

# Washington University Journal of Law & Policy

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Volume 62 *Celebrating 150 Years of Women at WashULaw*

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2020

## The Conservative Challenge to Caring for Compensated Caregivers

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### Recommended Citation

Peggie R. Smith, *The Conservative Challenge to Caring for Compensated Caregivers*, 62 WASH. U. J. L. & POL'Y 131 (2020),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol62/iss1/15](https://openscholarship.wustl.edu/law_journal_law_policy/vol62/iss1/15)

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## THE CONSERVATIVE CHALLENGE TO CARING FOR COMPENSATED CAREGIVERS

Peggie R. Smith\*

### INTRODUCTION

Growing numbers of households are turning to home care workers to help provide critical care for aging and disabled family members. However, the Supreme Court's 2014 decision in *Harris v. Quinn*<sup>1</sup> and more recent developments hold troubling implications for the provision of quality home care at a time when the demand for such care is at an all-time high.

*Harris* involved an Illinois law that governed the rights of state-paid workers who provided home care services to disabled and elderly individuals to join a union and engage in collective bargaining. In a 5-4 decision, the Court held that the state could not require workers who opted not to join the union to pay fees to cover the costs of union activities on their behalf. *Harris*, and the Court's later decision in *Janus v. AFCSME*,<sup>2</sup> opened the door for a full-fledged attack against state-paid home care workers as part of a larger conservative campaign to gut public sector unions.<sup>3</sup> The most recent manifestation of that onslaught occurred in 2019 when the Centers for Medicare & Medicaid Services (*CMS*) adopted a rule that bars these workers from deducting union dues from their paychecks.<sup>4</sup>

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1. 573 U.S. 616 (2014).

2. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

3. See, e.g., Juliana Feliciano Reyes, *Anti-Union Groups Are Targeting Home-Care Workers Nationally, But Labor in Pa. Has Already Scored a Win*, PHILA. INQUIRER (June 4, 2019), <https://www.inquirer.com/news/home-care-workers-union-dues-pennsylvania-20190604.html> [<https://perma.cc/E5L6-33MJ>] (commenting that “[c]orporate-backed groups that seek to weaken unions through legal challenges and public policy have set their sights on home-care workers”).

4. See *infra* notes 47-77 and accompanying text; see also Shefali Luthra, *Medicaid Officials Target Home Health Aides' Union Dues*, KAISER HEALTH NEWS (Aug. 13, 2018), <https://khn.org/news/medicaid-officials-target-home-health-aides-union-dues/> [<https://perma.cc/LM7K-CHA4>].

As this essay discusses, these developments threaten to destabilize the unionization that has helped transform home care into a viable job for many workers and to undermine the quality of care that they provide to clients. This essay begins by briefly outlining some of the supply and demand concerns in the home care industry, and the crucial role that organized labor has played in addressing these issues. Afterwards, it discusses the conservative attack on state-paid home care workers, examining *Harris* and the CMS rule change. The essay closes by exploring the value of the proposed federal domestic workers bill of rights and recommending proactive measures that states should pursue to help fortify the home care industry.

#### I. THE HOME CARE CRISIS AND THE POWER OF ORGANIZED LABOR

Go online, turn on the television, or pick up a newspaper and you are likely to find a discussion that underscores society's preoccupation with the growing number of Americans who need home care, especially aging baby boomers,<sup>5</sup> and the shortage of available care workers. This "care crisis" is detrimental to low-income and working-class families, as well as career-oriented professionals.<sup>6</sup> Access to adequate caregiving is vital not only because it helps families satisfy their household needs but also because it facilitates the participation of family members in economic and other activities outside the household. Yet, despite the dramatic demand for home care, the adverse job conditions that prevail in the industry make it difficult to attract and retain workers.<sup>7</sup> As a group, home care workers are

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5. See, e.g., Alexia Campbell, *Home Health Aides Care for the Elderly. Who Will Care for Them?*, VOX (Aug. 21, 2019), <https://www.vox.com/the-highlight/2019/8/21/20694768/home-health-aides-elder-care> [<https://perma.cc/J8YT-EU2Q>] (noting that the number of adults over the age of eighty-five—currently 6.3 million—"is expected to more than triple to 19 million by 2050").

