No. 16-

IN THE
Supreme Court of the United States

MARY JARVIS, SHEREE D'AGOSTINO, CHARLESE DAVIS, MICHELE DENNIS, KATHERINE HUNTER, VALERIE MORRIS, OSSIE REESE, LINDA SIMON, MARA SLOAN, LEAH STEVES-WHITNEY,

Petitioners,

v.

ANDREW CUOMO, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF NEW YORK ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment to United States Constitution prohibit the State of New York from compelling an entire profession, namely individuals who operate family daycare businesses, to accept a mandatory representative for lobbying and contracting with the State over regulations and policies that affect that profession?

2. Is a private party that violates a citizen's First Amendment rights immune from liability for damages under 42 U.S.C. § 1983 if that party acted with a "good faith" belief that its unconstitutional conduct was lawful?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants in the court below, are: Mary Jarvis, Sheree D'Agostino, Charlese Davis, Michele Dennis, Katherine Hunter, Valerie Morris, Ossie Reese, Linda Simon, Mara Sloan, and Leah Steves-Whitney. Respondents, who were Defendants-Appellees in the court below, are: Governor Andrew Cuomo, in his official capacity as Governor of the State of New York; Sheila J. Poole, in her official capacity as the Commissioner of the New York Office of Children and Family Services; and Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO. Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Second Circuit is reproduced in the appendix (App. 1a), as are the two unreported opinions of the United States District Court for the Northern District of New York dismissing Petitioners' claims (App. 8a, App. 21a).

JURISDICTION

The Second Circuit entered judgment on September 12, 2016. (App. 3a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

This is a First Amendment challenge to Chapter 540 of the Laws of 2010, N.Y. Lab. Law Art. 19-C, § 695-a *et seq*. ("The Representation Act"), which is reproduced at App. 36a. The case also presents the question of whether private parties can raise a "good faith" defense to claims brought under 42 U.S.C. § 1983, which is reproduced at App. 41a.

STATEMENT

This case concerns whether the First Amendment allows the government to extend exclusive representation beyond employment relationships and designate mandatory representatives to speak for professions in their relations with the government.

A. New York Compels Family Daycare Providers to Accept and Subsidize a Representative for Lobbying the State over Policies That Affect Their Profession.

Family daycare homes are child care businesses that operate from private residences in the State of New York. They are considered businesses for federal tax and other purposes, and sometimes employ one or more employees. New York regulates the operation of family daycare homes primarily through its Office of Children and Family Services ("OCFS"). *See* N.Y. Comp. Codes R. & Regs. tit. 18 ("OCFS Reg."), §§ 416-17.

Some family daycare homes, but not all, serve customers enrolled in New York's Child Care Block Grant program, which partially subsidizes the daycare expenses of low income families. *Id*. at §§ 415.5, 415.6, 415.9. Families enrolled in the Block Grant program choose their daycare provider, *id*. at § 415.7(f), and can elect to use not only family daycare homes, but corporate daycare centers, daycare programs at public schools, and unlicensed "informal child care" providers, *id*. at § 415.1(g). The latter are individuals who provide home based child care: (i) to less than two children; (ii) for less than three hours per day; (iii) to children to whom they are related; or (iv) to children in the child's home. *Id*. at § 415.1(h). Most informal child care providers are grandparents, aunts, or neighbors of the children receiving care. *See* N.Y. OCFS, Child Care Facts & Figures 2015

(http://ocfs.ny.gov/main/childcare/factsheet/DCCS%20Fact%20Sheet%201-2016.pdf).

Family daycare homes and informal child care providers are not employed by the State of New York. Nevertheless, in May 2007, New York Governor Eliot Spitzer issued Executive Order No. 12, "Representation of Child Care Providers" (May 8, 2007), N.Y. Comp. Codes R. & Regs. tit. 9, § 6.12. The Order calls for the State to certify union representatives for four "representation units" of family daycare homes and informal providers. *Id.* at ¶¶ 2-3. Certification empowers a union to represent all providers in that unit for purposes of meeting with OCFS to discuss State daycare policies, *id.* at ¶ 8; entering into agreements with OCFS governing its policies, *id.*; and seeking legislation, appropriations, and regulations to implement any agreements with OCFS, *id.* at ¶¶ 9-10. The State's justification for this action was that daycare providers "lack an organized voice in governmental decision-making on issues that impact the manner in which they carry out their profession." *Id.*

Two months later, the State certified Respondent Civil Service Employees Association, Local 1000, AFSCME ("CSEA") to represent all family daycare homes located outside of New York City. (App. 24a). This representation unit encompasses not only daycare homes that accept State monies, but also those that do not. N.Y. Comp. Codes R. & Regs. tit. 9, § 6.12, ¶ 2.

In October 2009, CSEA and OCFS entered into a Memorandum of Agreement ("First Agreement").[1] That Agreement recognized that family daycare homes are not State employees, but are "independent contractors of the families receiving child care services and/or of a social services district" if the provider has a contract with that district. *Id*. at § 4(e). In the Agreement, CSEA and OCFS agreed jointly to review the agency's daycare regulations, *id*. at § 7; to "seek legislation" to amend certain daycare licensing laws, *id*. at §§ 8(a), 8b(ii); and "to seek additional federal funding to expand the state's child care program," *id*. at § 10(d). CSEA and OCFS also agreed to "seek legislation authorizing" the seizure of compulsory union fees from all family daycare homes that serve subsidized families. *Id*. at § 3(l)(vi). On July 2, 2010, CSEA and OCFS attained this legislation. *See* Part H of Chapter 58 of the Laws of 2010, *extended by* Chapter 378 of the Laws of 2013.

On October 1, 2010, the State effectively codified Executive Order 12 by enacting the Representation Act. The Act recognizes that family daycare providers are not public employees, N.Y. Lab. Law Art. 19-C, § 695-g(2) (App. 40a). Nevertheless it requires the State to recognize provider representatives in four representation units. *Id*. at § 695-c (App. 37a-38a). OCFS is required to "meet with the designated rep-

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[1] The First Agreement can be found in the district court's docket as document 1-1.

resentative of those units of child care providers, either jointly or separately, for the purpose of entering into a written agreement to the extent feasible." *Id.* at § 695-f(1) (App. 39a). "The agreement may address the stability, funding and operation of child care programs, expansion of quality child care, improvement of working conditions, salaries and benefits and payment for child care providers." *Id.* The agreement "shall be binding on the state, contingent upon any regulatory or legislative action that may be required." *Id.* at § 695-f(2) (App. 39a-40a). "If legislative or regulatory action or appropriation of funds is required the parties will jointly seek such action." *Id.* at § 695-f(3) (App. 40a).

In January 2012, the State and CSEA began seizing compulsory fees from payments made to family daycare homes that provide care to subsidized children. (App. 10a). The compulsory fee seizures continued until January 2015, five months after this Court's ruling in *Harris v. Quinn* that it is unconstitutional for states to force individuals who are not "full-fledged state employees" to financially support a representative. 134 S. Ct. 2618, 2638 (2014). (App. 10a). Shortly thereafter, CSEA sent providers refund checks for compulsory fees seized after *Harris'* issuance in June 30, 2014, but not refunds for fees seized *before* the *Harris* ruling. (App. 10a). As a result, Petitioners D'Agostino, Dennis, Hunter, and Sloan were not compensated for monies unconstitutionally exacted from them before June 30, 2014. (App. 11a-12a).

On April 22, 2015, the State and CSEA signed a new Memorandum of Agreement ("Second Agreement"). (App. 10a).[2] Like the First Agreement, the Second Agreement calls for OCFS to implement certain policies that concern daycare provider licensing, registration, and enrollment, Second Agreement § 9, and to meet with CSEA representatives to review "current child care regulations . . . including the subsidy regulations, different classes and types of violations, to recommend changes to OCFS, and to draft proposed regulations and regulatory changes needed to implement the terms of this agreement." *Id.* at § 7(a). OCFS also must continue to assist CSEA with increasing its membership ranks, such as by requiring CSEA orientations for new daycare providers, *id.* at § 4(k), and by collecting CSEA membership dues from daycare providers' subsidy payments, *id.* at § 4(l). The Second Agreement, however, does not authorize compulsory fee seizures. *Id.* at § 4(l)(vi).

B. The Lower Courts Hold That Exclusive Representation Is Not Subject to First Amendment Scrutiny and That CSEA Has a Good Faith Defense to Paying Damages for Monies Unconstitutionally Exacted.

Petitioners Mary Jarvis, Sheree D'Agostino, Charlese Davis, Michele Dennis, Katherine Hunter, Valerie Morris, Ossie Reese, Linda Simon, Mara

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[2] The Second Agreement can be found in the district court's docket as document 29-9.

Sloan, and Leah Steves-Whitney operate family daycare homes in or around Syracuse, New York. They oppose being forced to associate with CSEA. On December 2, 2014, they filed a two-count Complaint alleging that the First Amendment prohibits the State and CSEA from forcing them to accept CSEA as their mandatory agent for lobbying the State (Count I), and from forcing them to financially support CSEA (Count II). (App. 25a).

On April 30, 2015, the district court dismissed Complaint Count I on the grounds that "the designation of CSEA as the exclusive representative of child care providers does not deprive Plaintiffs of their associational rights." (App. 28a). Several months later, Count II was dismissed on the ground that CSEA has a "good faith" defense to paying damages for fees it unconstitutionally seized from several Petitioners. (App. 18a-19a).

The Second Circuit affirmed in a summary order. (App. 7a). The appellate court held that *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), dictate that exclusive representation does not impermissibly burden associational rights. (App. 4a). In so doing, the Second Circuit joined the First Circuit in concluding that the First Amendment is no barrier to the government granting an organization the power to exclusively represent family daycare businesses in their relations with government. (App. 5a) (citing *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016)).

The Second Circuit further held "that a good faith defense [i]s available to a private defendant sued under § 1983 for a First Amendment violation." (App. 6a). It found CSEA not liable for damages stemming from the pre-*Harris* fee seizures because CSEA relied on State law authorizing the seizures and on *Abood*. (App. 7a).

