was decided before the SEIU was certified, PCAs in Minnesota were never *legally obligated* to financially support the SEIU, but many did nonetheless (and still do) because even in the unlikely event that a PCA knew about the *Harris* decision, he or she had either signed a union card or a card had been “signed” for them by an SEIU organizer.<sup>43</sup> Kris Greene put it this way:

That means the SEIU speaks for me even though I do not belong to the union and strongly disagree with how the union is affecting this important program.

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42. “Home care workers who join the Union contribute 3% of our gross income in Union dues. This means that for each dollar we earn, we contribute 3 cents to keep our Union strong. A committee of home care workers and other members of our Union’s Executive Board proposed the 3% dues rate after researching the experiences of home care Unions across the country. The home care Unions that have won the strongest standards (affordable health insurance, wage floors as high as \$15 an hour, paid training opportunities, even retirement benefits) pay dues of 3% or higher.” *Supra* note 34.

43. *Infra* note 62, see affidavit of Sarah Madill (forged union card; dues not refunded); see also, Minnesota Grandmother Takes on SEIU, <https://www.americanexperiment.org/2017/02/mn-grandmother-takes-seiu/>

And the SEIU is taking advantage of modestly paid PCAs who do belong to the union, by skimming 3% of their pay up to \$948.00 a year from Medicaid.

Think about that. This union is taking 3% of public money that is supposed to go to the disabled and the families struggling to care for them.

The SEIU promises that one day we will get all the benefits of being public employees, including big pay raises, health care and pensions, but that is not what most of us want. We just want the program restored, as it was, before the SEIU took over and began changing things for our families. We understand that this Medicaid program is a gift to our families, not a public jobs' program.<sup>44</sup>

The union membership terms, which make it very difficult to resign,<sup>45</sup> are being enforced by the State of Minnesota by allowing the deduction of union dues under a presumption that PCAs have waived their First Amendment rights without first obtaining the affirmative consent of PCAs following the decision in *Janus v. AFSCME* on June 27, 2018.<sup>46</sup>

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44. Supra note 30.

45. <http://www.seiuhealthcaremn.org/2015/07/24/frequently-asked-questions-about-membership-status/#bucover>

46. Minnesota Management and Budget, Office Memorandum dated June 28, 2018 stated, "All fair share union fees have been

## B. THE SEIU IS A LOBBYIST: BARGAINING BENEFITS THE UNION AS AN INSTITUTION, NOT PCAS

The State and SEIU are *excluded* by the Act from interfering with fundamental employment issues that arise between participants and PCAs (e.g. hiring, training, firing, schedule and budget) and *restricted* to “negotiating” minimum payment rates, orientation and training, and maintaining a PCA registry—all of which advance the union’s interest in growing membership by requiring PCAs to interface with and depend on the union, and none of which require a union contract to obtain.<sup>47</sup> Unlike other State employee contracts, the Legislature determines funding and other aspects of the PCA program *independent of the collective bargaining agreement*. SEIU’s role is, therefore, not collective bargaining for employees; it is lobbying over matters of public policy that help the union cause.

Though restricted in scope, the lobbying by the SEIU has nonetheless negatively impacted PCA Choice and related programs. The State’s contract with the SEIU features a minimum wage, paid time off (PTO) and holidays.<sup>48</sup> The SEIU also successfully lobbied for a \$500

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stopped following the Supreme Court’s decision in the case of *Janus v AFSCME*.” No other action by the State of Minnesota has been taken to obtain the affirmative consent of public employees. Public employers have been told to rely on the exclusive bargaining agent for direction on whether to deduct membership dues.

47. Minnesota Statute 256B.0711Subd.4(c)

48. <http://www.seiuhealthcaremn.org/2015/06/10/home-care-workers-contract-summary/>; and <http://www.seiuhealthcaremn.org/2015/06/01/home-care/>

“stipend” for 500 PCAs to attend a training conducted by the SEIU.<sup>49</sup>

Here is PCA Catherine Hunter’s assessment of these contract terms:

The union brags about “winning” benefits such as Paid Time Off (PTO) and holiday pay. They have “won” a new training program that is very complicated and pays PCAs a \$500 stipend to attend, which I view as a rebate to union members who were complaining about the high union dues. Aside from the fact that these “benefits” have little appeal to PCAs caring for a family member, they will likely result in fewer dollars for the Medicaid budgets of people with disabilities, people like my children, people who depend on this PCA program....

