

IN THE SUPREME COURT OF PENNSYLVANIA

M.D. Appeal Dkt.

No. 110 MAP 2016

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DAVID W. SMITH and DONALD LAMBRECHT,
Appellees,

v.

GOVERNOR THOMAS W. WOLF, in his official capacity
as Governor of the Commonwealth of Pennsylvania,
and COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HUMAN SERVICES,
Appellants.

**BRIEF OF *AMICUS CURIAE*, CENTER OF THE AMERICAN
EXPERIMENT, IN SUPPORT OF APPELLEES**

Appeal from the Order of the Commonwealth Court
at No. 177 MD 2015, dated October 14, 2016

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Center of the American Experiment (hereinafter the “Center”) is a nonpartisan, nonprofit, educational organization based in Minnesota. For more than twenty-five years, Center of the American Experiment has led the way in creating and advocating policies that make Minnesota a freer, more prosperous and better-governed state.

This case concerns *amicus* because the Center has worked with home-based personal care attendants (“PCAs”) and child care providers since 2010 to advocate against, and shield them from, first an executive order² and then legislation³ that

¹ Pursuant to Pa.R.A.P. 531, counsel for *amicus curiae* certifies that no person or entity (i) paid in whole or in part for the preparation of the *amicus curiae* brief, or (ii) authored in whole or in part the *amicus curiae* brief. 210 PA. Code § 531 (2017).

² Governor Dayton called for an election via executive order of certain home-based child-care provider in 2011. David Bailey, *Minnesota governor calls union vote on day care workers*, Reuters (Nov. 15, 2011), <http://www.reuters.com/article/us-minnesota-daycare-union-idUSTRE7AF04B20111116>. That executive order was found unconstitutional by the Ramsey County District Court; the District Court ruling was upheld on appeal. *Swanson v. Dayton*, No. A12-1368 (Minn. Ct. App. Apr. 22, 2013), <http://www.leagle.com/decision/In%20MNCO%2020130422300/SWANSON%20v.%20DAYTON>.

³ Minnesota Statute 179A.54 “Individual Providers of Direct Support Services.” Public Employment Labor Relations Act, Minn Stat. § 179A.54 (2016), <https://www.revisor.mn.gov/statutes/?id=179A.54>.

designated home-based PCAs child care providers as “state employees” solely for purposes of collective bargaining.⁴

The Center now advocates for a coalition of PCAs in Minnesota called “MNPCA” to help them protect the integrity of a vital Medicaid program that was designed to empower disabled Americans to live at home rather than live in institutions. The decades-old program provides the disabled with a Medicaid benefit that can be used to employ PCAs to provide in-home personal care. That program is now under stress due to the 2014 unionization of certain PCAs in Minnesota by the Service Employees International Union (SEIU). The Center is also assisting MNPCA and their legal counsel who are attempting to decertify the SEIU.

⁴ Child care providers went on to defeat a certification election held by the American Federation of State County and Municipal Employees (AFSCME-5) by a margin of greater than 2 to 1 on March 1, 2016. Don Davis, *Minn. childcare providers defeat mandatory union*, Forum News Serv. (Mar. 2, 2016), <http://www.inforum.com/news/3960168-minn-childcare-providers-defeat-mandatory-union-representation>.

ARGUMENT

I. SUMMARY OF *AMICUS'S* PETITION: HOW MEDICAID FUNDS FOR THE DISABLED ARE NOW FUNDING POLITICS IN MINNESOTA

In a patent effort to reward labor unions that provide reliable financial and logistical campaign support, and to prop up the declining membership and revenues of certain unions, Minnesota Governor Mark Dayton and the state's 2013 legislature classified certain home care providers as state employees but only for purposes of collective bargaining. The legislation followed an unsuccessful attempt by Governor Dayton to use an executive order to declare in-home child care providers "state employees" if they accepted children from families receiving a state child care subsidy.⁵ The use of welfare transfer payments as a pretext for creating new "state employees" has been deployed successfully elsewhere in the United States.⁶

⁵ See *supra* note 2.

⁶ According to their website, SEIU has organized PCAs into unions in the following states: California; Connecticut; Illinois; Indiana; Maryland; Massachusetts; Minnesota; Missouri; Kansas; New York; Oregon; Vermont and Washington. It appears some SEIU unions represent state blocs (for example, Illinois, Indiana, Missouri and Kansas are all combined on one website). *Overview of Homecare Collective Bargaining*, SEIU Local 503 (Dec. 13, 2013), <http://www.seiu503.org/2013/12/overview-of-homecare-collective-bargaining/>; *Home Care*, SEIU Healthcare Illinois, Indiana, Missouri, Kansas <http://www.seiuhcilin.org/category/home-care/> (last visited Mar. 18, 2017).

Following a highly questionable certification vote in 2014, the SEIU Healthcare Minnesota (SEIU) became the exclusive representative. Now thousands of care providers have joined a coalition called MNPCA, led by PCAs Kris Greene and Catherine Hunter, seeking to protect the PCA program by decertifying the union in what may be the largest decertification effort in labor law history.

To date, over 6,000 PCAs have called for a new election so they can get the PCA program back without interference from the SEIU.