REASONS FOR GRANTING THE WRIT

1. This petition presents an issue of profound importance: can the government force a profession to accept "an organized voice in governmental decision-making on issues that impact the manner in which they carry out their profession"? N.Y. Comp. Codes R. & Regs. tit. 9, § 6.12. The Second and First Circuits erroneously read *Knight* and *Abood* to give the government free reign under the First Amendment to impose an exclusive representative on practically anyone. In so doing, the courts have defied this Court's holdings that mandatory associations are constitutional only if they satisfy exacting First Amendment scrutiny, *e.g.*, *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012), and that *Abood* and its labor peace justification for exclusive representation have no application outside of employment relationships, *see Harris*, 134 S. Ct. at 2638-41.

The Court should resolve these conflicts, and make clear that the First Amendment generally prohibits the government from dictating who speaks for citizens in their relationship with the government; that exclusive representation is permitted only where it

satisfies exacting scrutiny; and that no compelling state interest justifies this mandatory association outside of employment relationships.

2. The second question is one that has long eluded this Court: do private defendants have a good faith defense to Section 1983 liability? The Court has suggested the possibility on at least two occasions, but has not decided the issue. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (leaving for "another day" question "whether or not the private defendants . . . might assert, not immunity, but a special 'good-faith' defense") (internal quotation marks omitted); *Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (similar). This case squarely presents that question, and is a suitable vehicle for resolving it.

The Court should determine if private defendants can raise good faith defenses under Section 1983 because the Second Circuit and an increasing number of district courts now treat the ostensible defense as if it were an immunity to Section 1983 itself, as opposed to only being a defense where motive is relevant to the underlying claim. This position is statutorily untenable, and threatens to deprive individuals of relief to which they are entitled for violations of their constitutional rights.

I. First Question: The Court Should Resolve Whether the First Amendment Allows the Government to Extend Exclusive Representation Beyond Public Employees to Professions and Business Operators.

A. The Second and First Circuits Have Given the Government Free Reign to Appoint Exclusive Representatives to Speak for Citizens in Their Relations with Government.

The constitutional importance of this case becomes evident simply by describing what New York has done. The State has granted an advocacy group (CSEA) authority to exclusively represent everyone in a particular profession (family daycare home operators) in their relations with the State. This authority includes the power to speak and contract for family daycare homes on "matters pertaining to the stability, funding and operation of child care programs; expansion of quality child care; and terms and conditions as [covered child care providers] including, but not limited to, subsidies, benefits, payment for services, licensing/registration, policies and regulations, rule making, and conditions of operation." Second Agreement, § 3a.

Seen for what it is, New York is forcing a profession to accept a government-appointed lobbyist, as CSEA's function as an exclusive representative is quintessential lobbying: meeting and speaking with public officials, as an agent of regulated parties, to

influence government regulation of those parties. *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group").

If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for individuals in their relations with government. "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Consequently, a citizen's right to choose which organization, if any, he or she associates with to lobby the government is a fundamental liberty protected by the First Amendment. *See, e.g., Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981).

The Second Circuit here, and the First Circuit in *D'Agostino*, have given states a green light to trample on this liberty by holding that the First Amendment is no barrier to state imposition of an exclusive representative on family daycare businesses. The implications of these decisions are staggering. They not only expose hundreds of thousands of similarly situated daycare providers to compulsory representation, but also *all other regulated professions or indus-*

tries.[3] For if the government is free under the First Amendment to impose an exclusive representative on individuals who operate daycare businesses in their homes—as the First and Second Circuit hold—then the government is also constitutionally free to do the same to other professions or businesses. This includes those who do *not* accept state monies, as the Second Circuit upheld the State's imposition of mandatory CSEA representation on all family daycare homes located outside of New York City, not just those who serve public-aid recipients. N.Y. Lab. Law Art. 19-C, § 695-c(2). (App. 37a).[4]

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[3] Eighteen states authorize, or previously authorized, the collectivization of family child care providers. Conn. Pub. Act 12-33 (May 14, 2012); 5 Ill. Comp. Stat. 315/3(n); Iowa Exec. Order 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order 07-21 (July 18, 2007) (rescinded); Mass. Gen. Laws ch. 15D, § 17; Md. Code Ann. Fam. Law § 5-595 *et seq*.; Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed); Interlocal Agreement Between Mich. Dep't of Human Serv. & Mott Cmty. Coll. (July 27, 2006) (repealed); Minn. Stat. § 179A.54; N.M. Stat. Ann. § 50-4-33; N.J. Exec. Order 23 (Aug. 2, 2006); N.Y. Lab. Law Art. 19-C, § 695-a *et seq*.; Ohio H.B. 1, §§ 741.01-.06 (July 17, 2009) (expired); Or. Rev. Stat. § 329A.430; Pa. Exec. Order 2007-06 (June 14, 2007); R.I. Gen. Laws § 40-6.6-1 *et seq*.; Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed).

[4] The implications of upholding the Representation Act would be vast even if it only called for collectivizing family daycare homes that serve public-aid recipients. Many professions and industries receive payments from public-aid programs for their services. For example, most medical practitioners and hospitals accept Medicaid and Medicare monies as payment for their healthcare services, most grocers accept public monies (food

The reach of the Second Circuit's decision does not end with regulated professions. The Representation Act upheld by the court also imposes mandatory representation on "informal care" providers. N.Y. Lab. Law Art. 19-C, § 695-c(4). (App. 38a). These primarily are individuals who provide home-based care to relatives or neighbors enrolled in the Block Grant program. OCFS Reg. § 415.1(h)(1)(iii). The State is thus forcing grandparents who watch their grandchildren in their own homes to accept a mandatory representative if they receive public monies for doing so. If this is constitutional, then government could politically collectivize practically anyone.

These ramifications are intolerable. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The Court cannot allow the government to seize that individual right for itself, and appoint representatives to speak for its citizens. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the

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stamps) as payment for food, and many landlords accept Section 8 vouchers as payment for use of their property. If New York can collectivize family daycare homes because they serve individuals who pay for that service with public-aid monies, then all of these other businesses are equally susceptible to the imposition of mandatory representation.

government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988). Indeed, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

In *Harris*, this Court reiterated its reluctance to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" and its reluctance to "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id.*

The Second and First Circuits' opinions give government carte blanche to regiment professions into mandatory advocacy groups. As a consequence, the opinion below cannot be allowed to stand. The Court should grant the writ and, as discussed below, hold that (1) exclusive representation is constitutional only when it satisfies exacting scrutiny, as *Knox*, 132 S. Ct. at 2289, requires; and (2) exclusive representation cannot be extended beyond employees to business owners because, under *Harris*, the labor peace interest that justifies employee representation does not extend beyond that unique context. 134 S. Ct. at 2638-41.

B. The Second and First Circuits' Opinions Conflict with *Knox* and *Harris*.

1. The Second and First Circuits' Opinions Conflict with This Court's Holdings That Mandatory Associations Must Satisfy Exacting Constitutional Scrutiny.

In *Knox*, this Court reiterated that mandatory associations are "exceedingly rare because . . . [they] are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). The Court has required, in a variety of contexts, that mandatory associations satisfy this level of constitutional scrutiny. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577-78 (1995); *Roberts*, 468 U.S. at 623; *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976).

The Second and First Circuits' decisions defy these precedents by allowing states to force family daycare businesses into exclusive-representation relationships with advocacy groups *without* showing a compelling reason for so doing. This is untenable. If there is any mandatory association that should have to pass constitutional muster, it is this one, as family daycare homes are being forced to accept a mandatory agent for lobbying the State over matters of public

policy. The Court should grant review for this reason alone: to hold that exclusive representation, like any other mandatory association, is constitutionally permissible only when it is the least restrictive means for achieving a compelling state interest.

2. The Second and First Circuits' Decisions Conflict with *Harris'* Holding That *Abood* and Its Labor Peace Rationale Do Not Extend to Individuals Who Are Not Public Employees.

New York's extension of exclusive representation to family daycare homes fails exacting constitutional scrutiny under *Harris*. Exclusive representation of public employees is deemed constitutional only because *Abood* found the mandatory association to be justified by the government's interest in "labor peace." 431 U.S. at 220-21, 224; *see Harris*, 134 S. Ct. at 2631. That is an interest in avoiding workplace disruptions caused by conflicting and competing demands from multiple unions. *Abood*, 431 U.S. at 220-21, 224. *Harris* "confine[d] *Abood*'s reach to full-fledged state employees," 134 S. Ct. at 2638, and held that the labor peace interest has no application to non-employee homecare providers because they "do not work together in a common state facility but instead spend all their time in private homes," and because "State officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Id.* at 2640-41. Under *Harris*, New York and other states cannot constitutionally justify extending exclusive representation beyond actual public employees to a regulated profession.

It makes sense that the government's interest in appointing exclusive representatives for its employees does not extend beyond that unique context. "[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). When acting as an employer, the government possesses unique interests in managing its workforce that it does not possess when acting as sovereign. *Id.* Among those unique interests is labor peace. A government employer may well have a managerial interest in using exclusive representation to avoid "the possibility of facing conflicting demands from different unions" representing its employees. *Abood*, 431 U.S. at 221. But government policymakers have no legitimate interest in suppressing conflicting demands from diverse groups of citizens on matters of public policy. "'[C]onflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id.* at 261 (Powell, J., concurring in judgment).

The Second Circuit's opinion here, and the First Circuit's in *D'Agostino*, conflict with *Harris* because they rely on *Abood* and its labor peace interest to find daycare-provider collectivization constitutional. (App. 4a). *See D'Agostino*, 812 F.3d at 243-44. The

Court should grant the writ to correct that error, and hold that states cannot constitutionally justify extending exclusive representation to individuals who are not full-fledged public employees.

C. The Second and First Circuits' Opinions Conflict with This Court's Rulings, and the Eleventh Circuit's Ruling, That Exclusive Representation Impinges on Associational Rights.

1. The Second and First Circuits' Holdings That Exclusive Representation Does Not Impinge on Associational Rights Is Inconsistent with This Court's Precedents Concerning Exclusive Representation of Employees.