The “wins” the union is touting are at the expense of real raises for PCAs. In the more than four years since the SEIU has been “representing” PCAs in the Choice program in Minnesota, my sons’ PCAs have not received an hourly raise.<sup>50</sup>

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49. Ibid.

50. Catherine Hunter, Comment in Support of the Centers for Medicare & Medicaid Services Notice of Proposed Rulemaking Reassignment of Medicaid Provider Claims, 83 Fed. Reg. 32252, RIN 0938-AT61, CMS2413-P (July 12, 2018)

The pay was not increased because the PCA agencies had to reallocate the benefit to pay for PTO, holidays and federally mandated overtime discussed below, as well as higher administrative costs due to interaction with the SEIU. To date, the minimum wage “negotiated” by the SEIU at \$12 an hour is much lower than the rate set by statute. The DHS chart (based on the quarter hour) below shows the progression of reimbursement rates set by the Legislature for the PCA program.<sup>51</sup> The chart demonstrates that the Legislature, not the union, sets compensation.

	<b>% Rate Change</b>	<b>15-min Unit Rate</b>
2006	2.26%	\$3.81
2007	2.26%	\$3.90
2008	2.00%	\$3.98
2009	2.00%	\$4.06
2010	-2.58%	\$3.96
2011	0.00%	\$3.96
2012	-1.50%	\$3.90
2013	0.00%	\$3.90
2014	1.50%	\$3.96
2015	5.00%	\$4.16
2016	2.53%	\$4.27
2017	0.20%	\$4.28

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51. INFORMATION BRIEF Research Department Minnesota House of Representatives, Updated: May 2012. See, Page 5, PCA reimbursement rates are increased or decreased each year based on cost-of-living adjustments. <http://www.house.leg.state.mn.us/hrd/pubs/perscare.pdf>



### C. SEIU LOBBYING REDUCED COVERAGE FOR DISABLED

The SEIU has skimmed revenue from PCAs in a Medicaid program to spend on lobbying for its agenda. Since money is fungible, the SEIU is free to use PCA dues to fund its agenda on a wide variety of issues, from immigration to health care, but also issues affecting PCA Choice, which may be objectionable to PCAs forced to associate with the SEIU. The SEIU successfully lobbied the Obama administration to get overtime pay for PCAs but that benefit has not been funded.<sup>52</sup> This has caused a coverage crisis particularly for the disabled who do not have a family member living with them but also by reducing the funding available for the normal hours worked by most family PCAs.<sup>53</sup> Walter Olson, a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies, described the reaction of the disabled community:

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52. ADAPT, an advocacy organization for people with disabilities, issued a statement urging the administration to reconsider its action, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/flsa-home-health-workers.aspx>; *Paying Minimum Wage and Overtime to Home Care Workers: A Guide for Consumers and their Families to the Fair Labor Standards Act*, Dep't of Labor Wage and Hour Div. (Mar. 2016), [https://www.dol.gov/whd/homecare/homecare\\_guide.pdf](https://www.dol.gov/whd/homecare/homecare_guide.pdf); MN Law. *Minimum Wage Laws in the States – January 1, 2017*, Dep't of Labor Wage and Hour Div., <https://www.dol.gov/whd/minwage/america.htm#Minnesota> (last updated Jan. 1, 2017).

53. Walter Olson, *Obama Administration Decrees Overtime for Home Health Companions*, Cato Inst. (Sept. 19, 2013), <http://www.cato.org/blog/obama-administration-decrees-overtime-home-health-companions>.