The Center offers the experience of Minnesota with the unionization of home-based PCAs as a cautionary tale to the Commonwealth of Pennsylvania. The similarities are striking: Minnesota began with a similar executive order that was struck down. We are now operating under legislation that accomplished the same goal. While legislation is certainly a more defensible route than an executive order, which thus far has not been successfully challenged in court, the means do not justify the end. This nation-wide effort by unions to capture welfare transfer payments is not a legitimate diversion of Medicaid funds. Certainly Congress in the 1970's did not envision this diversion when it created these options for the disabled. And while taxpayers may look with favor on helping the disabled and their families, it is not reasonable to ask them to fund a program that is now being used to fund politics and lobbying. Home-based PCAs are not equipped to exercise

their rights under labor law, or to meaningfully respond to or evaluate the demands of a union like the SEIU. The union has inserted itself between the state and PCAs and the disabled recipients of Medicaid, declaring itself a “representative.” This intrusion has caused much anxiety and no benefits except to the SEIU and its allies.

II. BACKGROUND: THE MINNESOTA PERSONAL CARE ASSISTANCE PROGRAM

In the 1970’s, the United States moved away from institutionalizing disabled people, in favor of keeping them at home, with their family, whenever possible.

Responding to the desire of disabled Vietnam veterans to stay in their communities, personal care attendant (“PCA”) services were introduced in Minnesota on July 1, 1977. The services were part of a state-planned service for adults with physical disabilities.

In 1978, PCA services were added to Minnesota’s Medicaid program as an optional service. From 1984 through today, the program has been expanded to include children, the elderly with disabilities, and those with mental illness or disease.⁷

Today disabled people get certain benefits from Medicaid. They can use part of their Medicaid grant to hire personal care attendants (PCAs) to help them with

⁷ *Recommendations from Evaluation of Current Service Authorization and Resource Allocation in Minnesota’s Personal Care Assistance Program Report #1*, The Lewin Grp. (Mar. 31, 2009), <http://rtc3.umn.edu/docs/MNPCAInterimReport1.pdf>.

daily living. Not only does this offer a superior care model for the disabled, it is less expensive for taxpayers.⁸ Under this Medicaid program in Minnesota, disabled adults are empowered to hire PCAs, often a family member, who is paid a modest hourly rate to help with daily needs.⁹ According to the Minnesota Department of Human Services (DHS), almost 27,000 people participated in the program in 2014 at a cost of \$684 million.¹⁰

A major benefit of the program is its flexibility. Individuals who have disabilities are given several options: the Flexible Use option, the traditional PCA option, and the PCA Choice option.¹¹

⁸ Personal care assistance services help a person with day-to-day activities in their home and community. PCAs help people with activities of daily living, health-related procedures and tasks, observation and redirection of behaviors and instrumental activities of daily living for adults. PCA services are available to eligible people enrolled in a Minnesota Health Care Program. *PCA consumer information*, Minn. Dep't of Human Servs., <https://mn.gov/dhs/people-we-serve/people-with-disabilities/services/home-community/programs-and-services/pca/> (last updated Mar. 18, 2016).

⁹ *Personal care assistance (PCA) program*, Minn. Dep't of Human Servs., http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=id_003867&RevisionSelectionMethod=LatestReleased (last updated Sept. 23, 2011).

¹⁰ *Steps for Success: Personal Care Assistance*, Minn. Dep't of Human Servs., http://www.dhs.state.mn.us/main/groups/business_partners/documents/pub/dhs16_164353.pdf (last visited Mar. 18, 2017); The list provided to legal counsel Douglas P. Seaton after filing a July 18, 2016 Notice of Intent to File Decertification Petition on July 18, 2016 contained approximately 27,000 names (and no addresses or phone numbers). The number of PCAs listed in subsequent lists varied a great deal; obtaining an accurate list of PCAs had been one of the biggest challenges of the decertification effort. This has made it nearly impossible for the PCAs wishing to decertify to know how many election authorization cards they need to win a new election.

¹¹ *PCA consumer information*, Minn. Dep't of Human Servs., <https://mn.gov/dhs/people-we-serve/people-with-disabilities/services/home-community/programs-and-services/pca/> (last updated Mar. 18, 2016). The Shared Care option, not at issue here, provides one worker for two or three people living in the same area

The Flexible Use option allows special-needs individuals to choose when they would like a PCA to be at their home. Under the traditional PCA option, an agency will train and pay the PCA workers. With the PCA Choice option, individuals hire and train the assistants themselves.

Compared to other states, Minnesota is a leader in PCA programs by requiring formal training and having a financial intermediary (often referred to as a “fiscal agent”) assist with taxes and payroll.

The “PCA Choice” program, along with the two smaller programs, Flexible Use and Shared Option (hereinafter “Choice PCA”), was designed with families in mind—and it was, at least until recently, the preferred option for disabled people because it offers the most control over the benefit, and therefore, over their own well-being and lives. The effort to unionize and now collectively bargain for PCAs has complicated the program choice for many people.