The lower courts' justification for not applying exacting constitutional scrutiny to state impositions of exclusive representation on family daycare providers is the notion that providers are not associated with their representative or with its expressive activities as their proxy. (App. 29a, 31a-32a); *D'Agostino*, 812 F.3d at 244. This is logically untenable.

The whole point of the exclusive representative designation is to establish that the representative speaks and contracts for *all* individuals in a unit. *See* S*zabo v. U.S. Marine Corp*., 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). CSEA obviously cannot speak and contract for family daycare providers, and yet those providers not be associated with CSEA, its

speech, and contracts. The proposition is as incongruous as saying that a principal is not associated with his own agent.

This Court's precedents recognize that exclusive representation impinges on associational rights. Exclusive representatives are often referred to as "exclusive bargaining *agents*." *Harris*, 134 S. Ct. at 2640 (emphasis added). This is for good reason: "By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). The Court has found this mandatory agency relationship analogous to that between trustee and beneficiary, and akin to "the relationship . . . between attorney and client." *ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991).

Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). These "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). For example, exclusive representatives can waive employees' right to bring discrimination claims against their employer in court by agreeing that such claims must be submitted to arbitration. *See 14 Penn Plaza LLC v. Pyett,* 556 U.S. 247 (2009).

A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Unsurprisingly, given an exclusive representative's power to speak and contract for individuals against their will, this Court has long recognized that exclusive representation impacts and restricts individual liberties. *See Pyett*, 556 U.S. at 271 (holding "[i]t was Congress' verdict that the benefits of organized labor outweigh *the sacrifice of individual liberty* that this system necessarily demands") (emphasis added); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting "[t]he collective bargaining system . . . of necessity *subordinates the interests* of an individual employee to the collective interests of all employees in a bargaining unit") (emphasis added); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (holding "individual employees are required by law *to sacrifice rights* which, in some cases, are valuable to them" under exclusive representation, and "[t]he *loss of individual rights* for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union") (emphasis added).

In fact, the Court requires that exclusive representatives fairly represent all individuals subject to their mandatory representation for these reasons—i.e., "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182. Otherwise, "the congressional grant of power to a union to act as exclusive collective bargaining rep-

resentative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems." *Id.*

The Second and First Circuits' conclusions that exclusive representation does not impinge on associational rights cannot be squared with these precedents. Unlike with employees, however, no countervailing state interest justifies forcing family daycare businesses into an exclusive-representative relationship with a union. *See supra* pp. 16-18.

2. The Court Should Grant Certiorari to Clarify That *Knight* Does Not Exempt Exclusive Representation from First Amendment Scrutiny.

The Second and First Circuits construed this Court's decision in *Knight* to stand for the proposition that exclusive representation does not compel association within the meaning of the First Amendment. (App. 4a-5a). *D'Agostino*, 812 F.3d at 244. *Knight* did no such thing. That "case involves no claim that anyone is being compelled to support [union] activities." 465 U.S. at 291 n.13.

Knight addressed only whether *excluding* employees from union bargaining sessions infringes on their constitutional rights. That is how this Court framed the issue before it: "[t]he question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* at 273. The "appellees' principal claim [was] that they have a right to force officers of the state acting

in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. This Court disagreed, holding that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.[5]

Knight has no bearing on this case because Petitioners do not allege that New York wrongfully excludes them from its meetings with CSEA. Nor do they assert a "constitutional right to force the government to listen to their views." *Id.* Rather, the providers here assert their constitutional right not to be forced to associate with CSEA and its speech. Their claim that exclusive representation *compels* association is different from the alleged *restriction* on speech at issue in *Knight*.

Knight did not address whether exclusive representation constitutes a mandatory association because the Court ruled on that issue years earlier in *Abood*, which held "[t]he principle of exclusive union representation" to be justified by the labor peace interest. 431 U.S. at 220–21; *see Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 (1986) (stating that *Abood* "rejected the claim that it was unconstitutional for a public employer to designate a union as the exclusive

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[5] The portion of the lower court's decision *Knight* summarily affirmed likewise "rejected the constitutional attack on PELRA's *restriction* to the exclusive representative of *participation* in the 'meet and negotiate' process." 465 U.S. at 279 (emphasis added).

collective-bargaining representative of its employees"). *Knight* did not revisit the compelled association issue previously decided in *Abood*.[6]

Overall, it is inconceivable that this Court, when deciding in 1984 the narrow issue of whether a college can exclude faculty members from union bargaining sessions, intended to rule that the First Amendment is no barrier to the government forcing small business operators to accept a mandatory representative for lobbying the government. Yet, that is how broadly the Second and First Circuits read *Knight*. The case cannot bear the incredible weight the lower courts place upon it. The Court should grant certiorari to eliminate the lower courts' misapprehension of *Knight*, and make clear that *Knight* does not exempt exclusive representation from First Amendment scrutiny.

3. The Second and First Circuits' Decisions Conflict with the Eleventh Circuit's Decision in *Mulhall v. Unite Here Local 355*.

Mulhall v. Unite Here Local 355 addressed whether exclusive representation by a union (Unite) threatened an employee (Mulhall) with associational injury, even though he could not be required to join the union under Florida's Right to Work law. 618 F.3d

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[6] As already discussed, *Abood's* labor peace rationale does not save New York's Representation Act because *Harris* held *Abood* and its labor peace interest inapplicable to non-employee homecare providers. 134 S. Ct. at 2638-41; pp. 16-18, *supra*.

1279, 1286–87 (11th Cir. 2010). The Eleventh Circuit held that "[i]f Unite is certified as the majority representative of . . . employees, Mulhall will have been thrust unwillingly into an agency relationship[.]" *Id.* at 1287. Thus, "regardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights." *Id.* The court, however, recognized that, while exclusive representation "amounts to 'compulsory association,' . . . that compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' . . . based on a legislative judgment that collective bargaining is crucial to labor peace." *Id.* (quoting *Acevedo–Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002)).

Mulhall's analysis applies here: exclusive representation infringes on associational rights because it forces individuals into an unwanted agency relationship with a union. If anything, the associational injury CSEA's mandatory representation inflicts on family daycare homes is far worse than the infringement at issue in *Mulhall*. That case involved forcing an employee to accept a representative for dealing with a private employer over workplace issues. Here, New York forces providers to accept a representative for petitioning the State over matters of public policy. But, unlike with the employee in *Mulhall*, the labor peace interest does not justify unionizing family daycare businesses. *See Harris*, 134 S. Ct. at 2640–41.

The First and Second Circuits' holdings that forcing individuals to accept an exclusive bargaining agent does not impinge on their associational rights, and thus requires no special justification, conflicts with the Eleventh Circuit's holding in *Mulhall*. That is a conflict this Court should resolve.

II. Second Question: The Court Should Resolve Whether Private Defendants Sued for First Amendment Violations Have a "Good Faith" Defense to Section 1983 Liability.

A. Lower Courts Are Transforming the "Good Faith" Defense from an Element of Ex Parte Seizure Claims to an Effective Immunity to All Section 1983 Claims Brought Against Private Parties.

An explanation of the development of the purported "good faith" defense to Section 1983 claims is necessary to evaluate the second question presented.

The tale begins with *Wyatt v. Cole*, 504 U.S. 158 (1992), which addressed "whether private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit." *Id*. at 159. The Court found that "the most closely analogous torts" to these claims were "malicious prosecution and abuse of process," *id*. at 164, and that, at common law, "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause," *id*. at 165. The Court nev-

ertheless held that private defendants in these types of Section 1983 actions were not entitled to a qualified *immunity* on that basis, because the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. The Court, however, left open the question of whether private defendants can raise a good faith *defense* to such claims. *Id.* at 168-69.[7]

The Court has yet to answer that question. *See Richardson*, 521 U.S. at 413–14. The lower courts, however, have been filling in the blanks.

On remand in *Wyatt v. Cole*, the Fifth Circuit held "that private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." 994 F.2d 1113, 1120 (5th Cir. 1993). This holding was predicated on malice and probable cause being elements of the analogous common law tort. *Id.* at 1119-20. Several

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[7] As several Justices recognized in *Wyatt*, "it is something of a misnomer to describe the common law as creating a good-faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id.* at 172 (Kennedy, J., concurring); *accord id.* at 176 n.1 (Rehnquist, C.J., dissenting). "Referring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id.* at 176 n.1.

other circuits reached similar conclusions in cases involving ex parte seizures or attachments that violated Fourteenth Amendment due process requirements. *See Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996); *Duncan v. Peck,* 844 F.2d 1261, 1266 (6th Cir. 1988); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008); *see also Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) (recognizing a good faith defense to ex parte seizure alleged to violate Fourth Amendment).

Several district courts, however, have extended the good faith defense beyond ex parte seizure claims, and treated it as a general defense applicable to *all* Section 1983 claims brought against private parties for damages.[8] The Second Circuit has now joined their company by rejecting the proposition that "a

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[8] *See Hoffman v. Inslee*, No. C14-200, Dkt. 195, at **8-9 (W.D. Wash. Aug. 16, 2016). (First Amendment illegal fee seizure); *Franklin v. Fox*, No. C 97-2443, 2001 WL 114438, at *6 (N.D. Cal. Jan. 22, 2001). (Sixth Amendment denial of right to counsel); *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 562 (W.D. Va. 2008) (Fourth Amendment illegal search), *rev'd on other grounds*, 570 F.3d 546 (4th Cir. 2009); *Goodman v. Las Vegas Metro. Police Dep't*, No. 2:11-CV-01447-MMD, 2013 WL 819867, at **1-2 (D. Nev. Mar. 5, 2013) (Fourth Amendment unlawful detention); *Robinson v. San Bernardino Police Dep't*, 992 F. Supp. 1198, 1207-08 (C.D. Cal. 1998) (Fourth, Eighth, Thirteenth, and Fourteenth Amendment claims); *Doby v. Decrescenzo*, No. CIV. A. 94-3991, 1996 WL 510095, at *21 (E.D. Pa. Sept. 9, 1996) (Fourth, Eighth, and Fourteenth Amendment claims).

good faith defense cannot apply where, as here, the underlying constitutional tort does not contain a scienter element," and holding that a good faith defense lies to First Amendment violations. (App. 6a).

