Labor & Employment Law

Does the First Amendment Allow States to Compel Recipients of Government Monies to Support State-Designated Representatives?

*By William L. Messenger**

A basic precept of democracy is that citizens choose their representatives in government. A growing trend in several states raises a new question: can governments choose representatives for their citizens?

Increasing numbers of states are designating entities to act as the mandatory representatives of groups of citizens vis-à-vis state agencies with respect to government programs that affect those citizens. The state-designated representatives are granted exclusive privileges to speak with state agencies to influence their administration of the government programs, and the citizens are compelled to pay for this compulsory representation.

These state schemes are currently directed at self-employed individuals who provide care to participants in state Medicaid and childcare programs ("providers"). However, if those schemes are lawful, any group of individuals or entities affected by a government program could be required to support a state-designated representative.

States compelling citizens to support an entity for the purpose of speaking to the state raises profound constitutional issues. Specifically, does this infringe upon the freedom of citizens to associate for purposes of speech and petition the government for redress of grievances under the First Amendment? Two lawsuits—*Schlaud v. Granholm* in Michigan and *Harris v. Quinn* in Illinois—present these issues to the federal courts.[1]

Personal Care and Childcare Providers

Two principal groups of individuals are currently being subjected to state-imposed representation. The first group is "Personal Care Providers," who provide home personal care to disabled, chronically ill, or elderly individuals whose care is paid for by state self-directed home and community-based service ("HCBS") programs established under Medicaid. This care generally includes assistance with daily living activities, such as dressing, grooming, and homemaking. Although the details of state HCBS programs vary, their core feature is that participants have discretion to hire, fire, and supervise their Personal Care Providers. The state subsidizes participants' costs for hiring a Personal Care Provider and provides counseling to facilitate the process.[2]

For example, the Illinois HCBS programs at issue in *Harris* subsidize the costs of home-based services for disabled individuals up to certain statutory maximums.[3] Program participants may use their allotted subsidy to employ Personal Care Providers, whom they choose, hire, fire, and supervise. The state pays these providers a certain hourly rate, which counts against the participants' subsidy.

The second group is "Childcare Providers," who provide home childcare (i.e., daycare) services to parents whose childcare expenses are subsidized by state programs established under the federal Child Care and Development Fund (CCDF).[4] Childcare Providers include independent contractors who operate daycare businesses from their homes, employees employed in parents' homes, and relatives willing to watch their grandchildren or other related children in their homes.[5] State programs generally permit participants to hire the private Childcare Provider of their choice,[6] with the state's role generally limited to paying some or all of their childcare costs.[7]

For example, the Michigan childcare program at issue in *Schlaud* pays between $1.60 and $3.60 of the hourly childcare expenses of qualified low-income individuals.[8] Program participants may choose any qualified private childcare provider of their choice, but are liable for paying any amount of their childcare providers' fee that exceeds the state subsidy.

The common relevant feature of Personal Care and Childcare Providers is that they are individuals who provide services that are paid for, in whole or in part, by state subsidy programs. But, they are not employed by states. Rather, they are private independent contractors or employees of the individuals that hire them.

State-Designated Representation

At least seventeen states have laws or executive orders that permit the designation of mandatory representatives for Personal Care and/or Childcare Providers: California, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, New Mexico, New York, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin.[9] The specifics of the schemes vary by state. Some are state statutes, while others are unilateral actions by state Governors. However, the schemes do share common features:

- An entity is designated by the state as the representative of providers for the purpose of speaking with a specific state body, usually pursuant to a mail-ballot election. The state bodies include Governors' offices, particular agencies, and often special "councils" created for the purpose of dealing with a provider representative.
- The purpose for the representation is to influence how the state administers aspects of a public aid program that affects the providers. This is generally limited to monies or benefits provided for serving participants in the programs.
- The state body is obliged to meet and deal with the representative on this issue, with the objective being to reach an agreement that governs what the state body will attempt

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to do with respect to the program. However, the state body often lacks the power to actually implement the agreement, as changes to public programs and subsidy rates often require rulemaking and/or legislation.