This is a terrible rule. The fear and anger it has stirred is coming not just from commercial employment agencies, as some careless media accounts might leave you to think, but above all from elderly and disabled persons and their families and loved ones, who know that home attendant services are often the only alternative to institutional or nursing home care....Even if you've followed this issue you probably had no idea that in April, ADAPT, a well-known disability-rights group, staged a demonstration in Washington, D.C. to protest the proposed overtime rule and even blocked all the entrances to the Department of Labor to make its point.

Being a PCA was challenging enough before being declared "state employees;" now PCAs have the added burden of countering the SEIU agenda with State agencies, the Legislature and Congress.

#### **D. PCAS ARE LEAVING THE PROGRAM BECAUSE THEY PREFER TO AVOID THE UNION**

The "PCA Choice" program was designed with families in mind—and it was, at least until recently—the preferred option because it offers the most control over the benefit, and therefore, over their own well-being and lives. Representation by the SEIU has changed the program chosen by, and raised costs for, many PCAs. The Center does not have hard data to cite (due in large part to the fact that DHS will not give MNPCA access to a current PCA contact list), but there is strong evidence that many PCAs

have left PCA Choice and switched to PCA “Traditional,” in particular due to the union.<sup>54</sup> Under the Traditional option, an agency hires, trains and pays the PCA workers. Traditional agency fees are higher than PCA Choice fees. Similarly, PCA agencies have told MNPCA that most or all their clients and PCAs switched to Traditional which is not unionized.<sup>55</sup> Both types of agencies offer health insurance to PCAs.

#### **E. DECERTIFICATION UNEARTHES FLAWED STATE CONTACT LISTS AND TROUBLING EVIDENCE OF FRAUD BY SEIU**

The on-going MNPCA decertification effort in Minnesota requires a 30 percent showing to get an election, but that requires an accurate list of PCAs. After a prolonged legal fight, and an admission in the Ramsey County District Court by Respondent DHS that the State was not keeping an updated list of providers as required by the Act,<sup>56</sup> MNPCA was given several lists. These lists

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54. *Infra* note 62, affidavits are on file with the Ramsey County Court; *see* Julie Dupre, employed by MNPCA, paragraph 5; and affidavits by PCA Renee Katz and agency administrator Carla Hemming. Renee Katz is an Oakdale area mother and part-time PCA for her special-needs daughter. In July 2015, she found it impossible to opt out of the union. She eventually changed programs to a non-unionized one, <http://www.mnpca.org/home-care-workers-find-getting-out-harder-than-getting-in-union/>

55. DHS admonished the SEIU in contract negotiations for causing havoc by contacting fiscal agents regarding grievances without DHS supervision. The contract attempts to rein in union behavior in Article 8, page 5. <http://www.seiuhhealthcaremn.org/files/2017/06/HCMN-2017-2019-Home-Care-Contract.pdf>

56. *Supra* note 12, 179A.54 Subd. 9.

had defects such as duplications, addresses where no one lived (e.g., parking lots and construction sites),<sup>57</sup> and a large percentage of PCAs no longer in the program; much time and money had to be expended to discover the defects and go back to court to fight for an accurate list. Eventually a list thought to be current was provided just days before MNPCA had to file the 30 percent showing under the SEIU contract in 2016.

This decertification has been marked by prolonged litigation, and administrative and legislative fights. MNPCA has so far produced over 13,000 cards from PCAs who wish to decertify the SEIU; the effort has not thus far produced an order for a new election due to specious defenses raised by the SEIU and the Respondents, as well as other procedural obstacles described in detail in a recent appeal.<sup>58</sup> The decertification has been further hampered by the declining number of PCAs in the Choice program.<sup>59</sup>

The decertification effort led by MNPCA since 2016, perhaps the largest in U.S. labor history, unearthed some troubling facts about how Petitioner SEIU came to exclusively speak for PCAs. These allegations are

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57. Infra note 62, see affidavits of MNPCA canvassers William Egan, Isaac Winnes, Levi Carstensen, Taylor Robert Barker, Adam Sharp and Benjamin Wetmore.