The Second Circuit and several district courts are thus now treating the purported good faith *defense* as if it were an *immunity* to Section 1983 liability. Those are very different things. A "defense" relates to an element of the underlying constitutional claim—i.e., whether there is a "deprivation of . . . rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983. (App. 41a). An "immunity" is an exemption to Section 1983 liability itself, that exists even where there is a constitutional deprivation. *See Wyatt*, 504 U.S. at 166-67; *id*. at 172-73 (Kennedy, J., concurring). As this Court put it in *Richardson*, "a legal defense may well involve 'the essence of the wrong' while an immunity frees one who enjoys it from a lawsuit whether he or not he acted wrongly." 521 U.S. at 403 (citation omitted). Here, the Second Circuit freed CSEA from liability notwithstanding that it violated the providers' First Amendment rights.

This petition thus presents to the Court the question of whether good faith is effectively an immunity to all Section 1983 claims for damages against private parties, or whether it is merely a defense that can be raised where the state of mind is relevant to the underlying constitutional tort.

B. A Universal Good Faith Defense Conflicts with Section 1983's Text and Allows Private Defendants to Get Away with Violating Citizens' Constitutional Rights.

The Court should grant certiorari to arrest the ongoing transformation of the good faith defense into a general exemption to Section 1983 liability for two reasons.

First, the defense is incompatible with Section 1983's statutory language. The statute provides that any person who deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. (App. 41a). The statute also "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). The proposition that private defendants are *not* "liable to the party injured in an action at law" under Section 1983, unless they acted with a certain state-of-mind (i.e., bad faith), contradicts both the statute and *Daniels*.

At most, Section 1983's language can support a good faith defense only where state of mind is an element of the underlying claim—i.e., is necessary to show or disprove a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. (App. 41a). The relevancy of state of mind varies depending on the constitutional claim being pursued under Section 1983. For example, malice and lack of probable cause may be an element of due process claims arising from an ex parte

use of replevin statutes. *See Wyatt*, 994 F.2d at 1119-21. But a defendant's state of mind is irrelevant to whether the seizure of compulsory fees for speech deprived citizens of their First Amendment rights. Consequently, there was no statutory basis for the Second Circuit's decision to carve an unwritten good faith defense into a Section 1983 action arising under the First Amendment.

Second, recognition of a good faith defense to all Section 1983 claims will deprive individuals of compensation for violations of their constitutional rights. It will also incentivize parties to push the boundaries of what is constitutionally permissible, as they will fear no liability for so doing.

This case illustrates the point. CSEA and New York's executive branch jointly agreed to "seek legislation authorizing" the seizure of compulsory fees from family daycare providers, First Agreement, § 3(l)(vi), notwithstanding that the seizure was presumptively unconstitutional. *See Knox*, 132 S. Ct. at 2288-89 (reiterating that compulsory union fees significantly impinge on First Amendment rights and are tolerated only where justified by compelling state interests). CSEA then unconstitutionally took money from thousands of daycare homes for over two years. The Second Circuit's recognition of a good faith defense deprives all of these victims of any recourse to recover monies wrongfully taken from them. It also allows CSEA to keep its ill-gotten gains. This inequitable result—innocents punished and a wrongdoer rewarded—weighs heavily against recognizing a uni-

versally applicable good faith defense to Section 1983 damages liability.

CONCLUSION

New York is unabashedly forcing family daycare operators to accept "an organized voice in governmental decisionmaking on issues that impact the manner in which they carry out their profession." N.Y. Comp. Codes R. & Regs. tit. 9, § 6.12. The Court should not allow this to stand. If the First Amendment prohibits anything, it prohibits the government from organizing the voices of its citizens. The petition for a writ of certiorari should be granted on both questions.

Respectfully submitted,

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DECEMBER 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

No. 16-441-cv

MARY JARVIS, SHEREE D'AGOSTINO, CHARLESE DAVIS, MICHELE DENNIS, KATHERINE HUNTER, VALERIE MORRIS, OSSIE REESE, LINDA SIMON, MARA SLOAN, LEAH STEVES-WHITNEY,

Plaintiffs-Appellants,

v.

GOVERNOR ANDREW CUOMO, in His Official Capacity as Governor of the State of New York, SHEILA J. POOLE, in Her Official Capacity as the Commissioner of the New York Office of Children and Family Services, CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000 AFSCME, AFL-CIO,

Defendants-Appellees.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of September, two thousand sixteen.

PRESENT: JON O. NEWMAN,
GUIDO CALABRESI,
REENA RAGGI,

Circuit Judges.

Appearing for Appellants:

WILLIAM L. MESSENGER, National Right to Work Legal Defense Foundation, Springfield, Virginia.

Appearing for Appellees:

Frederick A. Brodie, Assistant Solicitor General (Barbara D. Underwood, Solicitor General; Andrew D. Bing, Deputy Solicitor General, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York, Albany, New York, for Governor Andrew Cuomo and Sheila J. Poole.

John M. WEST (James Graham Lake, Bredhoff & Kaiser, P.L.L.C.; Daren J. Rylewicz and Steven A. Crain, Civil Service Employees Association, Inc., *on the brief*), Bredhoff & Kaiser, P.L.L.C., Washington, D.C., *for Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO*.

For Amicus Curiae:

Scott A. Kronland and Kristin M. García, Altshuler Berzon, LLP, San Francisco, California, *for Service Employees International Union*.

Appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on January 20, 2016, is AFFIRMED.

Plaintiffs, ten individuals who operate child-care businesses out of their upstate New York homes, appeal from the dismissal of their complaint (1) alleging that defendants violated their First Amendment rights in enacting and enforcing legislation allowing home child-care providers within a state-designated bargaining unit to elect an exclusive representative to bargain collectively with the state and (2) seeking a refund of union agency fees deducted from their state reimbursements prior to the Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). We review a judgment of dismissal *de novo*, "accepting all factual allegations in the complaint as true." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 796 (2d Cir. 2014). In so doing, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Compelled Association Claim

Plaintiffs contend that New York's recognition of defendant Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO ("CSEA") as the exclusive

bargaining representative for their bargaining unit violates their First Amendment rights because it compels union association. The argument is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 288–89 (1984), in which the Supreme Court held that a state law requiring public employers to "meet and confer" with a bargaining unit's exclusive representative did not infringe the First Amendment rights of nonunion unit members. In so holding, the *Knight* Court emphasized that unit members were "not required to become members of [the union]" and that any resulting pressure to join the union was "no different from the pressure to join a majority party that persons in the minority always feel," which is "inherent in our system of government" and not "an unconstitutional inhibition on associational freedom." *Id.* at 289–90. As in *Knight*, plaintiffs were not here required to become members of the union—and, in fact, were not members of CSEA. Accordingly, they cannot demonstrate a constitutionally impermissible burden on their right to free association. *See id.*; *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–22 (1977) (acknowledging that "designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment" and that resulting interference with First Amendment rights "is constitutionally justified").

In urging otherwise, plaintiffs argue that *Harris v. Quinn*, 134 S. Ct. 2618, undermined prior Supreme Court precedent upholding exclusive representation as constitutional as applied to non-full-fledged state employees. We disagree. *Harris* addressed only the narrow question of whether individuals who were

neither full-fledged state employees nor union members could be required to pay fair share fees to their bargaining unit's exclusive representative; it did not consider the constitutionality of a union serving "as the exclusive representative of [non-full-fledged state employees] in bargaining with the State." *Id.* at 2640. Thus, *Harris* does not relieve us from the duty to follow *Knight* even where, as here, plaintiffs are not full-fledged state employees. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (instructing that where Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [Supreme] Court the prerogative of overruling its own decisions"); *see also D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (Souter, J.) (explaining that *Harris* did not limit application of *Knight* because "issues at stake" were different).[1] Accordingly, for reasons already explained, plaintiffs' First Amendment challenge fails.

2. Good Faith Defense

Plaintiffs fault the district court for applying a good faith defense to their § 1983 claim for reimbursement of agency fees paid before the Supreme Court's decision in *Harris* because the First Amendment does not require proof of motive. We are not persuaded.

The Supreme Court has acknowledged in *dictum* that "private citizens who rely unsuspectingly on state laws they did not create and may have no reason to

[1] This conclusion is reinforced by language in *Harris* acknowledging that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." 134 S. Ct. at 2460.

believe are invalid should have some protection from liability, as do their government counterparts." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992); *see id.* at 169 ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith."); *see also Richardson v. McKnight*, 521 U.S. 399, 413–14 (1997) (leaving for "another day" question "whether or not the private defendants . . . might assert, not immunity, but a special 'good-faith' defense" (internal quotation marks omitted)). Courts have construed *Wyatt*'s *dictum* to admit an affirmative good faith defense for private parties sued under § 1983. *See Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993); *cf. Pinsky v. Duncan*, 79 F.3d 306, 312 (2d Cir. 1996) (holding that plaintiff had burden to show "want of probable cause, malice and damages" to prevail on § 1983 claim for due process violation).

Plaintiffs attempt to distinguish these cases by arguing that a good faith defense cannot apply where, as here, the underlying constitutional tort does not contain a scienter element. The argument fails because, unlike standard defenses, affirmative defenses need not relate to or rebut specific elements of an underlying claim. *See Black's Law Dictionary* 482 (9th ed. 2009) (defining "affirmative defense" as "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim even if all the allegations in the complaint are true"). Thus, the district court did not err in concluding that a good faith defense was available to a private defendant sued under § 1983 for a First Amendment violation.

The district court also correctly determined that CSEA was here entitled to a good faith defense. In obtaining the challenged fair share fees from plaintiffs, CSEA relied on a validly enacted state law and the controlling weight of Supreme Court precedent. Because it was objectively reasonable for CSEA "to act on the basis of a statute not yet held invalid," defendants are not liable for damages stemming from the pre-*Harris* collection of fair share fees. *Pinsky v. Duncan*, 79 F.3d at 313; *see Wyatt v. Cole*, 504 U.S. at 174 (Kennedy, J., concurring).

3. Conclusion

We have considered plaintiffs' remaining arguments and conclude that they are without merit. We therefore AFFIRM the judgment of the district court.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Filed 01/21/16]

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5:14-cv-1459 (LEK/TWD)

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MARY JARVIS, *et al*.,

Plaintiffs,

-against-

GOVERNOR ANDREW CUOMO, in His Official Capacity as Governor of the State of New York, *et al*.,

Defendants.

