No. 16-2327

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF OF APPELLEE SEIU HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS

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DISCLOSURE STATEMENT

1. The full name of every party that counsel represents in the case: SEIU Healthcare Illinois, Indiana, Missouri, Kansas.

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in the Court: Altshuler Berzon LLP and Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich.

3. If the party or amicus is a corporation: not applicable.

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JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUE

The State of Illinois pays homecare and childcare providers to perform services to carry out state programs. Under Illinois' Public Labor Relations Act ("PLRA"), the providers in each unit may, if they wish, democratically choose a representative for collective bargaining with state officials for a unit-wide contract governing terms and conditions of employment. The providers in both bargaining units chose representation by SEIU Healthcare Illinois, Indiana, Missouri, Kansas ("Union"). The issue presented is whether Illinois' PLRA compels individual providers to associate with the Union and its expressive activity in violation of their First Amendment rights, where individuals need not join or financially support the Union; they are free to speak and petition in opposition to the Union; and outsiders would not reasonably believe that every individual in the bargaining unit necessarily agrees with the Union's positions.

STATEMENT OF THE CASE

1. Illinois' Public Labor Relations Act

The PLRA, 5 ILCS 315/1 *et seq.*, declares it "the public policy of … Illinois to grant public employees full freedom of association, self-organization, and

designation of representatives … for the purpose of negotiating wages, hours, and other conditions of employment." *Id.* 315/2.

Under the PLRA, a majority of public employees in a bargaining unit may choose a labor organization to be the unit's "exclusive representative" for contract negotiations about employment terms. *Id.* 315/3(f), 315/6(c), 315/9. If the unit chooses a representative, the public employer and the representative have a "mutual obligation" to "negotiate in good faith with respect to wages, hours, and other conditions of employment" for the unit, but "such obligation does not compel either party to agree to a proposal." *Id.* 315/7, 315/10(a)(4), 315/10(b)(4). The representative is "responsible for representing the interests of all public employees in the unit," and any collective bargaining agreement must "contain a grievance resolution procedure which shall apply to all employees in the bargaining unit." *Id*. 315/6(d), 315/8.

Employees are not required to become members of the organization that serves as the bargaining unit's representative. To the contrary, employees have the right to join or support, or refrain from joining or supporting, any labor organizations. 5 ILCS 315/6(a). The PLRA makes it an "unfair labor practice" for the public employer to discriminate against employees based on their membership or support for a labor organization and for the exclusive representative to attempt

to cause such discrimination. *Id.* 315/10(a)(1) & (2), (b)(1) & (3). Additionally, "[n]othing in [the PLRA] prevents an employee from presenting a grievance to the employer and having the grievance heard and settled … provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative." *Id.* 315/6(b); *cf.* 29 U.S.C. §159(a) (similar provision of National Labor Relations Act).[1]

2. Personal Assistants in the Home Services Program

Illinois' Medicaid-funded Home Services Program provides care to individuals with disabilities in a home-based setting. 20 ILCS 2405/0.10 *et seq.*; 89 Ill. Admin. Code §676.10 *et seq.* The Program "prevent[s] the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at

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[1] A collective bargaining agreement may include a "fair share" provision that requires all bargaining unit employees to bear "their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and conditions of employment." 5 ILCS 315/3(g), 315/6(e). Collection of fair share fees for these units, however, ended after the Supreme Court's decision in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). First Amended Complaint ("FAC") ¶54 (App. 18).

home at lesser cost to the State." 89 Ill. Admin. Code §676.10(a). The Program delivers home-based care to its "customers" pursuant to "service plans" developed by the Department of Human Services. *Id*. §§676.30(b), (c), (u), 684.10(a).

The State pays about 25,000 "personal assistants" to carry out these service plans by performing "household tasks, shopping, or personal care," "incidental health care tasks," and "monitoring to ensure health and safety." *Id*. §§676.30(p), 686.20; FAC ¶24 (App. 11). Customers are responsible for hiring and supervising their personal assistants, subject to State rules. 89 Ill. Admin. Code §677.200(g). The State sets the economic terms of employment for the personal assistant workforce, including the hourly wage rate. *Id*. §686.40(a), (b); 20 ILCS 2405/3(f).

In 2003, the Governor issued Executive Order 2003-8, directing State officials to allow personal assistants to decide whether to designate a representative for collective bargaining with the State. The Executive Order explained that "each [customer] employs only one or two personal assistants and does not control the economic terms of their employment … and therefore cannot effectively address concerns common to all personal assistants," and that recognition of a representative would "preserve the State's ability to ensure efficient and effective delivery of personal care services."

Shortly thereafter, the Illinois General Assembly amended the PLRA to

cover labor relations between the State and the personal assistants. Public Act 93-204. Under the amendments, the personal assistants are "[p]ublic employees[s]" and the State is their "public employer" for purposes of collective bargaining "limited to the terms and conditions of employment under the State's control." 5 ILCS 315/3(n)-(o), 315/7. The amendments provide that the personal assistants are not considered public employees for other purposes. *Id*. 315/3(n). The same statute amended the Disabled Persons Rehabilitation Act to provide that "[t]he State shall engage in collective bargaining … concerning … terms and conditions of employment that are within the State's control," but collective bargaining shall not "limit the right of the persons receiving services … to hire and fire … personal assistants … or to supervise them within the limitations set by the … Program." 20 ILCS 2405/3(f).[2]

In 2003, the personal assistant workforce chose representation by the Union.

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[2] At least ten other states extend their similar public employee labor relations laws to similar homecare providers. *See* Cal. Gov't Code §§110001, 110027; Conn. Gen. Stat. §§17b-706, 17b-706a(e), 17b-706b(b); Md. Code, Health-Gen. §§15-903(b), 15-904; Mass. Gen. Laws ch. 118E, §73(b); *id.* ch. 150E, §4; Minn. Stat. §179A.54, §256B.0711; Mo. Rev. Stat. §§208.862, 105.500; Or. Const., art. XV, §11(3)(f); Or. Rev. Stat. §§410.612, 410.614, 243.666; Vt. Stat. Ann. Tit. 21, §1634; Rev. Code Wash. §74.39A.270.