- The agreements between the state body and representative require that all providers pay fees to the representative, which are generally deducted directly from the monies owed to providers for caring for participants in state HCBS and childcare programs. The exception is in schemes implemented by executive order in states with statutes that prohibit compulsory deduction of monies from individuals, such as Right to Work states Iowa and Kansas.

- The state-designated representatives have all been unions, usually affiliates of the Service Employees International Union ("SEIU") or American Federation of State, County, and Municipal Employees ("AFSCME"). The schemes have been implemented under administrations politically supported by these unions.

Another common feature is that all state schemes use labor law terminology, such as "exclusive representation" and "collective bargaining." Indeed, some state schemes define providers as "public employees" solely for purposes of a public sector-bargaining statute, but for no other purpose.[10]

This terminology does not address the fact that not only are providers not employed by the states—at most some could be considered government contractors—but states are actually designating mandatory lobbyists for their citizens.

Consider the situation at its most basic level. Providers are simply a group of citizens who receive monies from a government program. They are similar to many other groups in this respect: public-aid recipients, contractors with government, financial institutions, automobile companies, and others. States are compelling this particular group of citizens to support an entity for the purposes of speaking with state bodies to influence the administration of the government program that affects them. This activity is commonly referred to as "lobbying"[11]—or "petition[ing] the Government for a redress of grievances," in the parlance of the First Amendment.

Properly understood, at issue is nothing short of compulsory political representation. The representation imposed upon providers is no different from the government designating the American Association of Retired Persons as the mandatory representative of all senior citizens on Medicare; ACORN as compulsory voice of all individuals who receive government-subsidized housing; or the American Banking Association as the mandatory trade association for all financial institutions receiving Troubled Asset Relief Program funds, and then forcing the members of each group to pay monies to these organizations to lobby the government for more monies and benefits from these programs.

Constitutional Challenge

The First Amendment guarantees a right to "freedom of speech" and "to petition the Government for a redress of grievances." Implicit within these rights is the freedom to associate, or not associate, for the purposes of speaking and lobbying the government.[12] Whether compelling providers to support a state-designated representative for purposes of speaking to and petitioning the state violates these constitutional rights is the issue currently before the federal courts in two cases: *Schlaud v. Granholm* and *Harris v. Quinn*.[13]

Schlaud is a class-action lawsuit filed for over 40,000 Michigan Childcare Providers in the U.S. District Court for the Western District of Michigan in February 2010.[14] These providers include independent contractors who operate small daycare businesses from their homes; employees of parents in the homes of children; and relatives who watch their grandchildren or other related children in their homes. Many of these providers receive $1.60 to $3.60 per hour from a Michigan program for caring for the children of low-income parents (parents must pay the remainder).

Michigan Childcare Providers are being compelled to pay monies to a joint venture of the United Auto Workers (UAW) and AFSCME as a condition of doing business with state-subsidized parents. Michigan Governor Granholm's administration designated the UAW/AFSCME union as the representative of all Childcare Providers for the purposes of dealing with an advisory council (the "Michigan Home Based Child Care Council") created for the purpose of dealing with that union. The union and council entered into an agreement whose only non-precatory term is a requirement that all Childcare Providers pay a "service fee" to the UAW/AFSCME union for representing their interests before this advisory council.[15]

Harris is a lawsuit filed by two groups of Personal Care Providers in the District Court for the Northern District of Illinois in April 2010.[16] Both groups are employed by disabled individuals whose care is subsidized by one of two Illinois HCBS programs. Under former Illinois Governor Blagojevich, the state designated one group of providers as "public employees," and the State of Illinois as their "employer," solely for the purposes of the Illinois Public Labor Relations Act, and no other purpose.[17] An SEIU local was then designated as the representative of the providers. It entered into an agreement with the state that compels approximately 20,000 providers to pay millions of dollars in fees to the SEIU each year. Current Illinois Governor Quinn is attempting to force a second group of Personal Care Providers into the SEIU by means of an executive order.[18]