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AMENDED MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

This action was commenced by ten individuals (collectively, "Plaintiffs") who operate home child care businesses in the State of New York (the "State" or "New York"). Dkt. No. 1 ("Complaint") ¶ 1. In the Complaint, Plaintiffs assert that a State law authorizing child care providers to designate a representative to collectively bargain with the State violates Plaintiffs' First Amendment rights. *Id.* On April 30, 2015, the Court granted partial motions to dismiss filed by Defendants Governor Andrew Cuomo, New York State Office of Children and Family Services ("OCFS"), Commissioner Sheila Poole (together, "State Defendants"), and Civil Service Employees Association

("CSEA") (collectively, "Defendants"). Dkt. No. 27 ("April Order"). In the April Order, the Court dismissed Count I of the Complaint in its entirety and also dismissed all claims for money damages against the State Defendants. *Id.* Presently before the Court are Motions to dismiss Count II of the Complaint filed by the State Defendants and the CSEA pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. Nos. 28 ("State Defendants' Motion"); 28-1 ("State Defendants' Memorandum of Law"); 29 ("CSEA Motion"); 29-1 ("CSEA Memorandum of Law").

For the following reasons, Defendants' Motions are granted and the case is dismissed. Accordingly, Plaintiffs' Motion for summary judgment, which was stayed pending the Court's resolution of the pending Motions to dismiss, is now dismissed as moot. Dkt Nos. 36 ("Motion for Summary Judgment"); 38 ("Order Adjourning Summary Judgment Deadlines").

II. BACKGROUND[1]

The Court presumes the parties' familiarity with the facts and history of this case, and recites only those facts necessary for the resolution of the pending Motions. For a complete recitation of the background in this case, reference is made to the April Order.

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[1] Because this action is presently before the Court on a motion to dismiss, the allegations of the Complaint are accepted as true and form the basis of this section. *See Raila v. United States*, 355 F.3d 118, 119 (2d Cir. 2004); *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 408 (2d Cir. 2000). However, because the Court is reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court will not "draw inferences from the complaint favorable to plaintiffs." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004).

Count II of Plaintiffs' Complaint alleges that the "fair share" fees authorized under a Memorandum of Agreement ("Agreement") between the State and CSEA which took effect on October 1, 2009, violate 42 U.S.C. § 1983 as well as the First Amendment. Compl. ¶¶ 21, 39, 41; *see also* Dkt. No. 1-1 ("Agreement"). On July 2, 2010, the State enacted legislation authorizing the collection of fair share fees from non-member child care providers. Compl. ¶ 22. The State and CSEA began assessing the fair share fees from non-members in January 2012. *Id.* ¶ 25. On September 27, 2013, the State amended the law to extend its expiration until September 30, 2016. *Id.* ¶ 26. On June 30, 2014, the Supreme Court held in *Harris v. Quinn*, 134 S. Ct. 2618, 2626 (2014), that the First Amendment prohibited the collection of agency fees from personal assistants who either did not support or were non-members of a union. Plaintiffs received a letter from CSEA in November 2014, stating that in order to comply with *Harris*, "CSEA has requested that the State stop deducting fair share fees from non-members," and that the State "is reviewing and modifying its system to accomplish this." Compl. ¶ 33.

In January 2015, the State ceased withholding agency fee payments from the paychecks of non-members. Dkt. No. 29-2 ("Declaration of Robert Compani") ¶ 7. Shortly thereafter, CSEA refunded any agency fees that had been deducted from non-members after July 1, 2014, including interest. *Id.* ¶ 8. Simultaneously, CSEA renegotiated the provision in the collective bargaining agreement ("CBA") with the State that had previously provided for the assessment of fair share fees. CSEA Mem. at 3. The new CBA, which will remain in effect until September 30, 2017, was signed by CSEA on April 22, 2015, signed by the pertinent State officials between April 24 and May 12, 2015, and

eventually ratified by CSEA membership. *Id.* at 4; Dkt. No. 33 ("Opposition") at 4. The terms of the new CBA provide in relevant part:

> OCFS and the Union agree to end the deduction and transfer to the Union of fair share payments from those Covered Child Care Providers who do not choose to be members of the Union, or those that did not authorize the deduction of union dues but who receive subsidy payments directly from a LDSS, other than the City of New York, under the Social Services Law. The Union will assume all the design, development and implementation costs for the necessary changes to the State's existing payment system(s), and any other associated administrative costs necessary, to cease the collection of fair share payments that are deducted and transferred to the Union from payments due to the applicable Covered Child Care Providers.

Dkt. No. 29-9 ("Updated Collective Bargaining Agreement").

Defendants move to dismiss Count II of the Complaint on the basis that Plaintiffs' claims are now moot. State Defs.' Mot.; CSEA Mot. Plaintiffs agree that prospective relief is no longer necessary in light of the new CBA, which does not require compulsory fees. Opp'n at 1. Plaintiffs also concede that several Plaintiffs' claims for retroactive relief were satisfied when CSEA returned any fees seized after the *Harris* decision was issued. *Id.* However, Plaintiffs contend that four Plaintiffs—Sheree D'Agostino, Michele Dennis, Katherine Hunter, and Mara Sloan—have not been made whole because they have not received compensation for fair share fees that were seized from them

prior to *Harris*. *Id.* Plaintiffs contend that these four Plaintiffs are entitled to refunds for fees that were unlawfully assessed between January 2012 and July 1, 2014. Compl. ¶ 12; Opp'n at 4.

CSEA argues that "[w]hile this putative claim for repayment of fees paid prior to the *Harris* decision may not be moot, it is without merit and therefore subject to dismissal under Rule 12(b)(6)." CSEA Mem. at 8.

III. LEGAL STANDARD

A. Rule 12(b)(1)

A district court must dismiss a case for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *See* FED. R. CIV. P. 12(b)(1). When resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the pleadings without converting the motion into a motion for summary judgment. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). A court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [it] may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S.*, 386 F.3d at 110. "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* Since "jurisdiction must be shown affirmatively . . . that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F. 3d 129, 131 (2d Cir. 1998).

B. Rule 12(b)(6)

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* FED. R. CIV. P. 12(b)(6). A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of a plaintiff. *See Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006). A complaint may be dismissed pursuant to Rule 12(b)(6) only where it appears that there are not "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plausibility requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." *Id.* at 556. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that she is entitled to relief and the action is subject to dismissal. *See id.* at 678-79.

IV. DISCUSSION

A. Mootness

Defendants argue that Plaintiffs' second cause of action should be dismissed as moot. State Defs.' Mot.

at 4-6; CSEA Mot. at 4-7. A party seeking to dismiss a case as moot bears a heavy burden. *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005). "Article III of the Constitution limits federal 'judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). "[A]t all times, the dispute before the court must be real and live, not feigned, academic, or conjectural." *Russman v. Bd. of Educ.*, 260 F.3d 114, 118 (2d Cir. 2001). "When the issues in dispute between the parties 'are no longer live,' a case becomes moot." *Lillbask ex rel. Mauclaire*, 397 F.3d at 84 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "Under Article III of the U.S. Constitution, '[w]hen a case becomes moot, the federal courts lack subject matter jurisdiction over the action.'" *Doyle v. Midland Credit Mgmt.*, 722 F.3d 78, 80 (2d Cir. 2013) (quoting *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994)). Mootness must be judged in the present, not at the time the complaint was filed. *Stronko v. Bergin*, 843 F. Supp. 827, 828-29 (N.D.N.Y. 1994).

"Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). However, if after voluntarily ceasing to engage in the allegedly illegal activities "the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," then a finding of mootness is appropriate. *Campbell v. Greisberger*, 80 F.3d 703, 706 (2d Cir. 1996).

1. Recurrence

A case is not moot unless there is "no reasonable expectation" that the challenged actions will be repeated. *W.T. Grant*, 345 U.S. at 633. Where a defendant has voluntarily ceased enforcement of a policy, a case is only rendered moot if it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Exp. Ass'n*, 393 U.S. at 203.

Defendants contend, and Plaintiffs do not dispute, that the alleged wrongful behavior is unlikely to recur. After learning of the Supreme Court's decision in *Harris*, and prior to this lawsuit being filed, CSEA ceased collecting fair share fees from non-members and informed non-members in writing that it was doing so in order to comply with *Harris.* Compani Decl. ¶ 4. Defendants concede that *Harris* "is applicable to this bargaining unit and thus prohibits any agency fee requirement." State Defs.' Mem. at 5. In their respective Motions, Defendants disclaim any intent to resume the assessment of the fair share fee in the future. *Id.* at 5; CSEA Mem. at 5. It is well established that a defendant cannot reasonably be expected to resume conduct that it acknowledges is contrary to binding precedent. *See Granite State Outdoor Advert. v. Town of Orange*, 303 F.3d 450, 451-52 (2d Cir. 2002) (finding voluntary cessation satisfied where there was no evidence that town had any intention of returning to prior regulatory scheme); *see also Carlson v. United Acads.*, 265 F.3d 778, 786 (9th Cir. 2001) ("It is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct.").

Moreover, Defendants claim that it is not within their power to resume collecting the fees, even if they wanted to do so. State Defs.' Mem. at 5. They contend that the CSEA has no authority to unilaterally compel non-members to pay fair share fees, and the CBA that previously authorized the fair share fees has been replaced with a new CBA which expressly promises "to end the deduction and transfer to the Union of fair share payments." State Defs.' Mem. at 5; Compani Decl. ¶ 17; *see also* Updated Collective Bargaining Agreement. The new CBA will be in effect until September 2017, at which time the statute that provided the underlying authorization for the fair share fee will have expired. State Defs.' Mem. at 5; *see also* Compl. ¶ 26 (noting that Chapter 378 of the Laws of 2013 expires on September 30, 2016). Accordingly, the Court finds that Defendants are unlikely to reinstate the fair share fees, thus satisfying the first prong of the voluntary cessation analysis.