The Center does not have reliable data to cite yet, but there is strong anecdotal evidence that PCAs have left the PCA Choice program, and switched to PCA Traditional to avoid the stress caused by the SEIU. When MNPCA calls PCAs or their agents, seeking signatures for the election authorization card, many said they had left the Choice program in favor of “Traditional” citing the union.¹²

¹² Affidavits are on file with BMS and the Ramsey County Court; *see* Julie Dupre, employed by MNPCA, paragraph 5; and affidavits by PCA Renee Katz and agency administrator Carla

III. HOW HOME-BASED PCAs BECAME “STATE EMPLOYEES” SUBJECT TO UNIONIZATION

As a Choice PCA under Medicaid, you are employed by the Medicaid recipient (not an agency or the state). But that changed when Governor Mark Dayton made good on a campaign promise to the Service Employees International Union (SEIU) and the American Federation of State County and Municipal Employees (AFSCME) that helped Dayton, and other legislators, get elected. In May 2013, after the longest legislative debates in state history, the Minnesota legislature passed the “Individual Providers of Direct Support Services Representation Act.”¹³ 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 2012.¹⁴

Hemming. Renee Katz is an Oakdale area mother and part-time PCA for her special-needs daughter. In February 2014, she signed a card supporting an election to form a union. She didn’t realize she became a member by signing that card or that dues would be deducted. In July 2015, she found it impossible to opt out of the union. She eventually changed programs to a non-unionized one.

¹³ § 179A.54 (2016), <https://www.revisor.mn.gov/statutes/?id=179A.54>.

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

The legislation subjected both home-based child-care providers¹⁵ and home-based PCAs to unionization. The SEIU and AFSCME eventually divided up the state's home-based care providers as follows: SEIU got the PCAs and AFSCME got the child care providers. Governor Dayton signed the bill into law declaring that:

For the purposes of the Public Employment Labor Relations Act (PELRA) ... individual [homecare] providers shall be considered ... executive branch state employees. ... This section does not require the treatment of individual providers as public employees for any other purpose.¹⁶

In other words, PCAs who provide home care to the disabled, most often family members, are “state employees” in Minnesota, but only to subject them to “exclusive representation” by unions for collective bargaining. The Editorial Board of the Minneapolis Star Tribune had warned against the measure saying, “The legislation’s convolution of the traditional worker-employer union model should ... inspire skeptical, why-are-we-going-to-these-lengths questions.”¹⁷

¹⁵ After almost a decade of union organizing activity, the in-home child-care providers defeated a unionization attempt by AFSCME-5 on March 1, 2016 by a margin of over 2 to 1. “By the time the votes were tallied Tuesday, the lopsided results dealt a decisive loss to labor: 1,014 “no” votes to 392 who favored unionization. Although there are about 10,000 licensed child-care providers in the state, only those who care for children receiving state subsidies were eligible to vote. That meant 2,348 providers were eligible when voting began Feb. 8.” Mary Lynn Smith, *Minnesota child-care providers reject union*, Star Tribune (Mar. 1, 2016), <http://www.startribune.com/minnesota-childcare-providers-say-no-to-union/370677131/>.

¹⁶ § 179A.54 (2016), <https://www.revisor.mn.gov/statutes/?id=179A.54>.

¹⁷ *Minnesota lawmakers should reject day care union*, Star Tribune Editorial (April 27, 2013), <http://www.startribune.com/minnesota-lawmakers-should-reject-day-care-union/204936081>. The legislation covered both home-based child care and personal care attendants.

PCA Choice was targeted for unionization because the employer is the Medicaid recipient. Most of the disabled Medicaid participants opted for “PCA Choice” in 2013. The PCAs in the “traditional” program are employed through an agency (fiscal agent) and thus are not subject to unionization.

IV. LOW VOTER TURNOUT CERTIFICATION ELECTION OF SEIU HEALTHCARE MINNESOTA

After the 2013 legislation was signed, and after a “showing of interest” by the SEIU following several years of canvassing PCAs for potential union support, the Minnesota Bureau of Mediation Services (BMS) held a certification election on August 26, 2014.

During the BMS-supervised election, only 5,849 individuals voted in the for SEIU Healthcare Minnesota even though DHS said there were 26,977 PCAs in the targeted Choice program.¹⁸ That is a turnout of only 21.7 percent.

And of the targeted PCAs, only 3,543 voted for union representation (13.1 percent of the total number of PCAs on the list). SEIU won because under Minnesota labor law 3,543 (out of a possible 26,977) was a majority of those who voted.

¹⁸ Minneapolis Star Tribune report on the PCA election; Abby Simons, *In historic vote, Minnesota home health care workers unionize*, Star Tribune (Aug. 27, 2014), <http://www.startribune.com/in-historic-vote-minnesota-home-health-care-workers-unionize/272817821/>.

