LEGISLATIVE
TESTIMONY

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Medicaid Payments Should Go to Caregivers, Not to Unions

U.S. Senate Special Committee on Aging

MACKINAC CENTER
FOR PUBLIC POLICY

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The following is testimony submitted to the U.S. Senate Special Committee on Aging by Steve Delie on March 23, 2022. This testimony and others can be read online at **mackinac.org/testimony**.

Medicaid Payments Should Go to Caregivers, Not to Unions

The Mackinac Center for Public Policy is a nonprofit research and educational institute that advances the principles of free markets and limited government. Through our research and educational programs, we challenge government overreach and advocate for free-market approaches to public policy that allow people to realize their potential and their dreams.

The Mackinac Center strongly opposes the expansion of Medicaid payments to labor organizations acting as a putative employer for home-based health care services. Such payments would continue a system through which payments to home health care providers are diverted away from the vulnerable families whom are the intended recipients of this public support. Such diversions do not benefit individual providers or those in their care, but rather empower public sector unions to engage in inherently political activity. *Janus v American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2480 (2018). Congress should not allow unnecessary outside interference between caregivers and their patients.

BACKGROUND

In 2011, the Mackinac Center was the first organization to discover the redirection of Medicaid payments to labor organizations, commonly referred to as "dues skim." In Michigan, the Service Employees International Union's local affiliate recognized it could obtain "dues" from home health care providers and worked to unionize them. First, the SEIU lobbied the state to create an agency known as the Michigan Quality Community Care Council that would serve as the putative employer of home health care providers in Michigan.[1] The SEIU then bargained with that "employer" to unionize these workers. This all happened even though fewer than 20% of the affected home health care providers voted in the certification election.[2] Many were not even aware that a unionization election had occurred.

As a result, a portion of the federal money meant to pay these home health care providers to care for others — often their seriously ill or disabled family members — was redirected to the SEIU as dues.[3] By 2012, the SEIU had successfully redirected over $34 million in Michigan alone.[4]

After the Mackinac Center discovered this arrangement and brought it to the public's attention, the Michigan Legislature exempted home health

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1 https://perma.cc/LJ79-EZK7.

2 https://perma.cc/L9SY-KB2T.

3 https://perma.cc/D6CA-M3JA.

4 *Id.*

care providers from Michigan's public sector bargaining law.[5] There were also lawsuits throughout the states, ultimately resulting in the United States Supreme Court's 2014 ruling in *Harris v. Quinn*, which forbade states from requiring home health care providers in right-to-work states to pay agency fees to keep their jobs.[6]

In Michigan, after reforms were passed (and later reaffirmed in a ballot proposal),[7] home health care providers overwhelmingly demonstrated they did not wish to be unionized. In less than a year, SEIU Health Care Michigan's membership fell from 55,265 to 10,918.[8] That number has only continued to fall, with 2020 membership listed as only 7,181.[9] In other words, when given the choice about whether to become a member of a union, only 13% of providers decided it was worthwhile.

5 2012 MI PA 1018.

6 https://perma.cc/PF69-6WBY.

7 https://perma.cc/9KTL-BJ96.

8 Available through LM-2 reports for SEIU Health care Michigan. The fall in membership can be seen by comparing the 2012 and 2013 LM2 reports, available at file number 543-857. https://olmsapps.dol.gov/query/getOrgQry.do.

9 Available through LM-2 reports for SEIU Health care Michigan for the year 2020. https://olmsapps.dol.gov/query/getOrgQry.do.

COMMENTS ON THE DEPARTMENTS PROPOSED RULE

Any legislation which would permit the deduction of union dues from the Medicaid payments of home-based caregivers is of questionable benefit to providers, at best. This is particularly true in the case of those caregivers who serve as home health care providers for sick and disabled family members.