FAC ¶42 (App. 15). The State and the Union subsequently entered into a series of collective bargaining agreements. The principal subjects addressed by the most recent agreement are wages, health benefits, payment practices, training, orientations, background checks, health and safety, a registry, and grievance procedures. FAC, Exh. A (App. 25-51).

3. Providers in the Child Care Assistance Program

Illinois' Child Care Assistance Program pays for all or part of the cost of child care services for low-income and at-risk families. 305 ILCS 5/9A-11; 89 Ill. Admin. Code. §50.101 *et seq*. The Program is partially funded by the federal government. *See* 45 C.F.R. §98.10.

The Program pays about 60,000 providers for child care services, including licensed "day care homes" that serve up to 12 children (or up to 16 in the case of group licenses) and "licensed-exempt child care providers" that serve no more than three children (unless the children are from the same household). *See* FAC ¶¶26-33 (App. 11-13); 89 Ill. Admin Code §50.410. The State sets the payment rates for child care services; parents can choose their own providers; and parents who are financially able must share the cost. 89 Ill. Admin. Code §§50.110(c), 50.310, 50.320.

In 2005, the Governor issued Executive Order 2005-1, directing State

officials to allow the childcare providers to decide whether to designate a representative for collective bargaining with the State. The Executive Order explained that the "Department of Human Services … has plenary authority to determine the terms … under which day care services are provided in the State's child care assistance program, including setting rates and other compensation," and that the State "would benefit from a system of representation for day care home providers in implementing its goals for improvement of the State's child care assistance program."

Shortly thereafter, the Illinois General Assembly amended the PLRA to cover labor relations between the State and the childcare providers. Public Act 94-320. Under the amendments, the providers are "[p]ublic employees[s]" and the State is their "public employer" for purposes of collective bargaining "limited to the terms and conditions of employment under the State's control." 5 ILCS 315/3(n)-(o), 315/7. The amendments state that the providers are not considered public employees for other purposes. *Id*. 315/3(n). The same statute amended the Illinois Public Aid Code to provide that "[t]he State shall engage in collective bargaining … concerning … terms and conditions of employment that are within the State's control," but collective bargaining shall not "limit the right of families receiving services … to select … providers or supervise them within the limits of

[the Program]." 305 ILCS 5/9A-11(c-5).[3]

In 2005, the childcare provider workforce chose representation by SEIU-HCII. FAC ¶44 (App. 16). The State and the Union subsequently entered into a series of collective bargaining agreements. The principal subjects addressed by the most recent agreement are payment rates, payment procedures, health insurance, a training program, and grievance procedures. FAC, Exh. B (App. 53-76).

4. Proceedings Below

Plaintiffs are homecare personal assistants and childcare providers in the bargaining units that chose to be represented by the Union. FAC ¶¶19-23, 35-37 (App. 11, 13). They filed this action against State officials and the Union, alleging that the PLRA "violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983" by "forcing Plaintiffs to [a]ssociate with [the Union]." FAC, "Count 1" & ¶¶60, 68, 73 (App. 19, 21-22). Plaintiffs' first amended complaint alleges that the State's recognition of a PLRA representative

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[3] At least 10 other states extend their similar public employee labor relations laws to similar childcare providers. *See* Conn. Gen. Stat. §17b-705a; Md. Code Ann., Fam. Law §5-595.3; Mass. Gen. Laws Mass. ch. 15D, §17, *id.* ch. 150E, §4; Minn. Stat. §179A.52; N.J. Stat. Ann. §30:5B-22.1; N.M. Stat. §50-4-33; N.Y. Labor Law §695-a; Or. Rev. Stat. Ann. §329A.430; R.I. Gen. Laws §40-6.6-4; Rev. Code Wash. §41.56.028.

compels First Amendment association because it "forces them into a mandatory agency relationship with [the Union], in which [the Union] has the legal authority to act as their agent for petitioning and contracting with the State over certain … policies." FAC ¶60 (App. 19). Plaintiffs sought declaratory and injunctive relief to prohibit enforcement of the Illinois statutes that permit homecare and childcare providers to choose PLRA representatives for their bargaining units. FAC, ¶75 & Prayer (App. 23).

The district court granted Defendants' motions to dismiss the first amended complaint for failure to state a claim. App. 77-83 (Dist. Ct. Opinion).

The district court recognized that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), foreclosed Plaintiffs' claim of compelled First Amendment association. *Knight* held that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit."' App. 82 (quoting *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (internal quotation marks omitted)). The district court explained that, as in *Knight*, there is no infringement on associational rights here "because the state [i]s entitled to ignore dissenters (and listen only to the exclusive representative), the dissenters [a]re free not to join or support the association, and the dissenters

[a]re free to express their views." App. 81 (citing *Knight*, 465 U.S. at 287-90). The district court recognized that *Harris v. Quinn*, 134 S.Ct. 2618 (2014), did not change the analysis in *Knight* because *Harris* addressed only a requirement that homecare workers pay fees to a union, not the constitutionality of exclusive representative collective bargaining. App. 81-82.

SUMMARY OF ARGUMENT

Illinois law allows homecare and childcare providers to democratically choose a representative for negotiations with executive branch officials to reach a contract setting employment terms for their bargaining units. Illinois' system of exclusive representative collective bargaining is the same democratic system used throughout the United States for both private and public sector workers, including for similar homecare and childcare providers in other states. There is no merit to Plaintiffs' claim that, merely by using a system of exclusive representative bargaining, the State is infringing on their First Amendment associational rights.