6. See, e.g., *id.*; Kourtney Lipelt, *Solving the Home Care Crisis at the State Level*, HOME HEALTH CARE NEWS (Jan. 18, 2017), <https://homehealthcarenews.com/2017/01/solving-the-home-care-crisis-at-the-state-level/> [<https://perma.cc/AV8C-QJD8>]; Jay Newton Small, *A Growing American Crisis: Who Will Care for the Baby Boomers?*, TIME (Feb. 15, 2019), <https://time.com/5529152/elderly-caregiving-baby-boomers-unpaid-caregivers-crisis/> [<https://perma.cc/2YQW-CT38>]; Bob Woods, *America's \$103 Billion Home Health-care System is in Crisis as Worker Shortage Worsens*, CNBC (Apr. 9, 2019), <https://www.cnbc.com/2019/04/09/us-home-healthcare-system-is-in-crisis-as-worker-shortages-worsen.html> [<https://perma.cc/RD83-532K>].

7. See Campbell, *supra* note 5 ("Home care workers are among those who are hard to find. Not everyone is willing to deal with difficult patients for low pay and no benefits when so many other jobs are available").

disproportionately poor women of color who are often immigrants, and who rarely receive job-related benefits such as health insurance, sick leave, vacation time, or retirement plans.<sup>8</sup> They are also routinely subject to discrimination,<sup>9</sup> required to work excessively long hours,<sup>10</sup> and exposed to workplace health and safety hazards.<sup>11</sup> In addition, these workers are especially vulnerable to exploitative working conditions because various labor and employment laws deny them protections routinely extended to other workers.

This state of affairs poses serious consequences for workers as well as for clients and families who depend on their services. Low wages, few benefits, and demanding job conditions greatly exacerbate the shortage of workers and jeopardize the quality of care provided to elderly and disabled

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8. See generally SARAH LEBERSTEIN, IRENE TUNG & CAITLIN CONNOLLY, NAT'L EMP'T LAW PROJECT, UPHOLDING LABOR STANDARDS IN HOME CARE 4 (Dec. 2015), <https://www.nelp.org/wp-content/uploads/Report-Upholding-Labor-Standards-Home-Care-Employer-Accountability.pdf> [<https://perma.cc/XCG7-XBP4>].

9. Press Release, U.S. Equal Emp't Opportunity Comm'n, Alameda In-Home Senior Care Provider Settles EEOC Harassment Case (Nov. 11, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/11-19-18.cfm> [<https://perma.cc/S835-Y3TH>] (referencing the comment of an EEOC official that "[i]n-home caregivers can be particularly vulnerable to harassment, and one of the EEOC's top priorities is to defend vulnerable workers against discrimination"); see also Sarah Jaffe, *Who's Protecting Home-Care Workers in the #MeToo Era?*, DAME (April 3, 2018), <https://www.damemagazine.com/2018/04/03/whos-protecting-home-care-workers-in-the-metoo-era/> [<https://perma.cc/XV9A-DDQB>] (discussing the problem of sexual harassment among home care and other domestic workers).

10. See, e.g., Paula Katinas, *Home Care Attendants Demand Shorter Work Hours*, BROOKLYN REPORTER (Sept. 10, 2019), <https://brooklynreporter.com/2019/09/home-care-attendants-demand-shorter-work-hours> [<https://perma.cc/M3GC-2JB8>] (highlighting the problem of long hours among home care workers); PAUL K. SONN, CATHERINE K. RUCKELSHAUS & SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS 19 (August 2011) (discussing the problem of long hours in home care and how such hours can compromise the quality of care), <https://s27147.pedn.co/wp-content/uploads/2015/03/FairPayforHomeCareWorkers.pdf> [<https://perma.cc/JB32-H4MF>].