The Minneapolis Star Tribune Editors were prescient in their reaction: “But Tuesday's vote hardly represents a majority of home care workers in the state, and the controversial action is all but certain to trigger a legal challenge.”¹⁹

V. SEIU HEALTHCARE MINNESOTA CONTRACT: DUES UP TO \$948 A YEAR FOR “LOW-INCOME MEMBERS”

The Center estimates, based on comparisons of the SEIU’s federal LM-2 filings with the IRS in 2013, 2014 and 2015, that the union increased its membership by approximately 5,000 dues-paying members (described therein as “low income members”) following the 2014 election.²⁰

Under the first contract, the SEIU set union dues at three percent (3%) of gross pay up to \$948 a year.²¹ If all 5,000 members were paying three percent of their gross pay, and working the requisite hours, the union could be taking in \$4.7 million in new revenue each year. It defies reason to assume that this SEIU

¹⁹ Abby Simons, *In historic vote, Minnesota home health care workers unionize*, Star Tribune (Aug. 27, 2014), <http://www.startribune.com/in-historic-vote-minnesota-home-health-care-workers-unionize/272817821/>.

²⁰ *Union Search*, Dep’t of Labor, <https://olms.dol-esa.gov/query/getOrgQry.do> (last visited Mar. 18, 2017).

²¹ FAQs: “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.” *Frequently Asked Questions about membership status*, SEIU Healthcare Minn. (July 24, 2015), <http://www.seiuhealthcaremn.org/2015/07/24/frequently-asked-questions-about-membership-status/#uniondues>.

bargaining unit is spending millions of dollars a year representing Choice PCAs. And to date, the union has not bargained for an hourly rate that comes close to what the State of Minnesota is paying Choice PCAs. (So PCAs who are paying dues have lost out in the bargaining.)²² The SEIU is, however, expending time and money to defeat the thousands of PCAs who are pleading for a new election.

VI. THE TESTIMONY OF PCA KRIS GREENE

Kris Greene has been the face of the fight against the SEIU and one of the faces of MNPCA. She does not want the union to come between her and the care of her daughter. She wrote in a newspaper commentary:²³

On June 10, 1992, I gave birth to my daughter Meredie. She was a beautiful baby girl; my husband, Dave, and I couldn't have been happier or prouder. When we were told that Meredie suffered from Rubinstein Taybi syndrome, we knew we were in for some unique challenges. But we also knew having her in our lives was more than worth it.

Five years ago, I joined a Minnesota program and became a personal care assistant (PCA) to my (now adult) 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

²² See Article 8, Collective Bargaining Agreement Between SEIU and the State of Minnesota, July 1, 2015 to June 30, 2017 <http://www.seiuhhealthcaremn.org/files/2015/06/2015-2017-Home-Care-CBA-signed-and-dated.pdf>

²³ Kris Greene, *Why PCAs should beat back the union: The SEIU is taking millions in Medicaid dollars that should go to the vulnerable*, Star Tribune (Aug. 7, 2016), <http://www.startribune.com/why-pcas-should-beat-back-the-union/389345351/>.

allowed Meredie to live at home, instead of in a government-run institution.

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).

Kris Greene and other PCAs set up a website, MNPCA.org, as a forum for PCAs to connect with one another, read about the decertification campaign, and fill out the election authorization card.

On the site, Greene explained why she has launched the campaign:

It's a government program that has worked wonderfully, allowing special needs individuals to be at home instead of an institution. I worry that a union will make this valuable program both less effective and more complicated."²⁴

²⁴ MNPCA, www.mnpca.org (last visited Mar. 18, 2017).

VII. INACCURATE LISTS, EVIDENCE OF FRAUD, BULLYING AND COERCION: OVER 6,000 PCAs FILE SUIT AND CALL FOR A NEW ELECTION

As PCAs realize what has happened, the union has been met with stiff and heartfelt resistance in Minnesota. The controversy has received intense and steady press coverage in Minnesota and across the nation.²⁵

On August 18, 2015, in *Greene, et. al. v. Dayton, et. al.*, Kris Greene and other PCAs sued Minnesota Governor Dayton, et. al. in Minnesota's Federal District Court.²⁶ They argued that the 2013 PCA statute violates the Supremacy Clause of the U.S. Constitution, changes their preexisting contracts, and violates the Contract Clause of the Minnesota and U.S. Constitutions.

Unfortunately, Kris Greene lost in the District Court and in the Eighth Circuit Court of Appeals. And after Justice Antonin Scalia's death, the U.S. Supreme Court deadlocked 4-4 on a request for certiorari. Since this legal issue is on hold in the courts, the Center along with other coalition allies, is helping Kris Greene and thousands of PCAs press a decertification campaign. The Notice of Intent to File Decertification Petition was filed with BMS on July 18, 2016.

²⁵ Most of these articles can be found at MNPCA's website MNPCA.org under the "Blog."

²⁶ *Greene v. Dayton*, No. 14-3195 (D. Minn. Jan. 26, 2015), https://www.gpo.gov/fdsys/pkg/USCOURTS-mnd-0_14-cv-03195/content-detail.html.

As of March 16, 2017, approximately 6,200 PCAs in Minnesota have signed and submitted an election authorization card to BMS, stating that they do not wish to be represented by the SEIU and asking BMS to order a new election.²⁷ That is more than the number of PCAs who voted in the original election, and almost twice as many who voted for the union.

It is not clear, however, whether MNPCA has met the required threshold for a new election under Minnesota law.