As an initial matter, Plaintiffs' claim is foreclosed by precedent. The Supreme Court held in *Knight* that a system of exclusive representative bargaining does not, by itself, impinge on the First Amendment associational rights of the individuals in the bargaining unit by forcing them to associate with a union. *See Knight*, 465 U.S. 271 at 288 ("The state has in no way restrained [bargaining unit

workers'] freedom to … associate or not to associate with whom they please, including the exclusive representative."). The Supreme Court's decision in *Harris v. Quinn* addressed only a requirement that workers pay fees to support union activities and did not revisit precedent about exclusive representation. Accordingly, the district court correctly dismissed Plaintiffs' claim. Six other recent court decisions reject the same post-*Harris* legal challenge to exclusive representative bargaining for similar homecare or childcare workers. *See* p. 14-15, *infra.*

Even if precedent did not foreclose Plaintiffs' claim, moreover, Plaintiffs arguments lack merit because they gloss over the distinction between freedom of expressive association, which the First Amendment protects, and "association" for economic or other non-expressive purposes. Plaintiffs' First Amendment associational rights are not restrained at all. Individual workers need not join the Union, pay any fees to the Union, or do or say anything to support or endorse the Union or its speech and petitioning activities. They also are free to present their own grievances, to join and support other organizations, to criticize the Union and its positions, and to express their own message. Finally, outsiders would not reasonably believe that every individual in the bargaining unit endorses or agrees

with the Union's positions, so the Union's expressive activities are not attributed to Plaintiffs in the sense that matters for purposes of the First Amendment.

ARGUMENT

Collective bargaining systems in the United States are based on principles of majoritarian democracy: (1) The majority of individuals in a legally defined bargaining unit may, if they wish, democratically choose a representative; (2) if that occurs, the chosen representative becomes the "exclusive representative" for collective bargaining within the authorized scope of bargaining; and (3) any resulting contract applies to the entire bargaining unit, without regard to whether individuals choose to become union members. *See, e.g.*, 29 U.S.C. §159 (National Labor Relations Act). Illinois' PLRA follows these democratic principles. 5 ILCS 315/3(f). The PLRA thereby creates a process for the negotiation of unit-wide contract terms that State officials otherwise would set by fiat and offer on a take-it-or-leave-it basis.

Plaintiffs contend that Illinois' recognition of the Union as the exclusive bargaining representative democratically chosen by the homecare and childcare provider bargaining units is an infringement on their First Amendment associational rights. Plaintiffs' theory is that the State is compelling them to "associate" with the majority-chosen Union and its expressive activities. "While

the First Amendment does not in terms protect a 'right of association,' [Supreme Court] cases have recognized that it embraces such a right in certain circumstances." *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). As relevant here, the Supreme Court has recognized "'a right to associate for the purpose of engaging in those activities protected by the First Amendment.'" *Id.* at 24 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). That right to associate for the purpose of engaging in First Amendment activities "presupposes a freedom not to associate" for that purpose. *Roberts*, 468 U.S. at 623. Plaintiffs do not, however, identify any way in which they are compelled to "associate" with the Union's First Amendment activities in the normal sense of that term.

Indeed, Plaintiffs do not identify *any* obligation that the PLRA imposes on *them*. Plaintiffs need not become Union members, participate in Union activities, or support or subsidize those activities in any way. Moreover, Plaintiffs are not prevented from presenting their own grievances or from speaking or petitioning in opposition to the Union, either individually or through any group. "[T]he principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental

decisions concerning labor relations." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 (1977).[4] Illinois law does not transgress that limitation on the meaning of "exclusive" representation. Plaintiffs are free to speak and petition like all other citizens.

Plaintiffs' claim, therefore, depends upon the theory that the mere existence of a system of exclusive representative collective bargaining is an inherent restraint on bargaining unit members' "negative" First Amendment rights to avoid associating with the representative's expressive activities. That theory is untenable because neither state officials nor reasonable outsiders would believe that every bargaining unit member necessarily agrees with the union representative's speech and petitioning activities. Thus, the Union's positions are not attributed personally to individual bargaining unit members.

The First and Second Circuits recently rejected the same legal claim that Plaintiffs advance here. *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert.*

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[4] *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 173-76 & n.10 (1976) (bargaining unit members have the same First Amendment rights as other citizens to speak in opposition to union).

denied, 2016 WL 2594596 (June 13, 2016); *Jarvis v. Cuomo*, No. 16-441-CV, 2016 WL 4821029 (2d Cir. Sept. 12, 2016) (Summary order). In addition to the district court decision below, four other district court decisions also have rejected the same legal claim. *Mentele v. Inslee*, No. 15-5134, 2016 WL 3017713 (W.D. Wash. May 26, 2016); *Jarvis v. Cuomo*, No. 5:14-1459, 2015 WL 1968224 (N.D.N.Y., Apr. 30, 2015); *D'Agostino v. Patrick*, 98 F.Supp.3d 109 (D. Mass. 2015); *Bierman v. Dayton*, No. 14-3021, 2014 WL 5438505, at *7 (D. Minn. Oct. 22, 2014), *appeal dismissed* 817 F.3d 1070 (8th Cir. 2016). For the reasons set out below, this Court should follow these well-reasoned decisions.

I. Controlling Precedent Forecloses Plaintiffs' Claim That Exclusive Representative Bargaining, By Itself, Infringes On First Amendment Associational Rights

The Supreme Court's decision in *Knight* forecloses Plaintiffs' theory that individuals in a bargaining unit inherently are compelled to "associate," in a First Amendment sense, with the unit's exclusive representative and its expressive activities.

A. In *Knight*, a group of Minnesota college instructors argued that the exclusive representation provisions of that state's public employee labor relations act violated the First Amendment rights of instructors who did not wish to associate with the faculty union. 465 U.S. at 273, 278-79. The state law granted

their bargaining unit's elected representative the exclusive right to "meet and negotiate" over employment terms. *Id.* at 274. Also, because instructors are professional employees, the state law granted the unit's representative the exclusive right to "meet and confer" with campus administrators about employment-related policy matters outside the scope of mandatory negotiations. *Id.* at 274-75; *see also* Minn. Stat. §179A.07, subds. 2-3.

The lower court rejected the *Knight* plaintiffs' constitutional challenge with respect to exclusive representative status in the meet-and-negotiate process. *See* 465 U.S. at 278. On appeal, the Supreme Court summarily affirmed the lower court's rejection of the *Knight* plaintiffs' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.* at 278-79; *Knight v. Minnesota Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983). The district court ruled in favor of the *Knight* plaintiffs with respect to the meet-and-confer process. *See Knight*, 465 U.S. at 278. On appeal, however, the Supreme Court reversed that portion of the district court's judgment with a full opinion, holding that the statute's exclusive representation provisions – even with respect to matters beyond terms of employment – did not infringe on First Amendment rights. *Id.* at 288.