The complaints in both *Schlaud* and *Harris* allege that compelling providers to support a state-designated representative as a condition of receiving public monies infringes on their First Amendment rights, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. Specifically, it is alleged that providers are being forced to support core First Amendment activities, namely "speech" directed to the government and "petition[ing] the Government for a redress of grievances." It is further alleged that no government interest justifies this infringement on the providers' constitutional rights. These cases are pending before the district courts at the time of this article.

Vital Government Interest?

The dispositive issue in *Harris, Schlaud*, and any similar case filed in the future is whether a narrowly-tailored, vital government interest exists for compelling providers to support a state-designated representative. It is well-established that

compelling individuals to associate with an entity as a condition of receiving a public benefit infringes upon First Amendment rights.[19] Such infringements must survive exacting scrutiny, which requires that the state action be "narrowly tailored to further vital government interests."[20]

Whether a vital government interest justifies the compulsory representation imposed upon providers is an open question. Not only have the federal courts not addressed it any published decision,[21] but the interests found to justify compelled association in other contexts are inapplicable. For example, the "confidential employee" interest recognized by the Supreme Court in its political patronage precedents (*Elrod* and *Branti*)[22] has no relevance to providers. The "labor peace" interest held to partially justify compulsory unionism in employer/employee relations in *Street* and *Abood* is inapplicable to private citizens who are not in an employer/employee relationship, but are independent contractors who work for themselves in their own homes or homes of their customers.[23]

The interest most states assert for compelled representation is an ostensible need for provider input. Specifically, the asserted rationale is that provider input will improve the state's administration of the public aid program—sometimes by facilitating greater benefits for providers—and that collective representation is required because providers lack an effective means of communicating their views to the state.[24]

This rationale has several apparent flaws. It is counter-intuitive that only listening to one entity (the union), but not providers themselves, will increase provider input. Moreover, states can unilaterally provide more monies or benefits to providers, or ascertain the views of a union or providers themselves regarding this issue, without forcing all providers to support a union.

Most troubling are the implications of the asserted interest: that a state can designate a compulsory voice for citizens if it deems that they do not adequately voice their views voluntarily. This purports a state interest in dictating the degree to which individuals should engage in core First Amendment activities. It also assumes a state interest in dictating how much political influence particular groups of citizens should wield. If this is accepted as a legitimate state interest by the courts, matters once exclusively reserved to individual choice under the First Amendment—choosing whether and how to speak to and petition the government for a redress of grievances—will be subject to the tyranny of the majority.

Limitless Application

The ultimate outcome of *Schlaud*, *Harris*, and any similar future cases will have far-reaching effects. If the courts hold it unconstitutional to compel providers to support an entity for the purposes of speaking to and petitioning the state, union schemes in more than seventeen states could be invalidated. Hundreds of thousands of individuals would no longer be required to pay monies to state-designated political representatives as a condition for caring for individuals whose care the state subsidizes.

On the other hand, if it is held constitutional to compel providers to support state-designated lobbying representatives, states and Congress will be free to impose similar types of representation on other groups. This most evidently would include any individuals that receive monies from a government program, such as contractors with the government and recipients of Medicaid, Medicare, food stamps, subsidized housing, and other government entitlements. All of those individuals have as much interest as providers, if not more, in the government programs in which they participate. States, or Congress, could equally assert that greater input from these individuals could result in more benefits for them or improve the government programs. If Personal Care Providers who care for Medicaid patients can be compelled to support a union as their representative with respect to state Medicaid policies, Medicaid patients themselves can be similarly compelled.

Indeed, there is no reason why only recipients of government monies could be subjected to compulsory representation; it could be any occupation or enterprise regulated by the state or federal government. Nor is there any reason why only unions could be appointed as representatives; it could be a trade association or any other special-interest group. For example, a government that can lawfully make a union the mandatory representative of home Childcare Providers can lawfully make a trade association the mandatory representative of all corporate daycare centers regulated by that government.