2. Interim Relief

Turning to the second prong, Defendants must show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Campbell*, 80 F.3d at 706. Here, each of the Plaintiffs from whose paychecks agency fees were deducted at any time following the *Harris* decision has been repaid for the deducted amount, along with interest. Compani Decl. ¶ 8. Where, "with respect to the plaintiffs' individual claims for damages, nothing of practical significance remain[s] to adjudicate," the claim is moot. *ABN Amro Verzekeringen BV v. Geologistics Americas*, 485 F.3d 85, 96 (2d Cir. 2007). However, Plaintiffs contend that Plaintiffs D'Agostino, Dennis, Hunter, and Sloan have not received all of the damages they are entitled to, as these Plaintiffs have

not been reimbursed for fair share fees that were deducted from their paychecks prior to *Harris*. Opp'n at 1.

Defendants concede that Plaintiffs D'Agostino, Dennis, Hunter, and Sloan have not been reimbursed for fair share fees deducted prior to *Harris*, yet they do not specifically address why these claims are moot. *See* CSEA Mem. at 7. In fact, Defendants concede that "this putative claim for repayment of fees paid prior to the *Harris* decision may not be moot." *Id.* at 8. The Court concludes that for the purposes of mootness, Plaintiffs D'Agostino, Dennis, Hunter, and Sloan have not been made whole. Accordingly, the Court will move on to consider whether these four Plaintiffs have stated a claim pursuant to Rule 12(b)(6).

B. Rule 12(b)(6)

Defendants argue that Plaintiffs' claim for reimbursement prior to *Harris* fails "because damages cannot be awarded against a private party sued under § 1983 for actions taken in good faith based on a presumptively constitutional statute." CSEA Mem. at 8. Plaintiffs counter that there is no good-faith defense to Plaintiffs' First Amendment claim, and even so, CSEA did not act in good faith. Opp'n at 5-14.

It is well established that the doctrine of qualified immunity does not extend to private actors. *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992). However, the Court in *Wyatt* expressly stated that "we do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith." *Id.* The Supreme Court remanded the case to the Fifth Circuit, which held "that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to

act in good faith in invoking the unconstitutional state procedures, *that is*, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (cited by *Pinsky v. Duncan*, 79 F.3d 306, 311 (2d Cir. 1996)).

Plaintiffs argue that the good-faith defense is limited to cases involving garnishment or attachment. Opp'n at 6-8. However, the defense has been interpreted broadly by courts when analyzing claims for money damages against private actors pursuant to § 1983, and has been made available in cases involving an array of constitutional torts. *See*, *e.g.*, *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008) (finding good-faith defense available for a claim of insufficient notice under the Due Process Clause); *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 562 (W.D. Va. 2008) (finding good-faith defense available for Fourth Amendment claim of illegal home search), *rev'd on other grounds*, 570 F.3d 546 (4th Cir. 2009); *Franklin v. Fox*, No. C 97-2443, 2001 WL 114438, at *6 (N.D. Cal. Jan. 22, 2001) (finding good-faith defense applicable to Sixth Amendment claim of denial to the right to counsel); *Robinson v. San Bernadino Police Dep't*, 992 F. Supp. 1198, 1207-08 (C.D. Cal. 1998) (applying good-faith defense to § 1983 claims based on violations of the Fourth, Eighth, Thirteenth, and Fourteenth Amendments). Plaintiffs do not identify any reason or authority suggesting that the good-faith defense should not be available for private defendants facing § 1983 claims premised on a violation of the First Amendment. Accordingly, the Court finds that the good-faith defense is available to the CSEA Defendants.

Having determined that the good-faith defense is available in First Amendment cases, the Court must now determine whether Defendants knew or should have known that the fair share fee statute was unconstitutional prior to *Harris*. The Second Circuit has held that "it is objectively reasonable to act on the basis of a statute not yet held invalid." *Pinsky*, 79 F.3d at 313; *see also Wyatt*, 504 U.S. at 174 (Kennedy, J., concurring) ("[A] private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law."). Plaintiffs' Complaint does not contain any allegations that CSEA acted in bad faith in collecting the fee prior to *Harris*. To the contrary, the record indicates that CSEA acted in good faith when relying on the validly enacted state legislation that authorized the fair share fee as well as prior Supreme Court precedent authorizing a similar payment assessment in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1971). Moreover, the Court finds that Defendants took reasonable measures to make Plaintiffs whole after the *Harris* decision was issued. Accordingly, the Court finds that the good-faith defense applies to the CSEA Defendants and therefore, they cannot be liable for damages based on the collection of fees from Plaintiffs prior to July 1, 2014.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the State Defendants' Motion (Dkt. No. 28) to dismiss Plaintiffs' second cause of action pursuant to Federal Rule of Civil Procedure 12(b)(1) is GRANTED; and it is further

ORDERED, that Defendant CSEA's Motion (Dkt. No. 29) to dismiss Plaintiffs' second cause of action

pursuant to Federal Rule of Civil Procedure 12(b)(1) is GRANTED in part as to the dismissal of any claims made by Plaintiffs other than D'Agostino, Dennis, Hunter, and Sloan on the basis that these claims are moot and DENIED in part as to claims made by Plaintiffs D'Agostino, Dennis, Hunter, and Sloan; and it is further

ORDERED, that Defendant CSEA's Motion (Dkt. No. 29) to dismiss Plaintiffs' second cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED; and it is further

ORDERED, that Plaintiffs' Motion (Dkt. No. 36) for summary judgment is DISMISSED as moot; and it is further

ORDERED, that Plaintiffs' Complaint (Dkt. No. 1) is DISMISSED; and it is further ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: January 21, 2016
Albany, NY

/s/ Lawrence E. Kahn
Lawrence E. Kahn
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Filed 04/30/15]

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5:14-cv-1459 (LEK/TWD)

———

MARY JARVIS, *et al*.,

Plaintiffs,

-against-

GOVERNOR ANDREW CUOMO, in His Official Capacity as Governor of the State of New York, *et al*.,

Defendants.

———

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

The instant case was commenced by ten individuals (collectively, "Plaintiffs") who operate home child care businesses in the State of New York (the "State" or "New York"). Dkt. No. 1 ("Complaint") ¶ 1. Plaintiffs assert that State law authorizing child care providers to designate a representative to collectively bargain with the State violates Plaintiffs' First Amendment rights. *Id.* Presently before the Court are partial Motions to dismiss filed by Defendants Andrew Cuomo and Sheila J. Poole (together, "State Defendants") and Defendant Civil Service Employees Association, Inc. ("CSEA") (collectively, "Defendants") pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. Nos. 16 ("CSEA Motion"); 16-1 ("CSEA Memorandum"); 17

("State Motion"); 17-1 ("State Memorandum"). For the following reasons, Defendants' Motions to dismiss are granted.

II. BACKGROUND

New York subsidizes child care expenses of qualified low income families through various programs, the principal of which is the "State Child Care Block Grant" program. Compl. ¶12 (citing 18 N.Y. COMP. CODES R. & REGS. § 415, *et seq.*). Enrolled families can choose among eligible providers, 18 N.Y. COMP. CODES R. & REGS. § 415.4(c), and depending on their income level, must contribute towards the cost of the child care services, *id.* § 415.3. The State Child Care Block Grant program is administered by the New York Office of Children and Family Services ("OCFS") and county social service districts. Compl. ¶ 12. The social service districts determine eligibility for the program, maintain waiting lists for eligible families, and disburse subsidy funds to providers. 18 N.Y. COMP. CODES R. & REG. § 415.2(d)(3); 415.4. OCFS sets market rates for the compensation of providers by county. *Id.* § 415.9. OCFS also imposes requirements on providers offering services to families that receive subsidies, *id.* § 415.12, and sets "minimum quality program requirements for licensed and registered day care homes, programs, and facilities," 1 N.Y. SOC. SERV. § 390(2-a)(a).

On May 8, 2007, then New York Governor Eliot Spitzer issued Executive Order No. 12, "Representation of Child Care Providers," which stated that "child care providers should be given the option to organize themselves and select representatives for the purpose of discussing with the State the conditions of their employment." 9 N.Y. COMP. CODES R. & REGS. § 6.12. Order No. 12 divides child care providers into four

distinct "representation units": (i) all subsidized day care providers and informal providers in New York City; (ii) all unsubsidized day care providers in New York City; (iii) all day care homes outside of New York City; and (iv) all subsidized informal providers outside of New York City. *Id.* § 6.12(2). The Order mandates that the State shall recognize the representative designated as such by a majority of a unit of child care providers. *Id.* § 6.12(3). OCFS is required to meet with a designated representative to discuss State child care policies and to enter into a written agreement, which may address "the stability, funding and operation of child care programs; expansion of quality child care; and improvement of working conditions, including subsidies, benefits or payment, for child care providers." *Id.* § 6.12(7). OCFS and the designated representative shall jointly seek any legislation, appropriations, or regulations necessary to implement any agreement. *Id.* § 6.12(9). The Order does not "render any child care provider a state officer or public employee." *Id.* § 6.12(11)(b). Nor does it "interfere with any ability that child care providers, or any organization that represents such providers, may otherwise have to meet or correspond with, or otherwise appear before, state agencies in regard to any matter of relevance, including any matter under discussion or set forth in any agreement between the state agency and a unit representative." *Id.* § 6.12(11)(e).

On June 18, 2008, then Governor David Patterson issued Executive Order No. 9, which extended Executive Order No. 12. Compl. ¶ 20. On October 1, 2010, the State effectively codified Executive Order No. 12 by enacting Chapter 540 of the Laws of 2010 (the "Representation Act"). *Id.* ¶ 23 (citing N.Y. LABOR LAW art. 19-C §§ 695a-695g). The Representation Act enables child care providers "to organize themselves and select

representatives for the purpose of discussing with the state the conditions of their employment, the stability of funding and operations of child care programs and the expansion of quality child care." N.Y. LABOR LAW § 695-a. Under the Representation Act, the State shall recognize the majority designated representative of a child care unit and OCFS shall meet with the representative for the purpose of entering into a written agreement. *Id.* §§ 695-d; 695-e. The Representation Act reiterates that nothing therein shall render a child care provider a state officer or employee, *id.* § 695-g(2), nor shall it interfere with the ability of child care providers "to meet or correspond with any state agency with regard to any matter of relevance," *id.* § 695-g(5).