The *Knight* Court began its analysis by recognizing that government officials had no obligation to negotiate or confer with faculty members and that the meet-and-confer process (like the meet-and-negotiate process) is not a "forum" to which there is any First Amendment right of access. 465 U.S. at 280-82. The instructors also had no constitutional right "as members of the public, as government employees, or as instructors in an institution of higher education" to "force the government to listen to their views." *Id.* at 283. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285; *see also Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979) (the government did not violate the speech or associational rights of union supporters by accepting grievances filed by individual employees while refusing to recognize the union's grievances on behalf of its members).

The *Knight* Court then went on to consider whether the State's public employee labor relations act violated First Amendment rights that the instructors did have: the right to speak and the right to "associate or not to associate." 465 U.S. at 288. The Court concluded that the state law "in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate *or not to associate* with whom they please, including the exclusive representative." *Id.* (emphasis added); *see also id.* ("[T]he First Amendment

guarantees the right both to speak and to associate. Appellees' speech *and associational rights*, however, have not been infringed …." (emphasis added)).

The Supreme Court found no associational infringement because the instructors were "free to form whatever advocacy groups they like" and were "not required to become members" of the organization acting as the exclusive representative. 465 U.S. at 289. The Court acknowledged that the "unique status" of the exclusive representative may "amplif[y] its voice" in the meet and confer process, and that non-members may "feel some pressure to join the exclusive representative" to serve on its committees and influence its positions. *Id.* at 288-90. But the Court held that this "is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 290. Such pressure "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

B. Plaintiffs contend that *Knight* is not controlling because Plaintiffs do not allege "that Illinois wrongfully excludes them from its meetings with SEIU" or claim a "constitutional right to force the government to listen to their views" but instead assert that they are inherently "associated" with the Union because the Union represents the entire bargaining unit. AOB 24. But this contention ignores the reasoning and meaning of *Knight*. The Supreme Court explained in *Knight* that

Minnesota treated the democratically chosen exclusive representative as expressing "the faculty's official collective position," even though not all instructors were members of the exclusive representative and "not every instructor agree[d] with the official faculty view." 465 U.S. at 276. The Supreme Court explicitly affirmed the lower court's rejection of the challenge to exclusive representation for purposes of the meet-and-negotiate process, in which the representative bargains a contract on behalf of the entire bargaining unit. *See* p. 16, *supra*.[5]

The union's role as exclusive representative, moreover, was the central focus of the challenge in *Knight* and of the Court's rejection of that challenge. The State officials in *Knight* were conferring about employment-related policy matters with the faculty union in its role as the elected representative for the entire bargaining unit. *See* 465 U.S. at 276 n.3 (the union presented "an official collective faculty position as formulated by the faculty's exclusive representative"). *Knight* held that, under these circumstances, whether individual bargaining unit members' First Amendment rights "not to associate" with the union were impaired turned on whether the union's role as exclusive representative required bargaining-unit

[5] That summary affirmance is binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

members, as a legal or practical matter, to become union *members* or *supporters*. *See id.* at 289-90 (finding no associational impairment because instructors are not required to become union members and any pressure they feel to become members is "inherent in our system of government"); *id.* at 289 & n.11 & 291 n.13 (explaining that no requirement of financial support was at issue). The Supreme Court held that instructors had the "freedom … not to associate with whom they please, *including the exclusive representative*." *Id.* at 288 (emphasis added). Hence, the exclusive representative's representation of the entire bargaining unit for purposes of the public labor relations statute did *not* inherently "associate" individual bargaining unit members with the representative's First Amendment activities.[6]

C. The Supreme Court's decision in *Harris v. Quinn* did not change settled precedent about exclusive representative collective bargaining. The issue in

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[6] Plaintiffs seek to distinguish *Knight* by quoting from a passage in a footnote that states that the "case involves no claim that anyone is being compelled to support [union] activities." AOB 22 (quoting *Knight*, 465 U.S. at 291 n.13). But that passage used the term "support" to mean financial support. *See* 465 U.S. at 289 n.11 & 291 n.13. As in *Knight*, there is no claim here that Plaintiffs must financially support union activities.

Harris was whether homecare workers in Illinois could be required *to pay fees* to support union activities. The *Harris* "Petitioners [did] not . . . challenge the authority of the SEIU-H[C]II to serve as the exclusive representative of all the personal assistants in bargaining with the State. All they [sought was] the right not to be forced to contribute to the union …." 134 S.Ct. at 2640. The Supreme Court emphasized 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.*

Harris distinguished between "full" public employees and "partial" public employees for purposes of evaluating the state interest justifying fair-share fees, which the Court concluded were an impingement on First Amendment rights. 134 S.Ct. at 2636-38. The distinction is not relevant here because there is no First Amendment impingement that must be justified. Under *Knight*, the recognition of an exclusive collective bargaining representative – absent any requirement that workers pay fair-share fees – "in no way" restrains First Amendment associational rights, *Knight*, 465 U.S. at 288, so there is no restraint that must satisfy heightened First Amendment scrutiny.

As Justice Souter, sitting by designation, explained for the First Circuit in *D'Agostino*:

> [T]he *Harris* distinction does not decide this case. While we can agree with the appellants in assuming the comparability of *Harris*'s personal assistants and the child care providers here, the issues at stake in the two cases are different. Unlike the *Harris* litigants, the appellants are not challenging a mandatory fee …. *Harris* did not speak to … the premise assumed and extended in *Knight*: that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit. *Harris* did not hold or say that this rule was inapplicable to "partial" employees covered by a collective bargaining agreement. *Harris*, in fact, did not so much as mention *Knight*, and precedent supports applying its rule here.

D'Agostino v. Baker, 812 F.3d at 243-44; *see also Jarvis*, 2016 WL 4821029 at *1; *Mentele*, 2016 WL 3017713 at *3; *Bierman*, 2014 WL 5438505 at *7.