Government designation of compulsory representatives for citizens has consequences for the democratic process. This might be viewed by some critics as the diversion of public monies to political special-interest groups. In many ways, these representation schemes conjure a similar image to political patronage systems held unconstitutional in the 1970's, in which individuals were required to support a political party to receive public benefits.[25]

On a higher level, state-designated representation alters the fundamentals of the political process by granting government officials the ability to artificially empower special-interest groups to support their agendas. An advocacy group that individuals must support financially as a condition of receiving public benefits, and that enjoys special privileges in lobbying the state, will naturally have resources that far exceed what citizens would provide to it voluntarily. Thus, that group will wield political influence that exceeds citizens' voluntary support for the group and its agenda. This necessarily distorts the "market place" of competing ideas upon which the democratic process is predicated.

In Federalist No. 10, James Madison warned of the dangers posed to democratic governance by "factions" of individuals united for narrow, rent-seeking purposes.[26] A compulsory faction, artificially created by the state for the very purpose of advocating for a defined group of citizens on a discrete issue, raises this danger to a new level.

CONCLUSION

The government dictating who represents and advocates for groups of citizens on matters of public policy raises profound issues for the First Amendment and the democratic process. These issues are before the federal courts in *Harris* and *Schlaud*. The outcome of these and similar cases could define (or redefine) the proper relationship between citizens and government.

Endnotes

1 Schlaud v. Granholm, Case No. 1:10-cv-147 (W.D. Mich); Harris v. Quinn, Case No. 1:10-cv-02477 (N.D. Ill.). The author is attorney for the plaintiffs in these cases.

2 *See, e.g.*, Janet O'Keefe et al., Robert E. Johnson Foundation, Developing and Implementing Self-Direction Programs and Policies: A Handbook (2007); J.R. Knickman & R.I. Stone, *The Public/Private Partnership Behind the Cash and Counseling Demonstration and Evaluation: Its Origins, Challenges, and Unresolved Issues*, 42 Health Serv. Res. 362 (2007); B.C. Spillman, K.J. Black & B.A. Ormond, Henry J. Kaiser Foundation Commission on Medicaid and the Uninsured, Beyond Cash and Counseling: The Second Generation of Individual Budget-based Community Long Term Care Programs for the Elderly (2007).

3 Home Services Program, 20 Ill. Comp. Stat. 2405/1 *et seq.*, 89 Ill. Admin. Code §§ 676 *et seq.*; Home Based Support Services Program, 405 Ill. Comp. Stat. 80/20-1 *et seq.*; 59 Ill. Admin. Code §§ 117 *et seq.*

4 Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858 *et seq.*; *see also* 45 C.F.R. §§ 98.1 *et seq.* (implementing regulations).

5 "Eligible child care provider [under the CCDF] means: (1) A center-based child care provider, a group home child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation . . ." 45 C.F.R. § 98.2. "Group home" and "family child care" are defined as those that provide childcare services in their own homes, *id.*, an "in-home child care provider means an individual who provides child care services in the child's own home," *id.*, and "types of providers include . . . relatives who provide care." *Id.*

6 45 C.F.R. § 98.3.

7 Note that operation of home childcare businesses often requires a state license. However, these regulations are usually of general application—applicable to all childcare providers irrespective of whether they serve subsidized children—and are usually not the subjects of the compelled representation to which Childcare Providers are subject.

8 Child Development and Care Program, Mich. Comp. Laws § 400.6; Mich. Admin. Code r 400.5001 *et. seq.*; MI. Pub. Act No. 129, § 675.3(a)(ii) (30 Oct 2009) (setting subsidy rate).