11. See TRACI GALINSKY ET AL., NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, OCCUPATIONAL HAZARDS IN HOME HEALTHCARE (2010) (reporting on concerns of health and safety for home care workers), <https://www.cdc.gov/niosh/docs/2010-125/pdfs/2010-125.pdf> [<https://perma.cc/WB7J-KL9R>]; Russell Suarez et al., *Frequency and Risk of Occupational Health and Safety Hazards for Home Healthcare Workers*, 29 HOME HEALTHCARE MGMT. & PRAC. 207, 207 (2017) (commenting that home care workers face multiple hazards with injury rates being more than double the national average); see also PEGGIE R. SMITH, *Ageing and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1837, 1871-1900 (2007) [hereinafter Smith, *Ageing and Caring*] (discussing application of the Occupational Safety and Health Act for the health and safety of home care workers).

persons.<sup>12</sup> Consider that in 2017 the median caregiver *turnover* rate across the industry was 66.7 percent.<sup>13</sup> For clients, the costs associated with this statistic can be devastating. When workers quit, often unexpectedly, clients must adjust to new workers and may experience disruptions to their care that can lead to hospitalization. For other clients, turnover can culminate in their relocation to an institutional setting such as a nursing home.<sup>14</sup>

Against this backdrop, organized labor has made impressive gains in some parts of the country through the unionization of state-paid home care workers (often referred to as “personal care aides” or “personal assistants”).<sup>15</sup> Beginning in the 1990s, unions joined forces with these workers, disability activists, and consumer advocacy groups to push states to adopt measures that would give workers the right to unionize. Today, at least nine states allow these workers to unionize, including California, Connecticut, Illinois, Massachusetts, Minnesota, Pennsylvania, Oregon, Vermont, and Washington.<sup>16</sup> The organization of state-paid home care workers has netted the labor movement its most significant membership

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12. See PHI, STATE OF CARE: MINNESOTA’S HOME CARE LANDSCAPE 14 (2017), [https://phinational.org/wp-content/uploads/2017/07/phi\\_minnesota\\_report\\_web3.pdf](https://phinational.org/wp-content/uploads/2017/07/phi_minnesota_report_web3.pdf) [<https://perma.cc/4KAB-4Z8R>] (observing that “[t]he quality of home care jobs has a significant impact on turnover rates and quality of care”).

13. Amy Baxter, *Median Home Care Turnover Hit 66.7% in 2017*, HOME HEALTH CARE NEWS (Apr. 19, 2018), <https://homehealthcarenews.com/2018/04/median-home-care-turnover-hit-66-7-in-2017/> [<https://perma.cc/PE6K-YZ5W>].

14. See, e.g., NAT’L EMP’T LAW PROJECT, SURVEYING THE HOME CARE WORKFORCE: THEIR CHALLENGES & THE POSITIVE IMPACT OF UNIONIZATION 7 (2017), <https://s27147.pcdn.co/wp-content/uploads/surveying-home-care-workforce.pdf> [<https://perma.cc/4HJH-HZAW>] (noting that “[t]urnover can impact the quality and continuity of care that a consumer receives”); DORIE SEAVEY, THE COST OF FRONTLINE TURNOVER IN LONG-TERM CARE (2004), [https://www.leadingage.org/sites/default/files/Cost\\_Frontline\\_Turnover.pdf](https://www.leadingage.org/sites/default/files/Cost_Frontline_Turnover.pdf) [<https://perma.cc/W7DS-D823>] (examining the causes and consequences of turnover among long-term care workers including home care workers).

15. I use the phrase “state-paid home care workers” to refer to independent workers who are providing publicly-funded care, most often under a consumer-directed Medicaid program. The workers are independent in that they are not employed by a third-party home care agency. Instead, they are considered employees of care recipients as consumers. See *infra* notes 26 and 27, and accompanying text. Less clear is whether and under what circumstances they may qualify as public employees. See *infra* notes 37, 67, and 68, and accompanying text.