II. Even If Plaintiffs' Legal Claim Were Not Foreclosed By Precedent, Plaintiffs' Arguments Would Lack Merit

While this Court can simply affirm the district court's decision as compelled by precedent, Plaintiffs' arguments are also unpersuasive because they fail to distinguish between the freedom of expressive association, which the First Amendment protects, and "association" for economic or other non-expressive purposes.

A. The exclusive representative's duty to fairly represent the entire bargaining unit protects the right of individual workers not to associate with the representative

As a threshold matter, Plaintiffs get matters backwards in describing the exclusive representative's duty to represent the entire bargaining unit as a *burden*

that Illinois is "forcing providers to accept." AOB 12. The Union's duty of fair representation to the entire bargaining unit is solely a restriction on the Union. It requires the exclusive representative, when it acts in that capacity, to represent equally the interests of non-members. *See* 5 ILCS 315/6(d), 315/8.[7] The duty of fair representation imposes no obligation on Plaintiffs and requires nothing of them. The law imposes legal duties in a wide variety of circumstances. The duty imposed on the Union is no more a burden on bargaining unit members than the duty of a pension fund manager or health plan administrator is a burden on the fund or plan beneficiaries.

Indeed, a union representative's duty to represent all bargaining unit workers protects individuals' rights *not to associate* with the union. It prevents the union, when acting in its capacity as exclusive representative, from discriminating against bargaining unit workers who do not wish to join or support the union. The duty of fair representation means that the union cannot, for example, "negotiate

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[7] *See also Jones v. Illinois Educ. Relations Bd.*, 650 N.E.2d 1092, 1097 (Ill. Ct. App. 1995) (union has the "obligation to serve the interests of all [bargaining unit] members" (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)); *Eisen v. State Dep't of Pub. Welfare*, 352 N.W.2d 731, 735 (Minn. 1984) (same duty of fair representation existed under the Minnesota law at issue in *Knight*).

particularly high wage increases for its members in exchange for accepting no increases for others." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part). If the union negotiated higher wages for its members and lower wages for non-members, then workers might feel more "pressure" to become union members than the "pressure to join a majority party that persons in the minority always feel." *Knight*, 465 U.S. at 290. The same would be true if a collective bargaining agreement provided health benefits only to union members.

The courts have implied a legal duty of fair representation from the existence of an exclusive representation system, even when such a duty is not expressly set out in statute. *See Abood*, 431 U.S. at 221; *Vaca*, 386 U.S. at 177. The Supreme Court even has suggested that "constitutional questions [would] arise" unless the exclusive representative has "some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes" for the bargaining unit. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198, 201 (1944); *see also Leahy v. AFSCME Local 1526*, 348, 504 N.E.2d 602, 607 (Mass. 1987) (suggesting that "grave constitutional problems would arise if there were no duty of fair representation" and that "even if the Massachusetts statute did not provide for the duty of fair representation, the courts would infer it as a constitutional requirement"). Rather

than burdening First Amendment rights, the exclusive representative's legal duty to represent the interests of all unit workers, and not to prefer its members or supporters, preserves Plaintiffs' freedom not to join or support the Union.

B. The negotiation of unit-wide contract terms is not a burden on individual workers' freedom of expressive association

Plaintiffs are correct that an exclusive representative enters into contracts that apply to all homecare personal assistants and family childcare providers who choose to work within the State's programs and thereby accept the contract terms applicable to the unit. AOB 14-15. But Plaintiffs do not contend they have a First Amendment right to negotiate their own contracts or to be governed by any regime other than unit-wide contract terms. The First Amendment protects the right to associate (and not associate) for expressive purposes; it does not provide a right to negotiate contract terms or to particular economic relationships. *See, e.g.*, *Smith*, 441 U.S. at 465-66; *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972) (Stevens, J.).

Thus, there is no intrusion on First Amendment rights simply because the State has included an entire workforce in one contracting unit. The State could (and likely would) offer uniform terms to the workforce in the absence of a system of exclusive representative collective bargaining. Nor is there any intrusion on

individuals' First Amendment rights of expressive association simply because State officials use a formal process of negotiations with an organization designated by majority vote of the workforce to determine the contract terms to offer to the unit. The State must use *some* method to determine the contract terms to offer. Individual bargaining unit workers remain free to raise their own grievances, and they have the same First Amendment right to speak and petition about homecare and childcare policy issues as all other citizens. That Plaintiffs happen to be homecare or childcare workers does not give them any special First Amendment right to force government officials to listen to them about these issues. *See Knight*, 465 U.S. at 283-85.

Plaintiffs' assertion that they are inherently "associated" with the First Amendment activities of the Union because the Union serves as the "bargaining agent" for the entire unit ignores the distinction between expressive association and economic association. State officials who are negotiating the contract understand that not all individuals in the bargaining unit necessarily *agree with* the positions taken by the union representative in collective bargaining. *See Knight*, 465 U.S. at 276 ("The State Board considers the views expressed … to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with

the official faculty view ….”). As such, individuals are not personally associated with any “message” expressed by the Union in collective bargaining.

That Plaintiffs label the relationship between the Union and the providers a “mandatory agency” relationship does not make their argument any more persuasive. AOB 13-15. The most fundamental principle of the law of agency is the principal’s authority to direct the actions of the agent. Restatement (Second) of Agency §14 (1958). There is no such principal-agent relationship here between individual members of the bargaining unit and the unit’s exclusive representative, and reasonable outsiders would understand this. As Justice Souter explained in *D’Agostino*:

> No matter what adjective is used to characterize it, the relationship [between the union and bargaining-unit members] is one that is clearly imposed by law, not by any choice on a dissenter’s part, and when an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority.

812 F.3d at 244.

In sum, while it is true that Plaintiffs are “associated” with the contractual terms that the Union negotiates for the unit, in the limited sense that the same contract terms are offered to the entire unit, and it is true that the government “may not compel citizens to affiliate with messages with which they disagree,” AOB 19,

Plaintiffs are not being compelled to "affiliate" with any "messages" merely by working under the contract.