9 Cal. Welf. & Inst. Code, § 12301.6(c)(1); 20 Ill. Comp. Stat. 2405/3(f); IA Executive Order 45 (16 Jan. 2006); KS Exec. Order No. 07-21 (18 July 2007); MD Exec. Order 01.01.2007.14 (6 August 2007); Mass. Gen. Laws Ch. 118G, § 31(b); Interlocal Agreement Between Mich. Dept. of Human Services and Mott Comm. College, § 6.10 (27 July 2006) (on file with author); Minnesota is by county; Mo. Rev. Stat. § 208.862(3); Montana; N.M. Stat. § 50-4-33; NY Exec. Order No. 12 (11 May 2007); NJ Exec. Order 23 (2 August 2006); OH Exec. Order 2007-23S (17 July 2007) & OH Exec. Order 2008-02S (1 Feb. 2008); Or. Const. art. XV, § 11; Or. Rev. Stat. § 657A.430; PA Exec. Order 2007-06 (14 June 2007); Wash. Rev. Code §§ 41.56.028 and 41.56.029; Wis. Stat. §§ 111.81 *et. seq.*; WI Exec. Order 172 (16 Nov. 2006). Several counties in Minnesota have also recognized union representatives of childcare providers.

10 Cal. Welf. & Inst. Code, § 12301.6(c)(1); 20 Ill. Comp. Stat. 2405/3(f); Mass. Gen. Laws Ch. 118G, § 31(b); Mo. Rev. Stat. § 208.862(3); Or. Rev. Stat. § 657A.430(3); Wis. Stat. §§ 111.81 *et. seq.*

11 *Cf.* 2 U.S.C. § 1607(a) (defining "lobbying contact" under Federal Lobbying Disclosure Act).

12 *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 356-57 (1976); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

13 *See supra* note 1.

14 Complaint is available online at www.nrtw.org.

15 Agreement Between Michigan Home Based Child Care Council and Child-care Providers Together Michigan is Exhibit B to the Complaint in Schlaud, and is available online at www.nrtw.org.

16 Complaint is available online at www.nrtw.org.

17 20 Ill. Comp. Stat. 2405/3(f); *see also* Ill. Executive Orders 2003-08 (7 March 2003).

18 Ill. Executive Order 2009-15 (29 June 2009).

19 *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 359-60 (1976); Branti v. Finkel, 445 U.S. 507 (1980); Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

20 *See Elrod*, 427 U.S. at 362-63; *Rutan*, 497 U.S. at 72.

21 This issue was one of several counts raised in *West v. SEIU Local 434B*, Case No. 1-CV-10862 (CD. Cal. 2001). However, in an unpublished opinion, the U.S. District Court for the Central District of California dismissed the count on the grounds that "rational basis" scrutiny applied because collective bargaining had been held to be justified by the government's interest in industrial peace in the context of employer/employee relations. *Id.*, slip. op. at 20-23 (Aug. 30, 2002). In the author's opinion, this was not only erroneous, but missed the underlying issue entirely: does a government interest support so-called "collective bargaining" *outside* of an employer/employee relationship?

22 *Elrod*, 427 U.S. 347; *Branti*, 445 U.S. 507.

23 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-34 (1977); Int'l Assn' of Machinists v. Street, 367 U.S. 740, 760-64 (1961).

24 Ill. Executive Orders 2003-08 (7 March 2003) and 2009-15 (29 June 2009); Iowa Executive Order 45 (16 Jan. 2006); Maryland Executive Order 01.01.2007.14 (6 August 2007); Mo. Rev. Stat. § 208.853; OH Exec. Order 2007-23S (17 July 2007); OH Exec. Order 2008-02S (1 Feb. 2008); PA Exec. Order 2007-06 (14 June 2007); WI Exec. Order 172 (16 Nov. 2006); *cf.* KS Exec. Order No. 07-21 (18 July 2007); Or. Const. art. XV, § 11.

25 *See Elrod*, 427 U.S. 347; *Branti*, 445 U.S. 507.

26 The Federalist No. 10 (James Madison).