16. Brief for Respondent at 51 n.14, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681); see also Peggie R. Smith, *The Publicization of Home-based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1404, n. 65 (2008) [hereinafter, Smith, *Publicization*].

gains since 1937.<sup>17</sup> As commentators have observed, the organization of these workers represents the new face of labor.<sup>18</sup>

Unions have used these gains to improve working conditions in the industry and in turn the quality of care provided. In Illinois, for example, where the state's home care workers elected the Service Employees International Union (SEIU) as their union representative, collective bargaining has yielded training and orientation programs as well as increased compensation and health benefits for workers. It has also prompted the creation of a registry to help match clients with workers, and established a committee of workers and consumers to tackle issues of mutual concern.<sup>19</sup> Similar advancements have occurred in other states where unions are representing the interests of state-paid home care workers.<sup>20</sup> The unionization of these workers has also curbed state spending on long-term care. In Illinois, evidence indicates that the state has saved in excess of \$600 million per year in Medicaid costs as a result of transitioning expenditures away from nursing home care to in-home care.<sup>21</sup>

It is unlikely that these achievements would have occurred without the labor movement promoting the collective interests of workers through organizing. In states that do not allow these workers to unionize, they

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17. Steven Greenhouse, *In Biggest Drive Since 1937, Unions Gain a Victory*, N.Y. TIMES (Feb. 26, 1999), <https://www.nytimes.com/1999/02/26/us/in-biggest-drive-since-1937-union-gains-a-victory.html> [https://perma.cc/G253-J6Y3] (reporting that SEIU's organization of 74,000 home care workers in California in 1999 was the "biggest unionization drive in more than half a century").

18. See, e.g., *id.*; see also Frank Swoboda, *A Healthy Sign for Organized Labor*, WASH. POST (Feb. 27, 1999), <https://www.washingtonpost.com/archive/business/1999/02/27/a-healthy-sign-for-organized-labor/176f3a3c-4aa6-4b0c-aaed-6b9bd8186af0/> [https://perma.cc/5GAD-ZUSE].

19. See Brief for Respondent SEIU Healthcare Illinois & Indiana at 6-7, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681).

20. See generally Ross Eisenbrey, *Harris v. Quinn is About the Right of Home Care Workers to Improve Their Wages*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 20, 2014), <https://www.epi.org/blog/harris-quinn-home-care-workers-improve-wages/> [https://perma.cc/3PEP-222C] (discussing impact of unionization in various states on working conditions in home care and improvements in the quality of care); Smith, *Publicization*, *supra* note 16, at 1413 (discussing impact of unionization in various states on working conditions in home care); see also Don McIntosh, *Homecare Workers Get Retirement, Harassment Policy in New Contract*, NWLABORPRESS (Sept. 18, 2019), <https://nwlaborpress.org/2019/09/homecare-workers-get-retirement-harassment-policy-in-new-contract/> [https://perma.cc/HML9-K4LA] (reporting on SEIU's new collective bargaining agreement with Oregon that provides covered home care workers with pay raises, access to a retirement savings plan, and protections against on-the-job sexual harassment).

21. NAT'L EMP'T LAW PROJECT, *GIVING CAREGIVERS A RAISE 3* (2015), <https://www.nelp.org/wp-content/uploads/2015/03/Giving-Caregivers-A-Raise.pdf> [https://perma.cc/MT76-QU94].

remain largely invisible and ignored, toiling in the private setting of individual homes in isolation from each other, and lacking the ability to make the type of systemic changes necessary to improve their working conditions or the quality of care they deliver. Labor's success owes to its commitment to collective action and, just as importantly, its willingness to leave behind outdated forms of traditional organizing in favor of new strategies that mirror the reality of changing workplace relationships and shifting economic landscapes. In short, labor figured out how to organize these workers, even as popular sentiment deemed them unorganizable,<sup>22</sup> and transformed home care into a decent job with good benefits for many workers.