C. Plaintiffs' theory of "association" is inconsistent with decades of case law about collective bargaining systems

Plaintiffs' argument that exclusive representative collective bargaining is an inherent restraint on First Amendment associational rights also largely ignores the entire body of decades of precedents about collective bargaining that would have to be reconsidered if Plaintiffs' theory were accepted.

1. The National Labor Relations Act ("NLRA") and Railway Labor Act ("RLA") are systems of exclusive representative collective bargaining applicable to millions of private-sector employees. If workers in an appropriate bargaining unit elect union representation, the government certifies the union as the unit's exclusive bargaining representative. The NLRA and RLA impose a legal duty on the employer to bargain with the exclusive representative regarding the unit's employment conditions and a legal duty on the union to represent the entire bargaining unit. *See* 29 U.S.C. §158(a)(5), §159(a); 45 U.S.C. §152, Fourth; *Vaca v. Sipes*, 386 U.S. at 177.

Private sector employees have First Amendment rights, and private sector unions, in their role as exclusive representatives, engage in speech and expressive

activities with which individual workers may disagree.[8] But the NLRA and RLA have never been treated as impairments of "negative" First Amendment rights of expressive association, such that the statutes (and the administrative implementations of the statutes) would need to satisfy heightened First Amendment scrutiny in all their myriad details. The Supreme Court instead has upheld these statutes as rational means of regulating commerce. *See, e.g., N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) ("we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go"); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 553-54 (1937) ("The means chosen are appropriate to the end sought and hence are within the congressional power.").

Courts have rejected out of hand the argument that exclusive representative collective bargaining impairs First Amendment freedom of association, such that the details of these labor statutes are subject to heightened scrutiny. *See, e.g.,*

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[8] *See, e.g., Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 582-83 (1952) (nationwide labor dispute in steel mills that allegedly jeopardized national defense). Private sector collective bargaining in industries like automobile, steel, transportation, mining, healthcare, and privatized public services often involves issues of public significance.

Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1251-52 (2d Cir. 1992) (rejecting constitutional "right of free association" challenge to certification of union as exclusive representative because "the First Amendment [does not] protect individuals from being represented by a group that they do not wish to have represent them"); *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011) (same holding). These precedents would be wrong if Plaintiffs were right.[9]

Similarly, some states have adopted agricultural labor relations acts and "Little Wagner Acts" to extend collective bargaining rights to private-sector employees not covered by the NLRA and RLA. Those statutes also use exclusive representative collective bargaining. *See, e.g.*, Cal. Labor Code §1140-1166.3 (California Agricultural Labor Relations Act); Minn. Stat. §§179.01-179.17 (Minnesota Labor Relations Act). The details of such statutes have been treated as

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[9] Plaintiffs take statements in Supreme Court cases out of context in asserting that "the Supreme Court has long recognized that exclusive representation impacts and restricts individual liberties." AOB 14-15. Those cases have nothing to do with First Amendment rights. They concern the effect of a democratic system of unit-wide collective bargaining on the ability of individual private sector employees to negotiate their employment terms. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270–71 (2009); *Vaca*, 386 U.S. at 181–82; *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 401 (1950).

presenting issues for policymakers, not as triggering heightened First Amendment scrutiny. *See, e.g.*, *Babbitt v. United Farm Workers*, 442 U.S. 289, 312-14 (1979) (rejecting claim that the election procedures under a state agricultural labor relations act implicated First Amendment "freedom of association" and holding that the election procedures "are matters for the Arizona Legislature and not the federal courts").

The sole case that Plaintiffs rely upon for the proposition that private sector exclusive representative collective bargaining impairs First Amendment associational rights is *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010). AOB 15-16, 27-28. But *Mulhall* did not involve a First Amendment claim, and Plaintiffs mischaracterize its holding.

In *Mulhall*, an employee alleged his employer violated §302 of the federal Labor Management Relations Act by providing organizing assistance to a union. 618 F.3d at 1283-84. The decision addressed only whether the plaintiff had standing to pursue that claim. *See id.* at 1286 ("At issue today is only whether Mulhall has a stake in this controversy that is real enough and concrete enough to entitle him to be heard in a federal district court concerning his §302 claim, nothing more."); *see also id.* ("Importantly, therefore, the relevant question is *not*

whether Mulhall has a legal right to be free from involuntary unionization.") (emphasis added).

The *Mulhall* decision reasons that the plaintiff had an associational "interest" in not being represented by a union sufficient to support standing, but the decision "do[es] not purport to assess the strength of [the plaintiff's] interest," *id.* at 1288, and the decision explains that there is a difference between having an "interest" that supports standing and suffering an infringement of First Amendment rights. *See id.* at 1286, 1287-88; *see also D'Agostino*, 812 F.3d at 245. There are many situations in which a plaintiff has a First Amendment "interest" that is sufficient to support standing even though the court concludes on the merits that there is no impingement on the plaintiff's First Amendment rights. *See, e.g., Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 201 (1990) (plaintiff had standing to challenge compelled disclosure of peer review reports, but Supreme Court rejected claim that disclosure requirement impinged upon First Amendment rights). Accordingly, *Mulhall* does not support Plaintiffs' claim here. Moreover, even *Mulhall's* holding with respect to standing was seriously questioned when the Supreme Court, having granted certiorari on the merits of that case, dismissed the writ as improvidently

granted. *See Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting).[10]

2. In the public sector, the federal government, 41 States, the District of Columbia, and Puerto Rico authorize collective bargaining for at least some public employees, and *all* those systems are based on the principle of exclusive representation.[11] These laws reflect myriad legislative policy choices about which workers to cover, how to define bargaining units, election procedures, the scope of bargaining, etc. The courts have treated these laws and their details as matters for rational legislative judgments, not as inherent impingements on First Amendment associational rights that are subject to any form of heightened scrutiny. *See, e.g.*, *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 355 (Wisc. 2014) (rejecting First Amendment argument that legislative changes in the scope of exclusive

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[10] Plaintiffs rely on a portion of *Mulhall* that quotes the First Circuit's decision in *Acevedo-Delgado v. Rivera*, 292 F.3d 37 (1st Cir. 2002). AOB 16, 33 n.7. That case addressed a requirement that a government employee "participate in a workplace fund-raising campaign for a school voucher system." 292 F.3d at 38. There is no issue of compelled financial support here.

