



August 10, 2018

Ms. Seema Verma  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health & Human Services  
Attn: CMS-2413-P  
P.O. Box 8016  
Baltimore, MD 21244-8016

Via: <http://www.regulations.gov>

Re: Pacific Legal Foundation's Comments on Proposed Rule To  
Remove the Dues Skimming Exception at 42 C.F.R. § 447.10(g)(4)

Dear Administrator Verma:

Pacific Legal Foundation (PLF) submits these comments on the Centers for Medicare & Medicaid Services' (CMS) proposed amendment to 42 C.F.R. § 447.10(g)(4). The proposed amendment would remove regulatory text that currently allows payments for Medicaid services to be involuntarily redirected from individual healthcare providers to third parties.<sup>1</sup> The practice of redirecting Medicaid payments to third parties is commonly called “dues skimming,” because the vast majority of the payments made under this exception fund union dues—often without providers' affirmative consent.<sup>2</sup> The regulatory exception at Section 447.10(g)(4) (Dues Skimming Exception) must be removed, as CMS proposes in the rule subject to comment, because the current exception violates the First Amendment and the Social Security Act.

PLF is a nonprofit public interest law foundation that litigates in defense of individual rights and the First Amendment in courts nationwide. PLF regularly participates in the administrative process through commenting on proposed rules, regulations, and directives. PLF recently participated as *amicus curiae* in *Janus v. AFSCME Council 31*<sup>3</sup>, arguing that diverting part of an employee's pay to a union without the employee's

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<sup>1</sup> 83 Fed. Reg. 32,252 (July 12, 2018).

<sup>2</sup> State Policy Network, “Dues Skimming FAQs,” <https://spn.org/dues-skimming-faqs/>

<sup>3</sup> 138 S. Ct. 2448 (2018).

affirmative consent seriously impinges on the employee's freedom of expression.<sup>4</sup> The Supreme Court agreed, holding in a landmark decision that “[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.”<sup>5</sup>

The Dues Skimming Exception at Section 447.10(g)(4) deducts union dues from Medicaid payments without requiring affirmative consent from individual providers. As such, the Exception directly conflicts with the Supreme Court's holding in *Janus*. The Exception also violates Section 1902(a)(32) of the Social Security Act, which Section 447.10(g)(4) purports to implement.

**I. The Dues Skimming Exception Violates the Social Security Act and Providers' First Amendment Rights**

**A. The Dues Skimming Exception is Contrary to Social Security Act**

Section 1902(a)(32) of the Social Security Act requires that payments to home healthcare providers be made directly to the providers themselves (or the person receiving the care), with four specific statutory exceptions.<sup>6</sup> This prohibition on redirecting payments is known as the vendor payment principle, and it ensures that providers receive prompt payment “thereby eliminating disincentives in providing such services based on the fear of nonpayment.”<sup>7</sup>

The only statutory exceptions to the prohibition on redirecting payments are for: (1) payments to a practitioner's employer or the facility where care was rendered; (2) assignment of payments to a government agency, by a court order, or to a billing agent; (3) temporary services provided by one physician to the patients of another physician;

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<sup>4</sup> Brief for Pacific Legal Foundation, et al., as Amici Curiae Supporting Petitioner, *Janus v. AFSCME Local 31*, 138 S. Ct. 2448 (2018) (No. 16-1466).

<sup>5</sup> 138 S. Ct. at 2486 (emphasis added).

<sup>6</sup> 42 U.S.C. § 1396a(a)(32).

<sup>7</sup> *Greenstein by Horowitz v. Bane*, 833 F. Supp. 1054, 1060 (S.D.N.Y. 1993).

and (4) payment to manufacturers for certain childhood vaccines.<sup>8</sup> Prior to 2012, the regulatory exceptions tracked these four statutory exceptions.

In 2012, CMS proposed a new regulatory exception, not authorized by the statute.<sup>9</sup> That regulatory exception—the Dues Skimming Exception—is the subject of the current rulemaking. The Dues Skimming Exception permits payments to be made to third parties “on behalf of the individual practitioner for benefits such as health insurance, skills training, and other benefits customary for employees.”<sup>10</sup> While payments for union dues may not seem to qualify as “health insurance, skills training, and other customary employee benefits,” the regulatory exception’s overly broad language leaves it open to just such an interpretation. As discussed below, this expansive language has been widely abused by state governments to benefit their union allies.

At the time that CMS proposed the Dues Skimming Exception, it acknowledged that the proposed exception to the general prohibition on redirecting payments lacked any statutory foundation. CMS forthrightly acknowledged that Congress had never even considered such an exception: “we believe the circumstances at issue were not contemplated under section 1902(a)(32) of the Act.”<sup>11</sup> Relying on legislative history, CMS interpreted the “statutory silence in addressing this circumstance” as authorizing CMS to add a new exception to the statute’s carefully crafted list of four exceptions.<sup>12</sup>

This was a serious error. An agency cannot rewrite a statute under the guise of interpretation. Ordinarily, an agency’s regulations purporting to interpret the statute it administers are subject to judicial deference.<sup>13</sup> But when a regulatory interpretation is “inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement,” courts do not to defer to the agency’s interpretation.<sup>14</sup> Indeed,

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<sup>8</sup> 42 U.S.C. § 1396a(a)(32)(A)–(D).