In July 2007, the State certified CSEA as the exclusive representative of all day care homes outside of New York City, based on the submission of authorization cards. Compl. ¶ 18. That representation unit encompasses Plaintiffs. *Id.* The State and CSEA entered into a memorandum of agreement ("Agreement") effective October 1, 2009. *Id.* ¶ 21. The Agreement addresses, *inter alia*, compensation, dispute resolution, and training, and creates a quality grant program. *See* Dkt. No. 1-1 ("Agreement").

The Agreement also included a provision to seek legislation to authorize "fair share" fees from child care providers who did not join CSEA. *Id.* § 3(l)(vi). On July 2, 2010, the State enacted legislation authorizing the collection of fair share fees from non-member child care providers in each representative unit. Compl. ¶ 22. On September 27, 2013, the State amended the law so that it will not expire until September 30, 2016. *Id.* ¶ 26. However, on June 30, 2014, the Supreme Court held in *Harris v. Quinn*, 134 S. Ct. 2618, 2626

(2014), that the First Amendment prohibited the collection of agency fees from personal assistants who either did not support or were non-members of the union. Plaintiffs received a letter from CSEA in November 2014, stating that in order to comply with *Harris*, "CSEA has requested that the State stop deducting fair share fees from non-members," and that "[the State] is reviewing and modifying its system to accomplish this." Compl. ¶ 33.

Plaintiffs' Complaint alleges two causes of action pursuant to 42 U.S.C. § 1983. First, Plaintiffs claim that the Representation Act forces Plaintiffs into a mandatory agency relationship with CSEA and compels them to associate with CSEA and its expressive activities in violation of Plaintiffs' First Amendment rights. *Id.* ¶ 36. Second, Plaintiffs claim that the collection of fair share fees violates their First Amendment rights. *Id.* ¶ 39. Defendants move to dismiss Plaintiffs' first cause of action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). CSEA Mem. at 1-2; State Mem. at 1. State Defendants also move to dismiss Plaintiffs' Complaint to the extent that it seeks monetary damages against the State. State Mem. at 2.

III. LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* FED. R. CIV. P. 12(b)(6). A court must accept as true the factual allegations contained in a complaint and draw all inferences in a plaintiff's favor. *See Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006).

IV. DISCUSSION

The First Amendment guarantees "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. Jaycees*, 468 U.S. 609, 618 (1984). Freedom of association "plainly presupposes a freedom not to associate." *Id.* at 623. Compelled association may therefore infringe on a "group's freedom of expressive association." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gp. of Bos.*, 515 U.S. 557, 574-75 (1995).

Plaintiffs claim that the State is violating their First Amendment rights by forcing them to associate with CSEA in two ways: (1) Plaintiffs are forced to accept CSEA as their "mandatory representative"; and (2) Plaintiffs are forced to associate with CSEA's "expressive activities," such as its petitioning, contracts, and policy positions. Compl. ¶ 36. Neither theory is viable in light of controlling Supreme Court precedent that exclusive representation by a union does not violate First Amendment associational rights.

A. Supreme Court Precedent

The Supreme Court's holding in *Minnesota v. Knight*, 465 U.S. 271 (1984), that exclusive representation by a union does not violate non-union members' First Amendment rights, encompasses Plaintiffs' claims.

1. *Minnesota v. Knight*

Knight involved a constitutional challenge by community college faculty members to the Minnesota Public Employment Labor Relations Act ("PELRA"), which established a system of collective bargaining for

public employees. 465 U.S. at 273-74. The PELRA enabled public employees to designate an exclusive representative with whom employers were required to "meet and negotiate" regarding "terms and conditions of employment," and to "meet and confer" with on matters related to employment, but outside of the scope of mandatory negotiations. *Id.* at 274. The Minnesota Community College Faculty Association ("MCCFA") was selected as the exclusive representative of the faculty of the state's community colleges. *Id.* at 276.

Non-MCCFA faculty brought suit challenging the constitutionality of MCCFA's role as exclusive representative in the "meet and negotiate" and "meet and confer" processes. *Id.* at 278. The district court, relying on *Abood v. Bd. of Educ.*, 431 U.S. 209 (1977), rejected the plaintiffs' arguments against the "meet and negotiate" provision because the process related to the terms and conditions of employment. *Knight v. Minn. Comm'y Coll. Faculty Ass'n*, 571 F. Supp. 1, 4-5 (D. Minn. 1982). The Supreme Court summarily affirmed the district court's judgment on the "meet and negotiate" provision. *Knight*, 465 U.S. at 279.

The district court, however, found that the "meet and confer" provision was unconstitutional, in part because it infringed the plaintiffs' "First Amendment associational rights." *Minn. Comm'y Coll.*, 571 F. Supp. at 10. The Supreme Court reversed. *Knight*, 465 at 280. With respect to the plaintiffs' associational rights, the Supreme Court stated that the PELRA "in no way restrained [the plaintiffs'] freedom to speak on any education-related issue or their freedom to associate or not associate with whom they please, including the exclusive representative." *Id.* at 288. The *Knight* Court further stated:

> [The plaintiffs'] associational freedom has not been impaired. [The plaintiffs] are free to form whatever advocacy groups they like. They are not required to become members of MCCFA . . . [The plaintiffs] may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues. That pressure, however, is no different from the pressure they may feel to join MCCFA because of its unique status in the 'meet and negotiate' process, a status the Court has summarily approved. Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.

Id. at 289-90. For the same reasons, the designation of CSEA as the exclusive representative of child care providers does not deprive Plaintiffs of their associational rights. Plaintiffs are not compelled to join CSEA, and are free to associate with whomever they choose and otherwise express their views. This includes the right "to meet or correspond with any state agency with regard to any matter of relevance." N.Y. LABOR LAW § 695-g(5).

Plaintiffs claim that the associational argument in *Knight* "concerned only whether *excluding* employees from union bargaining sessions impinged on their associational rights because it indirectly pressures employees to join the union." Dkt. No. 21 ("Response")

at 17. Plaintiffs assert that their argument is distinguishable because Plaintiffs are asserting a "right not to be forced to associate with CSEA against their will." *Id.* at 18.

However, *Knight*'s holding is broader than Plaintiffs suggest. The Supreme Court's language indicates that it broadly considered whether exclusive representation by MCCFA infringed the plaintiffs' associational rights. *Knight*, 465 U.S. at 288. The Court explicitly stated that Minnesota had not restrained the plaintiffs' "freedom to associate or not to associate with whom they please," *id.* at 288, and that the plaintiffs were "free to form whatever advocacy groups they like," *id.* at 289. Plaintiffs focus on the Court's framing of the issue as whether "Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" infringed the plaintiffs' associational rights. Resp. at 17 (citing *Knight*, 465 U.S. at 288). However, the fact that in the context of the PELRA the exclusive representative participates in the "meet and confer" sessions does not mean that the Court's consideration of the impact on the plaintiffs' associational rights was so limited. Two other district courts have similarly read *Knight* as addressing whether exclusive representation by a union infringes non-members' associational rights. *See D'Agostino v. Patrick*, No. 14-cv-11866, 2015 WL 1137893, at *3-5 (D. Mass. Mar. 13, 2015); *Bierman v. Dayton*, No. 14-3021, 2014 WL 5438505, at *7 (D. Minn. Oct. 22, 2014).

2. *Harris v. Quinn*

Plaintiffs further claim that *Abood* is the controlling decision on the constitutionality of exclusive representation, and that the Supreme Court's recent decision in *Harris v. Quinn*, 134 S. Ct. 2618, held that *Abood* does not extend to individuals who are not

"full-fledged state employees," *id.* at 2638, such as Plaintiffs. Resp. at 19. The Court does not agree with Plaintiffs' reading of *Harris.*

Harris concerned the collection of fair share fees to support union activities from personal assistants who were not members of the elected union. 134 S. Ct. at 2626. The Supreme Court declined to extend *Abood* to individuals who were not full-fledged public employees, and applying "exacting First Amendment scrutiny," found the collection of fair share fees unconstitutional. *Id.* at 2639, 2644. The Supreme Court, however, carefully specified that it was not addressing the exclusive representation of the personal assistants by the elected union. *Id.* at 2640. The *Harris* plaintiffs did "not challenge the authority of the [union] to serve as the exclusive representative of all the personal assistants in bargaining with the State." *Id.* at 2640. Furthermore, the Supreme Court noted 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*., an assumption the Court found that the *Abood* Court had made, *id.* at 2634.

Thus, the Court finds that it does not follow from *Harris* that a union's exclusive representation of partial public employees would therefore infringe those employees' associational rights. *See D'Agostino*, 2015 WL 1137893, at *5; *Bierman*, 2014 WL 5438505, at *9.

B. Plaintiffs' Arguments

Considered on their own terms, Plaintiffs' arguments fail to state a viable claim under the First Amendment.

1. *Mandatory Agency Relationship*

Plaintiffs first argue that by designating CSEA as the exclusive representative of child care providers, New York is necessarily compelling Plaintiffs to associate with CSEA. Resp. at 8. New York, Plaintiffs claim, has made CSEA Plaintiffs' mandatory agent. *Id.* at 9.

Although vague, Plaintiffs appear to claim that the mere fact of CSEA's exclusive representation of child care providers unconstitutionally associates them with CSEA. *See id.* at 16. However, that argument is clearly foreclosed under *Knight.* 465 U.S. at 288-89. New York does not compel Plaintiffs to join CSEA, or to take any action. Plaintiffs are entitled to associate with whomever they choose and can express whatever views they choose. Moreover, Plaintiffs are entitled "to meet or correspond with any state agency with regard to any matter of relevance." N.Y. LABOR LAW § 695-g(5).