[11] *See* 5 U.S.C. §7111(a), §7114(a)(1); Amicus Br. for the State of New York, et al., at 8 n.3 & Appendix, filed in *Harris v. Quinn*,134 S.Ct. 2618 (2013), available at 2013 WL 6907713 (containing citations to state exclusive representation laws).

representative collective bargaining system infringed upon First Amendment associational rights).

Plaintiffs urge that *Abood v. Detroit Board of Education* held that exclusive representative collective bargaining in the public sector is an infringement on First Amendment associational rights, but concluded that the infringement in that case was justified by the government's interest in "labor peace." AOB 23-24. To the contrary, the alleged "infringement" in *Abood* was the requirement that workers *pay fees*. "A union and a local government employer [agreed] to an 'agency shop' arrangement, whereby every employee represented by a union … must pay to the union … a service fee …." 431 U.S. at 211. The issue in *Abood* was "whether *this arrangement* violates the constitutional rights of government employees." *Id.* (emphasis added). *Abood* held only that "[t]o compel employees *financially to support* their collective-bargaining representative has an impact upon their First Amendment interests." *Id.* at 222 (emphasis added).

Moreover, the Supreme Court's subsequent decision in *Knight* rejected Plaintiffs' erroneous interpretation of *Abood*. *See Knight*, 465 U.S. at 291 n.13 ("The basis for [*Abood*'s] holding that associational rights were infringed was the compulsory collection of dues from dissenting employees."); *id.* ("*Abood* did not

even discuss, let alone adopt, any general bar on 'exclusivity' outside the collective bargaining context.").

D. Plaintiffs' theory of First Amendment "association" is not supported by case law outside the collective bargaining context

Apart from the incompatibility of Plaintiffs' First Amendment analysis with precedents addressing exclusive representative collective bargaining, Plaintiffs are also wrong in their reliance on broader Supreme Court doctrine about First Amendment rights. By eliding the distinction between expressive association and other forms of association, Plaintiffs are "attempt[ing] to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) ("*FAIR*").

1. Plaintiffs do not show that the PLRA interferes with their right of expressive "association" by altering or impairing *their own* expressive activity. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572-73 (1995) (requirement that parade organizers include a group whose message they disapproved compelled speech/association because it "alter[ed] the expressive content of their parade"). Plaintiffs have an "absolute right" to communicate their views to the public or directly to the government. *City of Madison*, 429 U.S. at

176 n.10. The PLRA itself protects Plaintiffs' right to form their own associations and "to refrain from" participating in Union activities. 5 ILCS 315/6(a); *see also id.* 315/10(a)(1) & (2), (b)(1) & (3).

Plaintiffs seek to rely on *Hurley* and the related decisions in *Roberts* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), and *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), but those decisions addressed situations in which the "forced inclusion of an unwanted person in a group … affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648; *see also Roberts*, 468 U.S. at 623; *Christian Legal Society*, 453 F.3d at 861-62. Plaintiffs here are not forced to include anyone in any group they might form, and exclusive representative collective bargaining does not affect in any significant way Plaintiffs' ability to advocate their own viewpoints. *See D'Agostino*, 812 F.3d at 244.

This Court's decision in *Krislov v. Rednour*, 226 F.3d 851, 862 (7th Cir. 2000) (AOB 27, 31, 41), also provides no support for Plaintiffs' argument here. *Krislov* addressed the burden placed on political candidates by a state law that prohibited individuals who were not registered to vote in the political subdivision from collecting signatures to place candidates on the ballot. *Krislov*, 226 F.3d at 856. That prohibition made it difficult for candidates to "associate in a meaningful

way with the prospective solicitors for the purposes of eliciting political change." *Id.* at 862. Here by contrast there is no restriction on Plaintiffs' ability to associate with whomever they like to speak and petition.

2. Plaintiffs also do not show that the PLRA compels Plaintiffs to "associate" with the Union or its expressive activities by joining or supporting the Union or its activities. As such, the First Amendment cases that Plaintiffs rely upon are far afield from this case and provide no support for their position here.

The line of cases addressing requirements that employees affiliate with a political party to receive or retain government employment, *see* AOB 12, 19, 21, 35, involved requirements that individuals personally align themselves with political viewpoints with which they disagreed by pledging allegiance to, contributing to, or obtaining sponsorship from a political party. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 355 (1976); *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272-73 (3d Cir. 2007). No such requirements exist here. The State is not "forc[ing]" Plaintiffs to support the Union or "conscript[ing] [Plaintiffs] to support SEIU's agenda against their will." AOB 18. Plaintiffs are not required to join the Union or express any support for its positions; they are not required to display Union signs, wear Union buttons, or attend Union rallies; they are not required to do or say anything that suggests support for or endorsement of the Union's views.

Nor may Plaintiffs be subjected to discrimination with regard to their employment based on their failure to do any of these things. The union's duty to fairly represent the bargaining unit ensures that workers are treated equally regardless of whether they join the union or support its activities. *See* pp. 23-24, *supra*.

Plaintiffs also rely upon *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). AOB 19, 21, 26-27. But *Wooley* and *Barnette* are compelled speech cases in which an individual was "obliged personally to express a message he disagrees with." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); *see also Wooley*, 430 U.S. at 713 (state cannot require individual to publicly display ideological state motto on license plate); *Barnette*, 319 U.S. at 632 (government cannot constitutionally require flag salute, which "is a form of utterance"). Similarly, *Miami Herald Pub. Co. v. Tornillo* (AOB 27) held that the government cannot compel a newspaper "to print that which it would not otherwise print." 418 U.S. 241, 256 (1974). And *United States v. United Foods* (AOB 27, 40) is inapposite because that case involved a "forced subsidy." 533 U.S. 405, 409 (2001). Plaintiffs here are under no obligation to display, utter, publish, financially support

or otherwise express or endorse any message related to the Union or its speech/petitioning.[12]

3. Finally, Plaintiffs do not show that the PLRA compels Plaintiffs to "associate" with the Union's speech/petitioning in the sense that outsiders would reasonably believe that Plaintiffs necessarily *endorse or agree with* the Union's message.