<sup>9</sup> 77 Fed. Reg. 26,361, 26,381 (May 3, 2012).

<sup>10</sup> 79 Fed. Reg. 2947, 2949 (January 16, 2014).

<sup>11</sup> 77 Fed. Reg. at 26,382.

<sup>12</sup> *Id.*

<sup>13</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

<sup>14</sup> *See, e.g., Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *see also New York City Health and Hosp. Corp. v. Perales*, 954 F.2d 854, 858 (2nd Cir. 1992) (New York regulation limiting Medicare Part B cost-sharing coverage for patients who were dual eligible violated both the Medicare and Medicaid statutes.).

since courts are the authoritative voice on issues of statutory construction, they “must reject administrative constructions which are contrary to clear congressional intent.”<sup>15</sup>

The Dues Skimming Exception obviously falls into that category of regulations not entitled to deference because CMS admitted at the outset that Congress did not contemplate the Exception and did not add it to the statute’s detailed list of four exceptions to the vendor payment principle.<sup>16</sup> Moreover, the purpose of the vendor payment principle and the statute’s prohibition on redirecting payments is to ensure that *providers* receive prompt and full payment to encourage their participation in Medicaid.<sup>17</sup> The Dues Skimming Exception defeats that purpose by involuntarily directing payments away from providers and to unions.

In this proposed rulemaking to eliminate the Dues Skimming Exception, CMS acknowledged that Section 1902(a)(32) does not authorize the agency to create new exceptions. CMS is correct that the language of the regulatory exception at Section 447.10(g)(4) is “insufficiently linked” to the enumerated exceptions in the Act.<sup>18</sup> Indeed, there is no link between the existing regulatory exception and the statute. The Dues Skimming Exception violates Section 1902(a)(32) of the Social Security Act and must be rescinded.

B. Unions Have Taken Advantage of the Overbroad  
Dues Skimming Exception for Their Own Benefit

Even if Section 1902(a)(32) of the Social Security Act allowed CMS to invent new exceptions to the general prohibition on redirecting payments, the Dues Skimming Exception’s overly broad language is ripe for abuse. Indeed, the broad language of the Dues Skimming Exception for “health insurance, skills training, and other benefits customary for employees” has allowed millions of public dollars to be shifted from healthcare to union political activities.<sup>19</sup> The Social Security Act was meant to provide

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<sup>15</sup> *Chevron*, 467 U.S. at 843 n. 9.

<sup>16</sup> See *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (“The question . . . is not what Congress ‘would have wanted,’ but what Congress enacted . . .”).

<sup>17</sup> *Greenstein*, 833 F. Supp. at 1060.

<sup>18</sup> 83 Fed. Reg. at 32,253.

<sup>19</sup> Nelsen, Maxford. “Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity” at 3,

support for the most vulnerable among us; it was not intended to serve as a funding tool for partisan political activities.

Eleven states have taken advantage of the Dues Skimming Exception's overly broad language to fill the coffers of public sector unions like the SEIU and AFSCME. Despite the fact that many home healthcare and family childcare providers are employed by the family members they serve, many states classify these providers as public workers for collective bargaining purposes.<sup>20</sup> From California to Vermont, state governments use the Dues Skimming Exception to skim an estimated \$150 million from home healthcare providers' and \$50 million from family childcare providers' Medicaid paychecks each year.<sup>21</sup> The resulting \$200 million goes directly to the unions.<sup>22</sup>

### C. Medicaid Dues Skimming Schemes Are Unconstitutional Under *Janus*

In *Janus*, the Supreme Court quoted Thomas Jefferson's powerful exhortation that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."<sup>23</sup> The Court recognized that compelling individuals to subsidize the speech of private organizations like unions "seriously impinges" their First Amendment rights and "cannot be casually allowed."<sup>24</sup>

The *Janus* Court took a firm stance against compelled union subsidies, holding not only that forced union payments are unconstitutional, but that clear and affirmative consent is required before any money is taken from employees.<sup>25</sup> Providers affected by Medicaid dues skimming, however, gave no such clear and affirmative consent to having their Medicaid payments taken by the state and turned over to a union. Instead, instances of state governments and unions working together to take money from

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<https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf>

<sup>20</sup> See *Harris v. Quinn*, 134 S. Ct. 2618, 2624 (2014) ("While customers exercise predominant control over their employment relationship with personal assistants, the State, subsidized by the federal Medicaid program, pays the personal assistants' salaries.").