1. Objections to Dues Skim Generally

Past experience demonstrates that dues skim would authorize a system that drains federal funds from the pockets of those who need it most, namely, home caregivers. Given that it was common for most caregivers to not even be aware of their unionized status, it is wildly inappropriate to implement a system in which payments of Medicaid funds can be directed to third parties without significant additional protections.[10]

The practical consequences of permitting dues skimming cannot be understated. The providers from whom payments would be diverted are often the family members of those with serious illnesses or disabilities,

10 As previously stated, only 20% of the affected caregivers in Michigan voted in the unionization election. https://perma.cc/L9SY-KB2T. Ina study measuring election participation in fourteen states and three California counties, that number averaged only 27%. https://perma.cc/D6CA-M3JA. For Washington and Oregon, the percent participating was 31% and 42% respectively. https://perma.cc/VE6U-JF97. In some states, such as Illinois and Iowa, no election was even held. *Id*.

who would be otherwise unable to care for themselves. These family members sacrifice their time and energy, compensated primarily through Medicaid payments. Despite this, the caregiver and patient see little, if any, tangible benefits from unionization. Home health care providers are not employed by an outside agency, but rather by their patients, and work from either their own homes, or the homes of their ill and disabled relatives. They manage their own working conditions and hours, based on the needs of their patients. Unions play no representational role in these areas, the traditional core of collective bargaining.

Likewise, it is unnecessary to permit diversion of Medicaid payments for purposes of training. It would be difficult, if not impossible, to track whether each labor organization paid directly through Medicaid actually provides training. It would be similarly difficult to quantify the value of that training, or to track whether home caregivers participate in it. There has also been little, if any, evidence that demonstrates how diverting payments has benefitted providers in the past.

To the extent legislation is aimed at providing better resources for providers, a far better proposition would be to continue the status quo and allow providers to choose whether they wish to pay for additional training. Such trainings could be offered by any third parties, including unions, and priced at a level selected by those organizations. It would then be up to the providers, who regularly make decisions about what is best for their patients, to decide whether a particular training provides enough value to justify the cost.

History teaches us that allowing diversion of Medicaid payments to unions does not benefit providers. In our state, there has been an 87%

reduction in SEIU Health Care Michigan's membership once caregivers were no longer required to maintain membership to keep their jobs.[11] If the alleged benefits of unionization of home caregivers are as significant as claimed, this membership drop would be unexpected. Congress should not consider legislation that is contrary to the free choice of a vast majority of providers.

Caregivers should not find their Medicaid payments reduced to pay for membership dues in a labor organization. This is doubly true for those who are most vulnerable, caring for family and loved ones in a home health care capacity. The consequences of the proposed legislation are serious and would hurt families, as demonstrated by a recent documentary film "The Big Skim," in which providers tell how they were affected by the previous dues skim efforts.[12] If nothing else, these stories should give Congress pause about the wisdom of proceeding with this proposed rule.

2. If Legislation is to Advance, it Must Adequately Protect Caregivers' Constitutional Rights

The Mackinac Center maintains that dues skim is inherently unethical and must be reformed. Permitting dues skim doubles down on a policy that hurts home health care providers, and which is overwhelming unpopular with caregivers. To the extent legislation endorsing this system moves forward, however, it should at minimum include

11 *Supra*, notes 11 and 12.

12 https://perma.cc/7X2J-RX7K.

meaningful protections designed to ensure caregivers have full knowledge of their rights.

Any legislation permitting dues skim should contain a requirement that providers voluntarily consent to having their Medicaid payments diverted. This requirement cannot be illusory and must ensure voluntariness. To do so, legislation must account for two key opinions of the United States Supreme Court that have provided greater protections to home health care providers.

In 2014, the Court decided *Harris v. Quinn*, 134 S. Ct. 2618 (2014), which held that independent in-home caregivers in Illinois could not be forced to pay agency fees as a condition of employment. That decision was later expanded upon in the landmark *Janus v. Am. Fedn' of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), in which the Court ruled that public sector employees, including home-based health care workers, could not be required to financially support a union in order to keep their jobs.