When MNPCA filed for decertification, it was entitled to a current list of PCAs. But getting an accurate and reliable list of PCAs has been the biggest challenge for MNPCA.

This matter is now before BMS and the Ramsey County District Court; the on-going suit has many twist and turns so we will only summarize the case here.²⁸ The PELRA statutes that govern labor elections require MNPCA to produce signatures from thirty percent (30%) of the members of the bargaining unit.²⁹ That requires MNPCA to know how many PCAs are in the bargaining unit. At first,

²⁷ MNPCA set up a website and Facebook page to communicate with PCAs scattered around the state. The goal is to decertify the SEIU and then organize an association of PCAs to represent the true interests of PCAs and their families at the State Capitol. MNPCA, www.mnpca.org (last visited Mar. 18, 2017).

²⁸ Kristina Greene v. Minn. Bureau of Mediation Servs., No. 62-CV-16-5981 (Dist. Ct. Minn. filed Oct. 20, 2016).

²⁹ Subd. 10.Certification. Upon a representative candidate receiving a majority of those votes cast in an appropriate unit, the commissioner shall certify that candidate as the exclusive representative of all employees in the unit. Public Employment Labor Relations Act, Minn Stat. § 179A.12(10) (2016), <https://www.revisor.mn.gov/statutes/?id=179A.12>.

MNPCA accepted the assertion by BMS that there were about 27,000 PCAs in the bargaining unit, thus requiring about 8,000 election cards. MNPCA set out in good faith to get them.

In addition to the fact that this is not a traditional bargaining unit, with a shared workplace or other points of contact between “employees,” these PCAs are spread all over the state, with no connection to one another. The challenge of reaching PCAs has been monumental.

But very quickly MNPCA began to doubt the accuracy of the initial list, and over time when working with a succession of new lists found evidence that the bargaining unit might be as small as 12,000-15,000 PCAs.

The inaccuracy of the PCA lists is explained, at least in part, by an admission to the Ramsey County District Court that DHS was not actually keeping lists of PCAs even though the 2013 law required the state to do so monthly. Until recently, only the SEIU had the list of Choice PCAs.

In any event, the lists provided to MNPCA have all been unreliable, and pointed to fraud in the initial election and a fraud perpetrated on PCAs who are now paying dues that they never agreed to pay.

That, in summary, is why MNPCA took their case to court. After dutifully attempting to find additional contact information working with a succession of bad lists, MNPCA came to several conclusions:

MNPCA could not conclude with any certainty how many PCAs were in the bargaining unit, and therefore, did not know how many election cards it was required to produce to trigger an election;

The SEIU's original "showing" was fraudulent. (MNPCA has demanded SEIU's original cards or petitions that resulted in the 2014 representation election. These allegations are carefully supported by affidavits on file with BMS and the Ramsey County Court. See, for example, affidavits on file by William Egan, Adam Sharp, Benjamin Wetmore, and Julie Dupre'); and

The SEIU committed fraud and unfair labor practices during the election, including SEIU representatives signing cards for PCAs, filling out and signing cards using random names and addresses, and harassing PCAs at their homes to get them to sign a union card. Some SEIU representatives told PCAs that the union card was "just for information" and pressured them to sign. (See, for example, affidavits on file by PCAs Patricia Johnson, Mary Barton, Mary Ann Howitson, Renee Katz, and Carla Henning.)

Patricia Johanson is a PCA for her disabled granddaughter. In 2014, the SEIU started calling her and showing up at her door to encourage her to vote "yes" in the upcoming unionization election. She told the union many times that she was

not interested in joining, but they kept contacting her. They were pushy, and she was scared.

In the fall of 2015, Patricia's son-in-law noticed that union dues were being deducted from her paycheck even though she had never signed a card authorizing this. She demanded that the union send her a copy of the card she had purportedly signed. When she received it, she knew it was a forgery:

Within a week, I received a copy of the Union card with my information filled out and my signature forged by someone. This Union card is attached as Exhibit 1 hereto. I called Mr. Cryan back and told him that my signature had been forged and that I was certain that I was not the only one who had been victimized this way. I asked him if there was any possibility they would find out who forged my signature and he said "Yes." They were quite sure they knew who it was; they no longer worked there. Mr. Cryan said he could see the difference in the signatures and would refund the dues.³⁰

MNPCA has asked the Ramsey County District Court to rescind the election and/or order a re-run election. When the election took place in 2014, most Choice PCAs had not heard about the campaign. If they received a ballot, many PCAs have reported that they did not know what it was, and threw it away. Because of MNPCAs efforts and press coverage, there is a greater awareness among Choice PCAs of what has happened so an election, if done properly should more accurately reflect whether Choice PCAs want the SEIU to "represent" them.

³⁰ Tom Steward, *MN Grandmother Takes on SEIU*, Center of the American Experiment (Feb. 11, 2017), <https://www.americanexperiment.org/2017/02/mn-grandmother-takes-seiu/>.

VIII. SEIU HEALTHCARE MINNESOTA: YOU CAN CHECK IN BUT YOU CAN NEVER LEAVE

The SEIU union card, once it is signed, is a special kind of contract.³¹ This “contract” may be appropriate in a normal workplace but the unique circumstances of PCAs, spread all over the state, unknown to one another, working in their own homes, or the home of a disabled person, presents a circumstance entirely unsuited to traditional labor elections and collective bargaining.