58. See Respondents' Statement of the Case in the State's appeal of *Greene v BMS*, (pgs. 5-10) and Statement of Fact (pgs. 11-59)

59. Supra note 57. MNPCA is forced to work with out-of-date 2016 and 2017 lists; it has been unable to get a current one from DHS. Many of the PCAs from those lists have moved, are no longer in the Choice program or are no longer a PCA.

described in detail and supported by affidavits on file with the Ramsey County District Court:<sup>60</sup> All PCAs, including several caring for the son of a former State Senator, did not receive a ballot from BMS;<sup>61</sup> SEIU forged PCA signatures;<sup>62</sup> SEIU got PCAs to sign a union card under duress by, for example, showing up repeatedly while PCAs were helping a disabled family member;<sup>63</sup> and SEIU tricked PCAs into signing cards by telling them that the union card was “just for informational purposes.”<sup>64</sup>

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60. *Greene v. BMS*

61. State Senator Al DeKruif, Retired. “My wife Carol and I have a son, Jason (38 years old) who was born with cerebral palsy. Jason is bright, alert and very smart but cannot speak, walk, feed or bathroom himself. Carol and I made the decision years ago to keep Jason at home and raise him ourselves, but we needed some help and use the PCA “Choice” Medicaid program to assist us...Being a former State Senator, I watched closely when SEIU was making a play to unionize the PCAs. ***I was astonished when I heard the vote passed because neither my wife Carol nor any of Jason’s other four PCAs ever even received a ballot and were not given the chance to vote. Jason’s team would have all voted no.***” Re: Comment in Support of the Centers for Medicare & Medicaid Services Notice of Proposed Rulemaking Reassignment of Medicaid Provider Claims, 83 Fed. Reg. 32252, RIN 0938-AT61, CMS-2413-P (July 12, 2018); see also *infra* note 62, affidavit of PCA Hollee Hembree.

62. See affidavits of Patricia Johansen, Mary Wety, Janine Yates and Sarah Madill. Brief for Relators at 23, *Certain Emps. v. SEIU Healthcare Minn.*, No. A17-0798, 2018 WL 414363 (Minn. Ct. App. Jan. 16, 2018).

63. See affidavits of Janine Yates and Sarah Madill. Addendum for Relators at 16-17, 62-64, *Certain Emps. v. SEIU Healthcare Minn.*, No. A17-0798, 2018 WL 414363 (Minn. Ct. App. Jan. 16, 2018)

64. See affidavits of Mary Welty and Sarah Madill. Addendum for Relators at 56-57, 62-64, *Certain Emps. v. SEIU*

The Dayton administration has refused repeated requests to investigate why some providers did not receive a ballot or whether the required showing by, and certification of, the SEIU was tainted by fraudulently obtained cards.<sup>65</sup>

### CONCLUSION

PCAs caring for a family member do not choose to be PCAs as a livelihood. The blessing and challenge of caring for a disabled family member, however, presents a dilemma for those who need or want to work for an income. That is the dilemma Congress addressed by offering the disabled the right to hire their own family members to provide personal care. Kris Greene and Catherine Hunter both gave up careers that paid more to stay home with their disabled children.

The SEIU is lobbying to convert this Medicaid program into something contrary to its design and current funding, and the wishes of most PCAs. Yet the SEIU speaks for all PCAs.

This Medicaid program was intended to empower the disabled to avoid institutionalization and live at home. It was not intended to provide public employment and benefits to PCAs, nor to turn PCA's homes into regulated public workplaces. And it certainly was not intended to fund the political agenda of government unions.

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*Healthcare Minn.*, No. A17-0798, 2018 WL 414363 (Minn. Ct. App. Jan. 16, 2018).

65. Brief for Relators at 7, *Certain Emps. v. SEIU Healthcare Minn.*, No. A18-0661 (Minn. Ct. App. filed Jun. 25, 2018).

Successful or not, these unionization schemes have been devastating for Providers and parents looking for home-based care, and for PCAs who have left PCA Choice to avoid the SEIU. PCAs who remain in PCA Choice have been forced to counter the SEIU agenda, while conducting a massive decertification. Any deficiencies in subsidized home-based care should be addressed by Congress and state legislatures with input from all providers directly rather than through “exclusive” union lobbying.

Respectfully submitted,

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