Janus examined whether public employees had a First Amendment right to refuse to financially support a public sector union. The Court answered affirmatively, noting that all actions of a public sector union, even traditional representational activities, were "inherently political."[13] Since payments to these unions necessarily, therefore, supported an act of political speech, such payments could not be compelled under

13 *Id.* at 2480 (citation and internal quotations omitted).

the First Amendment.[14] Instead, the Court ruled, public sector workers must first waive their First Amendment rights before any dues or fees could be withdrawn from their paychecks.[15]

The Court continued by elaborating on precisely what was required. It held that a worker's First Amendment "waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling evidence.'"[16] To satisfy that standard, "employees [must] clearly and affirmatively consent before any money is taken from them…."[17]

Other Supreme Court precedent highlights the standards that should be applied when evaluating whether a waiver is the result of clear and affirmative consent, as required by *Janus*. First, a waiver must be a "knowing, intelligent act … done with sufficient awareness of the relevant circumstances and likely consequences."[18] "An effective waiver must … be one of a 'known privilege or right."[19] It must also be done with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[20] Therefore, for any truly voluntary waiver to occur, employees must know both what their rights are, and the consequences of waiving those rights.

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14 *Id*. at 2486.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Brady v. United States*, 397 U.S. 742, 748 (1970).

19 *Curtis Pub Co v. Butts*, 388 U.S. 130, 143 (1967) (citation omitted).

20 *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

It is not enough for proposed legislation to contain a term requiring a provider "voluntarily consents" to diversion of Medicaid payments to a third party. That addition fails to meet the requirements highlighted above if it carried no further protections.

This is particularly true in light of union-supported state laws limiting the ability of outside organizations to communicate with public sector and home health care employees regarding their rights.[21] In Washington, a union-supported ballot initiative, approved by voters, prevents anyone from obtaining the contact information for home health care providers, with an exception for a union that serves as their exclusive representative.[22] And Washington is not the only state to adopt such a law. Indeed, at least 10 states have some law restricting access to the contact information of public sector employees or care providers.[23] This is in addition to other laws giving unions preferential

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21 These laws, and their effects on the workers' rights, are discussed extensively in the Goldwater Institute and Cato Institute's joint *amicus curiae* brief in *Troesch v. Chicago Teachers Union*. This comment will highlight a number of these laws, but wishes to draw Congress' attention to this additional resource, available at: https://perma.cc/DC6S-N7CM.

22 See *Boardman v. Inslee*, 978 F.3d 1092, 1123–24 (9th Cir. 2020) (Bress, J., dissenting) (citing Wash. Rev. Code §§ 42.56.640(2), 42.56.645(1)(d), 43.17.410(1)), *petition for cert. filed*, No. 20-1334 (Mar. 24, 2021).

23 *Id*. See also, Cal. Gov't Code §§ 3558, 6254.3; Haw. Rev. Stat. § 89-16.6(a), (d); 5 Ill. Comp. Stat. 140/7.5(oo), (pp), 315/6(c), (c-5); 26 Me. Rev. Stat. Ann. § 975(2); Md. Code, State Pers. & Pens. §§ 3-208, 3-2A-08; Md. Code, Educ. § 6-407; Md. Code, General Provisions §§ 4-311(b)(3), 4331; N.J. Stat. Ann. 34:13A-5.13(c), (d); N.Y. E.O. 183 (June 27, 2018); N.Y. Civ. Serv. Law §§ 208(4)(a), 209-a(1)(h); 3 Vt. Stat. Ann. §§ 909(c), 910, 1022(c), 1023; 16 Vt. Stat. Ann. §§ 1984(c), 1985; 21 Vt. Stat. Ann. §§ 1646, 1738(c), 1739; 33 Vt. Stat. Ann. § 3619; see also Or. Rev. Stat. §§ 192.355(3), 192.363, 192.365, 243.804(4)(a).

access to newly hired employees, in order to convince them to join a union.[24] Unions have no incentive to inform these employees of the full extent of their First Amendment rights to either join or refuse to join a union; in fact, they have every incentive to not do so.