<sup>21</sup> State Policy Network, "Dues Skimming FAQs," <https://spn.org/dues-skimming-faqs/>

<sup>22</sup> *Id.*

<sup>23</sup> *Janus*, 138 S. Ct. at 2464 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis and footnote omitted)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2486.

providers are still “widespread and well-documented,” including deductions made without providers’ knowledge, requiring providers to sit through captive audience union sales pitches, coercing providers into signing nearly irrevocable dues deduction authorizations, or imposing steep hurdles to resigning union membership.<sup>26</sup>

Since the Supreme Court’s 2014 ruling in *Harris v. Quinn*, Medicaid-funded home healthcare providers have theoretically enjoyed freedom from paying coerced union representation fees.<sup>27</sup> Six months prior to that ruling, however, CMS enacted the Dues Skimming Exception, which softened the blow later dealt by *Harris* by authorizing what *Harris* forbade. Dues skimming, a practice that has existed since at least 1992<sup>28</sup>, gained new political cover under the 2014 regulatory exception. By unequivocally barring any payment to unions “unless the employee affirmatively consents to pay,” *Janus* finally puts an end to the practice of dues skimming.<sup>29</sup>

As putative public employees, home healthcare and family childcare providers have a clear and unequivocal constitutional right to refuse to subsidize the unions’ speech and other activities. Their right to refuse to pay part of their hard-earned money to a union should have been clear after *Harris*, and is expressly declared in *Janus*. Dues skimming under the auspices of Section 447.10(g)(4) is unconstitutional and must end.

## II. CMS’ Proposed Rule Cures the Statutory and Constitutional Violations

### A. Removing the Dues Skimming Exception in Its Entirety Will Protect Providers’ Rights

CMS is correct that the Dues Skimming Exception codified at 42 C.F.R. § 447.10(g)(4) should be removed in its entirety. The overly broad language of subsection (4) makes it

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<sup>26</sup> State Policy Network, *supra*, at <https://spn.org/dues-skimming-faqs/>; Nelsen, *supra*, at 4.

<sup>27</sup> 134 S. Ct. 2618 (2014).

<sup>28</sup> Nelsen, Maxford. “Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity” at 4, <https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf>

<sup>29</sup> 138 S. Ct. at 2486 (emphasis added).

susceptible to abuse—an easily foreseeable hazard that has deprived caregivers and their patients of millions of dollars.

Unlike subsection (4), subsections (1) through (3) of Section 447.10(g) are not under scrutiny in the Proposed Rule. Those sections were enacted prior to subsection (4) and fit neatly within the exceptions enumerated in the Social Security Act.<sup>30</sup> If CMS wants a way to “provide further clarification on the types of payment arrangements that would be permissible assignments of Medicaid payments,”<sup>31</sup> it should specifically list which additional assignments fall within the confines of the Act. There is no need for a “catch-all” provision like subsection (4), and any attempt to amend or reform subsection (4) only runs the risk of further abuse.

B. Full removal of the Dues Skimming Exception  
Does Not Prevent Voluntary Union Dues Payments

As many have noted after *Janus*, nothing in the Supreme Court’s decision prevents employees from voluntarily joining a union and voluntarily paying dues to that union.<sup>32</sup> Similarly, fully striking the Dues Skimming Exception would do nothing to prevent home healthcare and family daycare providers from voluntarily paying dues to a union, or voluntarily contributing to “benefits such as health insurance, skills training, and other benefits customary for employees” as currently contemplated by Section 447.10(g)(4). Ending dues skimming simply means that state governments may no longer deduct money from providers’ Medicaid checks before those checks reach the providers and without the providers’ affirmative consent. Providers are still free to send dues payments to their union, their health insurer, their retirement account, or a training program—without the state acting as the automatic bill collector.

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<sup>30</sup> See 42 U.S.C. § 1396a(a)(32).

<sup>31</sup> 83 Fed. Reg. at 32,253.

<sup>32</sup> See, e.g., Perkins, Olivera, The Plain Dealer, “Supreme Court Janus ruling may not lead to fewer union members, both sides say,” [https://www.cleveland.com/business/index.ssf/2018/06/supreme\\_court\\_janus\\_ruling\\_may.html](https://www.cleveland.com/business/index.ssf/2018/06/supreme_court_janus_ruling_may.html); Miller, Brian, Forbes, “Unpacking the Janus Decision,” <https://www.forbes.com/sites/briankmiller/2018/06/27/unpacking-the-janus-decision/#9aa442f41a42>; Kovacs, Trey, U.S. News & World Report, “Don’t Fear Worker Freedom,” <https://www.usnews.com/opinion/economic-intelligence/articles/2018-02-26/union-wont-be-doomed-by-worker-freedom-in-janus-case>

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### III. CONCLUSION

The proposed rule removing the Dues Skimming Exception at Section 447.10(g)(4) is a welcome and necessary step toward safeguarding the freedom of expression of all home healthcare and family childcare providers and should be enacted without delay.

Sincerely,

A handwritten signature in blue ink, appearing to read "JMM", with a long horizontal flourish extending to the right.

James M. Manley  
ATTORNEY

A handwritten signature in blue ink, appearing to read "Erin Wilcox", written in a cursive style.

Erin Wilcox  
ATTORNEY