First, the cards are vulnerable to the fraud of paid union canvassers filling it out for PCAs so they can collect a per card bonus. Cards were filed with names and addresses of people who do not exist or who are not PCAs; cards have addresses of empty lots and commercial buildings.

Second, once the union card is turned in, even if it was signed by a PCA, the person who signed it, or is alleged to have signed it, cannot get a copy from the SEIU.

³¹ Here is the language from the card: I hereby request and voluntarily authorize the State of Minnesota or their agent to deduct from my wages the correct amount of Union dues and other fees or assessments as shall be certified by SEIU Healthcare MN and to remit those amounts to SEIU Healthcare MN on my behalf. This authorization is irrevocable for a period of one year from the date of execution and from year to year thereafter, irrespective of my membership in the Union, unless I notify the Union in writing, with my valid signature, of my desire to revoke this authorization not less than thirty (30) and not more than forty-five (45) days before the annual anniversary date of this authorization or the date of termination of the applicable contract between the Union and the State of Minnesota, whichever occurs sooner.

Third, once the SEIU won the election, union dues were deducted from PCA paychecks, with no further authorization by PCAs or authentication of the cards required by the SEIU.

Fourth, the contract is irrevocable and the narrow “window” for “opting out” is designed to frustrate even the most persistent PCA. If you do not have a copy of the card, and the union is under no duty to give you one, how are you supposed to exercise your right to opt out?

PCAs who did not sign the card but had dues deducted anyway have had a hard time getting the matter resolved. (See, e.g. affidavits on file with BMS for PCAs Janine Yates, Patricia Johansen and Helen Hembree).

IX. WHO IS THE EMPLOYER UNDER THE PCA MEDICAID PROGRAM

As a Choice PCA, you are employed by the Medicaid recipient (not an agency or the state). But following the 2013 legislation, PCAs are now an odd form of “hybrid.” They work for the Medicaid participant, but they are also “state employees.” The law excludes them from benefits like pensions but not from labor rules like overtime (which is causing chaos in the program).³² This exclusion is

³² 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>.

appropriate given that this is a Medicaid program that was never intended for that purpose.

Choice PCAs do not have the sort of employer/employee relationship with the government that public employees have, though the rhetoric and promises made by SEIU Healthcare Minnesota may have led some PCAs to think that would be the case, at least eventually, if they elected the union.³³

By statute, only disabled participants (often guided by a legal guardian) can hire and direct the care provided by PCAs. These same individuals are the ones who give instructions to their PCAs, and only they can fire their PCAs.³⁴

At no time is the government involved in any of these traditional employer responsibilities. In fact, in Minnesota, day-to-day “HR” employer responsibilities are contracted out by DHS to approximately 750 fiscal agents³⁵ that handle payroll and tax withholding. Disabled participants can do their own paperwork or opt to pay a handling fee.

³³ “I was proud to be part of the bargaining team that reached a tentative agreement that will, if it’s now ratified by union members and the legislature, make major strides forward in addressing the care crisis — a severe shortage of quality care workers because of low pay and few benefits — by raising the pay floor from \$11 to \$13, providing new funding for training and stipends to reward home care workers to improve their skill sets, more paid time off, two paid holidays for the first time ever, additional wage increases for workers providing care to the clients with the highest level of complex care needs, and more. Ashley Christenson, *Bureau of Mediation Services Rules with Minnesota Home Care Workers: Dismisses Efforts to Decertify Union*, SEIU Healthcare Minn. (Feb. 10, 2017), <http://www.seihealthcaremn.org/2017/02/10/bureau-of-mediation-services-rules-with-minnesota-home-care-workers-dismisses-efforts-to-decertify-union/>.

³⁴ § 179A.54 (2016), <https://www.revisor.mn.gov/statutes/?id=179A.54>.

³⁵ MinnesotaHelp.info, <https://www.minnesotahelp.info> (last visited Mar. 18, 2017).

Hence the 2013 law declared:

Rights of covered program participants. No provision of any agreement reached between the state and any exclusive representative of individual providers, nor any arbitration award, shall interfere with the rights of participants or participants' representatives to select, hire, direct, supervise, and terminate the employment of their individual providers; to manage an individual service budget regarding the amounts and types of authorized goods or services received; or to receive direct support services from individual providers not referred to them through a state registry.³⁶

NOTE: this language is also restated in the SEIU contract.