Alternatively, Plaintiffs might be understood to argue that Plaintiffs are associated with CSEA insofar as it is their agent and therefore owes Plaintiffs a duty of impartiality. *See* Resp. at 8-9. A union is obligated to "fairly and equitably" represent union and non-union employees in the relevant unit. *Abood*, 431 U.S. at 221. To the extent that Plaintiffs rely on CSEA's role as their agent, that argument has been rejected by both the *D'Agostino* and *Bierman* courts. *D'Agostino*, 2015 WL 1137893, at *6; *Bierman*, 2014 WL 5438505, at *8. The duty of impartiality only imposes obligations on CSEA. As the *Bierman* court stated,

> Plaintiffs owe no corresponding duty to [CSEA]. Plaintiffs cite no authority for the

> proposition that the imposition of a legal duty on an entity impermissibly burdens the rights of the *beneficiaries* of that duty. In any event, the duty of fair representation protects bargaining members' rights not to associate with the union. It bars the union from discriminating against them when bargaining and administering a collective bargaining agreement.

Bierman, 2014 WL 5438505, at *8 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part)). The Court now adopts the reasoning expressed in *Bierman* in rejecting this argument.

Plaintiffs also rely on *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), for the proposition that a union's exclusive representation can infringe associational rights. Resp. at 9. However, Plaintiffs' reliance is misplaced; the *Mulhall* court only found that exclusive representation by a union implicated the plaintiff's associational rights for the purposes of standing under the Labor Management Relations Act. *Mulhall*, 618 F.3d at 1286-88; *see also D'Agostino*, 2015 WL 1137893, at *7. *Mulhall's* holding that exclusive representation by a union may constitute an injury-in-fact for the purposes of standing is insufficient to support Plaintiffs' claim.

2. *CSEA's Expressive Activities*

Plaintiffs also argue that they are necessarily associated with CSEA's "petitioning, contracts, and policy positions." Resp. at 10-11. Plaintiffs assert that the nature of an agency relationship is that the represented parties are affiliated with the positions adopted by the representative. *Id.* Plaintiffs argue

that this violates the principle that "the government cannot compel citizens to affiliate themselves with messages with which they disagree." *Id.* at 10 (citing *Hurley*, 515 U.S. 557; *Branti v. Finkel*, 445 U.S. 507 (1980); *Wooley v. Maynard*, 430 U.S. 705 (1975)).

The Court finds that Plaintiffs are not unconstitutionally affiliated with CSEA's expressive activities. The public's perception is relevant in forced association cases. *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 459 (2008) (Roberts, C.J., concurring). In *Hurley*, for example, the Supreme Court held that the organizers of a parade could not be compelled to include a group they wished to exclude. 515 U.S. at 566. Inclusion of the group, the Court stated, "would likely be perceived as having resulted from [the organizers'] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575; *see also Dale*, 530 U.S. at 653 (holding that forced inclusion of gay scoutmaster in Boy Scouts would "send a message . . . [to] the world" that the Boy Scouts approved of homosexual conduct). CSEA's representation of Plaintiffs would not be likely to create the perception that Plaintiffs endorse CSEA's expressive activities. *D'Agostino*, 2015 WL 1137893, at *7-8. A reasonable person would not perceive that the activities of CSEA, as a majority-elected representative, N.Y. LABOR LAW § 695-d(1), are identical with the views of the providers it represents.

Plaintiffs attempt to avoid the force of the Supreme Court's forced association decisions by arguing that "[i]rrespective of whether [Plaintiffs] agree with CSEA's petitioning and policy positions, the dispositive fact is that all providers have been *associated* with CSEA's petitioning and policy positions." Resp. at

11. However, a group cannot make a forced association claim "simply by asserting that mere association would impair its message." *Rumsfeld v. Forum for Academic & Inst. Rights*, *Inc*., 547 U.S. 47, 69 (2006).

Plaintiffs' attempts to characterize CSEA's representation as infringing their right to "lobby" or "petition" the government are also unavailing. *See* Resp. at 12-15. Again, CSEA's representation does not compel or restrict Plaintiffs' actions, nor would Plaintiffs be perceived to be affiliated with CSEA's positions.

3. *Summary*

For the foregoing reasons, Plaintiffs' arguments that CSEA's exclusive representation violates their First Amendment associational rights fail to state a legally cognizable claim.

C. Monetary Damages Against State

The Complaint, in part, seeks monetary damages. Compl. at 12. State Defendants move to dismiss the Complaint insofar as it seeks monetary relief against them. State Mem. at 2. The Eleventh Amendment bars claims for monetary relief against states, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), and accordingly, to the extent the Complaint seeks monetary relief against State Defendants, those claims are dismissed with prejudice.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendant CSEA's Motion (Dkt. No. 16) to dismiss Plaintiffs' first cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED; and it is further

ORDERED, that State Defendants' Motion (Dkt. No. 17) to dismiss Plaintiffs' first cause of action and any claims for monetary damages pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED; and it is further

ORDERED, that any claims for monetary damages against State Defendants are DISMISSED with prejudice; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: April 30, 2015
Albany, NY

/s/ Lawrence E. Kahn
Lawrence E. Kahn
U.S. District Judge

APPENDIX D

NEW YORK LABOR LAW ARTICLE 19-C REPRESENTATION OF CHILD CARE PROVIDERS

N.Y. Lab. Law Art. 19-C, § 695-a. Statement of public policy; findings

The legislature declares that it is the public policy of the state and the purpose of this act to create a framework for child care providers to secure representation to help improve the environment in which they work.

The legislature hereby finds child care providers perform an essential service for working parents and guardians in this state by creating a safe, educational and enjoyable home-like environment for their children. Many of New York's children spend a significant part of their crucial early years of development under the supervision of child care providers. It is in the best interest of New York state to maintain a child care delivery system that fosters quality child care options and compensation, and benefits and working conditions for child care providers commensurate with the value of the work they perform.

Accordingly child care providers are hereby given the option to organize themselves and select representatives for the purpose of discussing with the state the conditions of their employment, the stability of funding and operations of child care programs and the expansion of quality child care.

N.Y. Lab. Law Art. 19-C, § 695-b. Definitions

As used in this article, "child care provider" shall mean:

1. An operator of a group family day care home as defined in paragraph (d) of subdivision one of section three hundred ninety of the social services law or

2. A family day care home as defined in paragraph (c) of subdivision one of section three hundred ninety of the social services law or

3. An individual providing child care in reference to one or more children who are receiving child care assistance under title five-c of article six of the social services law under circumstances where the individual is not required to be licensed or registered under section three hundred ninety of the social services law or to be licensed under the administrative code of the city of New York.

N.Y. Lab. Law Art. 19-C, § 695-c. Representation Units

For purposes of this article only, New York's child care providers shall be divided into four representation units as follows:

1. All child care providers in New York city who are paid from funds administered by New York city pursuant to section four hundred ten-u of the social services law.

2. All registered or licensed child care providers in New York city who are not paid from funds administered by New York city pursuant to section four hundred ten-u of the social services law.

3. All registered or licensed child care providers outside the city of New York and

4. All child care providers outside New York city who provide child care in a residence to one or more children who are receiving child care assistance under title 5-c of article six of the social services law under circumstances where the individual is not required to be licensed or registered under section three hundred ninety of the social services law.

N.Y. Lab. Law Art. 19-C, § 695-d. Procedure for recognition

For the purpose of this article, New York state shall recognize as the representative of the child care providers in any unit set forth in section six hundred ninety-five-c of this article each representative as is designated by a majority of the providers in the unit pursuant to the following procedure: A perspective [FN1] representative may demonstrate majority designation upon submission of authorization cards, approved within twelve months of this submission, by the majority of providers in the unit, to the state employment relations board (SERB) or any successor agency for the purpose of review. The SERB and/or its designee shall review the cards and if it determines that the cards constitute at least fifty percent plus one of the providers in the unit at issue, then the SERB shall certify the party making application as the designated representative of the unit. If the SERB determines that cards submitted constitute at least thirty percent of providers in the unit at issue, but not more than fifty percent, it shall conduct an election in a manner directed by the SERB and consistent with its standard election procedure to determine if a majority of members designate the prospective representative.

2. Any relevant state agency, including the office of children and family services shall provide the SERB with information necessary to determine the size of

the units and the identities of members of said unit subject to any limitations or dissemination of information as the agency believes necessary to protect confidentiality, or as otherwise required by law.

N.Y. Lab. Law Art. 19-C, § 695-e. Challenges.

Any party seeking to challenge the status of a unit representative may submit information to the SERB. The SERB shall determine whether the information provides a reasonable basis to constitute that a majority of the unit wishes to be represented by a different representative or a majority of the unit decides no representation. If the SERB so determines, it shall adopt a process it believes warranted to ascertain the majority's choice of representation, including by the submission of authorization cards or election, unless such process has been undertaken in the previous two years.

N.Y. Lab. Law Art. 19-C, § 695-f. Application of this article

1. The office of children and family services shall meet with the designated representative of those units of child care providers, either jointly or separately, for the purpose of entering into a written agreement to the extent feasible. The agreement may address the stability, funding and operation of child care programs, expansion of quality child care, improvement of working conditions, salaries and benefits and payment for child care providers. If issues under discussion require the participation and/or approval of other state agencies, those agencies shall participate in the discussions. Nothing herein shall require that an agreement be reached on any matters described above.

2. In the event an agreement is reached, it shall be embodied in writing between the office of children and

family services and other affected agencies and the designated representative. The agreement shall be binding on the state, contingent upon any regulatory or legislative action that may be required.

3. If legislative or regulatory action or appropriation of funds is required the parties will jointly seek such action.

N.Y. Lab. Law Art. 19-C, § 695-g. Legal effect

Nothing herein shall:

1. Permit child care providers collectively the right to engage in a strike or to take work action to secure any right or privilege from the state or its agencies;

2. Render a child care provider a state officer or employee or in any way imply an employee-employer relationship with the state or its subdivisions, including but not limited to a public retirement system, public health insurance program, unemployment insurance, workers compensation, disability coverage, New York civil service law or indemnification under the public officers law;

3. Alter any current regulations, policies or procedures for health, safety, discipline inspection or enforcement applicable to child care providers or programs unless agreed to and enacted;

4. Interfere with the existing relationship between consumers and child care providers including existing rights of parents or guardians to change or terminate a provider's service;

5. Interfere with any ability of child care providers or child care provider representatives to meet or correspond with any state agency with regard to any matter of relevance; and

6. Create any contractual right or obligations.

* * *

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.