Without significant protections designed to demonstrate a caregiver's consent is truly voluntary (as described above), providers are at risk of being forced to pay dues to a labor organization they often don't know they are even members of. Worse still, since these dues would pay public sector labor organizations, they would be funding inherently political activity, often without meaningful knowledge or consent on the part of the provider.

Therefore, to the extent Congress chooses to move forward with legislation, despite the well-grounded opposition thereto, it should at the very least clarify that "voluntary" payments to third parties be truly voluntary. This would require that providers be fully informed about their rights before agreeing to divert funds, including their rights not to be forced to financially support a union to continue to receive Medicaid payments or otherwise keep their jobs. Absent such information, a provider's consent cannot be said to be a "knowing, intelligent act" as required by *Janus*.

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24 See, e.g., Cal. Gov't Code § 3556; 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (enacted December 2019); 26 Me. Rev. Stat. Ann. § 975(1)(c); Md. Code Ann., State Pers. & Pens. § 3-307(b)(3), (5); Md. Code, Educ. §§ 6-407.1, 6-509.1(a)(1); Mass. Gen. Laws Ann. ch. 150E, § 5A(b)(iii); N.J. Stat. Ann. 34:13A-5.13(b)(3); N.Y. Civ. Serv. Law § 208(b), (c); Or. Rev. Stat. § 243.804(1)(b)(B); Wash. Rev. Code § 41.56.037.

Some states, such as Alaska, Texas, Indiana, and Michigan, have already identified the need for employees' First Amendment rights to be further protected.[25] If this legislation advances, we urge Congress to follow the example of these states by requiring specific waiver language designed to protect caregiver rights. Such language should be made part of a waiver form and contain language that is substantially similar to the following:

> "The Department of Health and Human Services wishes to make you aware that you have a First Amendment right, as recognized by the United States Supreme Court, to either join, or refrain from joining and paying dues to a union or labor organization. Your membership and payment of dues are voluntary and you may not be discriminated against or terminated for your refusal to join or financially support a union. By signing this form, you are agreeing to authorize dues from any payments to you by the Department in the amounts specified in accordance with your union's bylaws. You may revoke this authorization at any time."[26]

In addition, the legislation should require the department to verify that any payments to third parties are, in fact, authorized by each

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25 Texas Attorney General Opinion No. KP-0310; 2019 Op. Alaska Att'y Gen. (August 27)(Opinion); Indiana Attorney General Opinion 2020-5 (June 17, 2020); https://perma.cc/9UCK-NUBM.

26 This language is a variant of the language proposed by Chase Martin in his piece "Ending the Skimming of Union Dues from Federal Child Care Funds." https://perma.cc/8LBS-WBY6. In discussing similar diversionary payments, Mr. Martin proposes language to protect child care providers, as well as providing the justification for taking protective action. Much of this publication is equally applicable to home health care providers and is therefore useful in evaluating potential legislative language.

caregiver. Evidence of voluntariness should have to be provided directly to the department by the individual caregiver, rather than any third party, including their purported union. And the department should confirm with the individual caregiver that any payment to a third party is consistent with his or her wishes before diverting any payments. This is especially important given a number of cases in which labor organizations forged dues authorizations, and it helps to avoid that problem going forward.[27]

While these additions do not alleviate the fact that the proposed rule is a policy that hurts caregivers, it at least ensures that providers will be given a free and truly voluntary choice about where their Medicaid payments should be directed.

27 See, e.g., *Quezambra v. United Domestic Workers of America*, AFSCME Local 3930, 445 F. Supp. 3d 695 (C.D. Cal., 2020) (under appeal); https://perma.cc/Z7X2-HVPH.

CONCLUSION

The Mackinac Center strongly opposes legislation that would permit the diversion of Medicaid funds to third parties. Such a change would harm caregivers, provide no meaningful benefit to their patients, and directly lead to the federal funding of the inherently political activity of public-sector unions. Funds paid to caregivers should be used to support their efforts to care for the sick and disabled. But, to the extent Congress does authorize dues skim legislatively, it should also include specialized procedural protections to adequately protect providers' First Amendment Rights under *Janus* and *Harris*.

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