A parent-teacher association at a public school or an alumni association at a public university may be regarded as representing and expressing the "official" positions of the parents or alumni. Parents or alumni may elect the leaders of these organizations, and public officials may accord special weight to their positions. But everyone understands (or should understand) that not all parents or alumni necessarily agree with the associations' positions, so individual parents and alumni are not compelled to "associate" with them. *Cf. Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (high school students understand that school does not endorse speech of school-recognized student groups); *FAIR*, 547

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[12] Because the plaintiffs in *Wooley, Barnette, Tornillo,* and *United Foods* (unlike Plaintiffs here) were required to speak, display, publish, or financially support a disfavored message, their First Amendment rights were restrained even though they were free to make clear in other ways their disapproval of that message.

U.S. at 64-65 (outsiders would understand that law schools do not necessarily agree with speech of military recruiters granted access to campus).

Likewise, many states require practicing attorneys to join and pay dues to a state bar association that engages in political activities in addition to regulatory activities. The state bars are democratic organizations that may be regarded as presenting the official position of the legal profession. But attorneys are not compelled to "associate" with the bar's political activities because the attorneys need not pay for them, *see Keller v. State Bar of California*, 496 U.S. 1, 14 (1990), *and* because "everyone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual." *Lathrop v. Donahue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (citation, internal quotation marks omitted); *see also Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999) (the "political positions of the Bar are unlikely to be attributed to all its individual members").

The same analysis applies to labor unions. Individuals choose through a democratic process whether to be represented by a labor union, and the members of a labor union also govern the union through a democratic process. As such, reasonable outsiders understand that individual bargaining unit members do not necessarily agree with the union's positions.

In the absence of any restriction on Plaintiffs' own affirmative First Amendment activities, and in the absence of any requirement that Plaintiffs' support or subsidize the Union's activities, the fact that the Union's message would not reasonably be perceived to express Plaintiffs' personal views is dispositive. *See FAIR*, 547 U.S. at 65 (rejecting law schools' First Amendment objection to military recruiters on campus because reasonable people would not believe the "law schools agree[d] with any speech by recruiters"); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457-59 (2008) (Roberts, C.J., concurring) (explaining that *Hurley* and *Dale* involved "forced association" because outsiders would believe that the organizations "endorsed" or "agreed with" a certain message).[13]

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[13] Adopting Plaintiffs' novel theory of First Amendment association, under which the perception of reasonable outsiders does not matter, would require upending many other settled areas of law. For example, under Federal Rule of Civil Procedure 23, the courts appoint attorneys to represent the class in litigation, and there is no notice and opt-out procedure for class actions seeking declaratory and injunctive relief, even though litigation is First Amendment petitioning activity. *See* Fed. R. Civ. P. 23(a), (c)(2); *see also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002). Under the federal Administrative Procedure Act, negotiated rulemaking involves the appointment of individuals to represent the various "interests" that would be affected by the rule. *See* 5 U.S.C. §§561-570. These (continued)

The *FAIR* decision makes clear that the First Amendment protects the right to associate (and not to associate) for expressive purposes, not "association" in the broader and more colloquial sense of the term. The law schools in *FAIR* were required to associate with the military recruiters in the sense that the recruiters were granted access to law school facilities. But there was no compelled association for expressive purposes because the law schools did not have to endorse (and would not reasonably be perceived as endorsing) the recruiter's *message*.

E. Because there is no infringement on First Amendment rights, heightened scrutiny does not apply

As demonstrated above, the recognition of a democratically chosen exclusive representative for purposes of the PLRA "in no way restrain[s]" Plaintiffs' freedom not to associate with that representative's expressive activities and leaves Plaintiffs' First Amendment rights "wholly unimpaired." *Knight*, 465 U.S. at 288, 290 n.12. That being so, the State "need not demonstrate any special justification" for its law. *Univ. of Pa.*, 493 U.S. at 201. The State Legislature's

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(continued)

systems are not treated as burdens on First Amendment associational rights that trigger heightened scrutiny.

policy decision to extend its system of exclusive representative collective bargaining to homecare personal assistants and family child care providers must be respected if there is a rational basis for the legislation. The Supreme Court held in *Knight* that Minnesota's interest in recognizing a single representative chosen by the majority that can present "one collective view" during negotiations "certainly" satisfies that standard. 465 U.S. at 291-92. The same is true here.

That Plaintiffs are not compelled to "associate" with the Union's activities in any First Amendment sense disposes of Plaintiffs' contention that they are being forced to associate for the purpose of "lobbying" the government. AOB 19-22. But in any event what Plaintiffs characterize as lobbying is simply collective bargaining with the state agency that pays the homecare and childcare workers and sets the economic terms of service, like public-sector unions do all the time. *See Abood*, 431 U.S. at 227-32.[14]

[14] Because exclusive representation is part of the process of negotiating a unit-wide labor contract to govern the terms upon which the State will compensate homecare and childcare providers for providing services, there is nothing comparable in Plaintiffs' attempted analogy to public advocacy by the National Rifle Association, Sierra Club, and Chamber of Commerce. AOB 22.

That there is no infringement on First Amendment associational rights also disposes of Plaintiffs' strange contention that "the fact that Illinois made SEIU the providers' representative pursuant to an ostensible majority vote for SEIU only makes the infringement worse." AOB 21. It is true that a majority vote cannot cure a violation of the First Amendment, but neither does the fact that the Union is democratically elected create one. There is no underlying First Amendment violation here, so the democratic election of the Union to be the exclusive representative of the units of home care personal assistants and family child care providers poses no constitutional problem.

CONCLUSION

The judgment below should be affirmed.

Dated: September 23, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word, and contains 9,386 words in 14-point proportionately-spaced Times New Roman typeface.

Dated: September 23, 2016

/s/ Scott A. Kronland
Scott A. Kronland

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I filed and served the foregoing BRIEF OF APPELLEE SEIU HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. All counsel of record are registered CM/ECF users.

Dated: September 23, 2016

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