Catherine Hunter is a Choice PCA who takes care of her disabled adult child, and a co-founder of MNPCA. She explained on MNPCAs Facebook page why she objected to the SEIU representing her:

“I am a former teacher who was a member of the teacher’s union, so I know a bit about how a true union operates and I can state with some authority that the SEIU is not what they claim to be. They do not truly represent any PCA. If you are accused of harming a client in any way, the SEIU does not represent you. If you make a mistake on your timesheet and are accused of fraud, the SEIU does not represent you. If you don’t like your working conditions, you cannot strike. In short,

³⁶ § 179A.54 (2016), <https://www.revisor.mn.gov/statutes/?id=179A.54>.

the SEIU is a false union, certified by misleading thousands of hardworking, compassionate PCAs.”³⁷

X. COLLECTIVE BARGAINING OVER MEDICAID BENEFITS

Under the new law, PCAs could only “collectively bargain.” But over what and with whom? All their benefits come from Medicaid, and in turn are authorized and funded by Congress and state legislatures. This is why the U.S. Supreme Court recently ruled in *Harris v. Quinn* that they could not be forced to pay any union dues.³⁸

The DHS chart below shows the progression of reimbursement rates (set by the quarter hour) set by the Minnesota legislature for the PCA program.³⁹ The point is that the legislature, not the union, sets the actual compensation under the Medicaid program. Even if the SEIU negotiated a \$20-dollar an hour rate, paid

³⁷ *A Conversation Between Two PCAs*, MNPCHA (Aug. 26, 2016), <http://www.mnpca.org/a-conversation-between-two-pcas/>.

³⁸ *Harris v. Quinn*, 573 U.S. ____ (2014), https://www.supremecourt.gov/opinions/13pdf/11-681_j426.pdf.

³⁹ INFORMATION BRIEF Research Department Minnesota House of Representatives 600 State Office Building St. Paul, MN 55155 Danyell A. Punelli, Legislative Analyst 651-296-5058 Updated: May 2012. See, Page 5, PCA Reimbursement PCA fee-for-service reimbursement rates are set by DHS and are currently just under \$16 per hour for nonrelative care. PCA reimbursement rates are increased or decreased each year based on cost-of-living adjustments. Prior to a recent change in law, relatives providing PCA services were reimbursed at the same rate as nonrelatives. Beginning July 1, 2013, certain relatives will be reimbursed at 80 percent of the rate paid to nonrelatives (parent or adoptive parent of an adult child, a sibling aged 16 years or older, an adult child, a grandparent, or a grandchild). Danyell Punelli, *Personal Care Assistance*, Information Brief, Minn. H.R. Research Dep’t, <http://www.house.leg.state.mn.us/hrd/pubs/perscare.pdf> (last updated May 2012).

time off and pensions, the terms of that contract would be illusory unless the legislature approved it and funded it.

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

To date, the hourly rate negotiated by the SEIU is lower than the reimbursement rate set by statute. The union has negotiated such benefits as paid time off but again, it has to be funded by the legislature. Family members are paid eighty percent (80%) of the hourly rate that non-family members receive. This is in recognition of the different needs, costs and interests of family and unrelated PCAs.⁴⁰

XI. THE UNCERTAIN LEGACY OF *HARRIS V. QUINN* (2014)

Like Minnesota, Illinois has a PCA program that was unionized following the efforts of Governors Blagojevich and Quinn. It led to one of the most important Supreme Court cases in labor law history, *Harris v. Quinn*. The Court held that PCAs could not be forced to join a union or pay agency/mandatory fees.

⁴⁰ See *supra* note 39.

Governor Quinn argued that the union helped PCAs by improving wages and benefits, organizing training programs, etc. The Supreme Court also dismissed this argument:

The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.⁴¹

Because of the Harris ruling, only traditional government employees can still be required to pay agency fees.

Unfortunately, most PCAs in Minnesota have never heard about the Harris case. For PCAs with a signed union card on file, no matter how it got there, the Harris ruling does not help them unless they realize dues are being taken out, know their rights and the SEIU elects to respond helpfully.

XII. WHY *HARRIS* IS NOT ENOUGH: “STATE EMPLOYEE” STATUS THREATENS MEDICAID PROGRAM WITH OVERTIME RULES AND OTHER UNINTENDED CONSEQUENCES

If PCAs cannot be forced to pay dues, what is the problem? Both defenders and critics of PCA unions have concluded that the Harris decision solved the problem of forced dues.

⁴¹ Harris, 573 U.S. __

For many Choice PCAs and their families, union dues are the least of their problems since the SEIU knocked on the door.

SEIU's attempt to "exclusively represent" PCAs and their families is driving them out of the PCA Choice program they prefer, and into the union-free safe harbor of the "Traditional" option. Their new status as "state employees" has also exposed them to new labor and tax rules. The "collective bargaining" in Minnesota has driven a wedge between PCAs who are caring for a family member, and PCAs who do this for a living (some of whom are also employed by the SEIU).⁴²

Families caring for a disabled person or persons have enough challenges without adding the unsolicited offer of a union trying to "help." The Center observed the 2017 contract negotiations with DHS. DHS officials admonished SEIU in the strongest terms for treating the fiscal agents like a traditional employer for purposes of grievances, making it clear that SEIU had caused complications for PCAs, fiscal agents and DHS.

PCAs are now subject to overtime rules that the SEIU lobbied for that have not been funded by Medicaid.⁴³ This has caused chaos particularly for the disabled

⁴² The Center attends the negotiation sessions for the SEIU contract, and has become familiar with SEIU employees who are also Choice PCAs. These PCAs often sign op-eds in newspapers and act as spokespersons for the SEIU. *Service Employees International Union*, CitizenAudit, <https://www.citizenaudit.org/organization/262160104/SERVICE%20EMPLOYEES%20INTERNATIONAL%20UNION/>.

⁴³ Page 32 OT rule, see checklists and use on MNPCA.org. *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),

who do not have a family member caring for them.⁴⁴ Family members scoff at the idea of overtime. PCAs who are not family members may be interested in overtime pay but only if they can still get the hours they need. Here is one commentator:

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.⁴⁵

The Center was alerted by a long-time PCA that the SEIU contract may also trigger unintended tax consequences for PCAs.⁴⁶

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).

⁴⁴ 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>.

⁴⁵ See *supra* note 44.

⁴⁶ If the caregiver employee is a family member, the employer may not owe employment taxes even though the employer needs to report the caregiver's compensation on a Form W-2. See Publication 926, Household Employer's Tax Guide for more information. However, in some cases the caregivers are not employees. In such cases, the caregiver must still report the compensation as income on his or her Form 1040, and may be required to pay self-employment tax depending on the facts and circumstances. *Publication 926, Household Employer's Tax Guide*, I.R.S., <https://www.irs.gov/uac/about-publication-926> (last updated Sept. 12, 2016).

The Center estimates that in 2014 at least eighty percent (80%) of Choice PCAs were taking care of a family member, as the program intended. The small percentage of PCAs who do this for a living do not have the same core interests as someone caring for a family member. They may care deeply about the people they attend, and provide excellent care, but they want more out of the Medicaid program than it was designed to give. PCAs who care for a family member have expressed satisfaction with the hourly pay and scoff at the idea of paid time off or holiday pay.

CONCLUSION

This Medicaid program was intended to empower the disabled so they could avoid institutionalization and live at home. It was not intended to provide public employment and benefits to home-based personal care attendants. If there are deficiencies in the program, they should be addressed by Congress and state legislatures. Minnesota offered the Choice option so that families could control the benefit. The SEIU has robbed PCAs of that flexibility and peace of mind.

It is much easier to get a union certified than decertified. This is especially true for this union of home-based PCAs who do not have the benefit of a common employer or shared workplace. PCAs are not the appropriate target of labor laws written for *bona fide* public employees. And with dues set at \$948 a year, the SEIU

now has substantial revenues to defeat thousands of PCAs calling for a new and fair election.

Finally, the Harris decision does nothing to help PCAs who have never heard of the ruling, or PCAs who voluntarily signed a card, or who had a card fraudulently signed for them.

If despite Minnesota's experience, Pennsylvania lawmakers agree with Governor Wolf that unionization would be good for PCAs and the disabled, then the legislature should pass a law and be held accountable to voters.

For all of the foregoing reasons, *Amicus Curiae* submit that this Court should uphold the order of the Commonwealth Court and hold that the Executive Order is not a valid exercise of the Governor's executive authority.

Respectfully submitted,

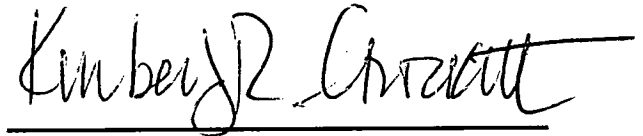
A handwritten signature in black ink, reading "Kimberly R. Crockett". The signature is written in a cursive style with a horizontal line underneath.

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CERTIFICATE OF COMPLIANCE UNDER RULE 2135 (d)

This Brief complies with the length-of-brief limitation under Pa.R.A.P. 531(b)3 because it contains 6985 words, excluding the parts exempted by Rule 2135(b). This certification is based on the word count of the word processing system used to prepare this Brief.

Dated: March 20, 2017

A handwritten signature in black ink, reading "Kimberly R. Crockett", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE WITH SERVICE

Amicus certifies that it has served the parties in compliance with PA. R.A.P. 121.
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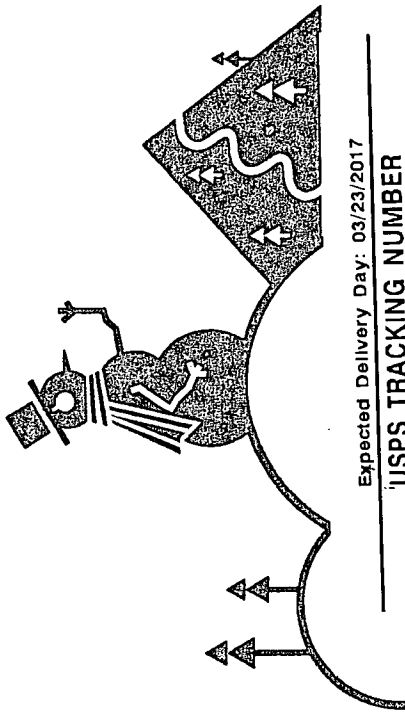
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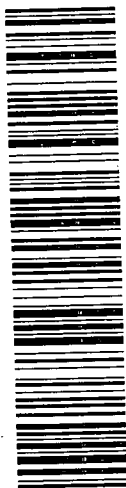
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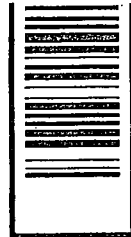
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