## II. THE CONSERVATIVE ASSAULT ON STATE-PAID HOME CARE WORKERS

Unfortunately, the phenomenal success of the labor movement with respect to state-paid home care workers has coincided with sustained conservative efforts to weaken the union movement, especially the unionization of public-sector employees.<sup>23</sup> As one commentator observed, "conservatives view unions that represent public sector employees . . . as anathema."<sup>24</sup> While conservative groups have sought to undermine public-sector unionization across the board, the attacks against state-paid home care workers have been especially virulent. The conservative bullseye on home care no doubt stems in part from unions' success in representing these workers, and their potential to represent considerably more workers

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22. See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000). The traditional view of domestic workers as unorganizable has not been limited to the United States. See, e.g., Zhe Jiang & Marek Korczynski, *When the "Unorganizable" Organize: The Collective Mobilization of Migrant Domestic Workers in London*, 69 HUM. REL. 813 (2016) (discussing domestic workers in the United Kingdom).

23. See, e.g., Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 95 WASH. U. L. REV. 1291 (2018); Michael L. Artz, *Beyond Wisconsin: Public Employee Union Rights Amidst State Attacks on Public Sector Collective Bargaining*, 2 AM. U. LAB. & EMP. L.F. 131 (2012); Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407 (2012); Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301 (2011).

24. Thomas Edsall, *Republicans Sure Love to Hate Unions*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/republicans-sure-love-to-hate-unions.html> [<https://perma.cc/945K-TA8H>].

over the coming years, given that home care jobs are among the fastest-growing occupations in the United States.<sup>25</sup> The longstanding legal marginalization of individuals who perform domestic work in the home has also aided and exacerbated the assault. Even as home care workers provide an invaluable service to countless families, the law most often treats them as second-class citizens who are less deserving of the labor and employment protections that so many workers take for granted. The Supreme Court’s 2014 decision in *Harris v. Quinn* vividly captures this point.

The home care workers at issue in *Harris* provided services to individuals who qualified for home care services under a publicly-funded consumer-directed care program. This type of program, which exists in almost every state, focuses on individuals who, because of age and/or disability, need assistance to live in their own homes but cannot afford such assistance.<sup>26</sup> Relying heavily on Medicaid funding, Illinois and other states compensate home care workers in order to aid consumers with personal care and household activities as well as occasional basic medical tasks. The programs are “consumer directed” because they empower individual care recipients, as consumers, to control and direct their own care.<sup>27</sup> Consumers can decide, for example, whom to select as a worker; they can also supervise the work. Although consumers make day-to-day choices concerning the services that they receive, state agencies that operate the programs can implement universal terms and conditions of employment—such as training, compensation, and benefits—for all participating home care workers.

Because Illinois considered these workers independent contractors, then governor Rod Blagojevich issued an executive order that designated them as “public employees” for purposes of exercising collective

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25. *Occupational Outlook Handbook: Home Health Aides and Personal Care Aides*, U.S. BUREAU LAB. STAT. (Sept. 4, 2019), <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> [https://perma.cc/2XYE-A5JZ] (reporting that “employment of home health aides and personal care aides is projected to grow 36 percent from 2018 to 2028, much faster than the average for all occupations”).

26. *Harris v. Quinn*, 573 U.S. 616, 620-21 (2014).

27. See, e.g., A. E. Benjamin, *Consumer-Directed Services at Home: A New Model for Persons with Disabilities*, 20 HEALTH AFF. 80 (2001); A. E. Benjamin & Ruth E. Matthias, *Age, Consumer Direction, and Outcomes of Supportive Services at Home*, 41 GERONTOLOGIST 632 (2001).

bargaining rights under the state’s labor relations act.<sup>28</sup> A majority of the workers eventually elected SEIU to represent their interests. The Illinois labor law, similar to most labor laws, requires an elected union to represent all workers in a given bargaining unit, including workers who vote against unionization.<sup>29</sup> Thus while some of the state-paid home care workers did not join the union, they were legally required to pay “agency fees”<sup>30</sup> to cover their fair share of the union’s costs in providing them with legal services pursuant to agreements reached with the state including, for example, costs associated with the provision of workplace benefits and protections.<sup>31</sup>

In 2010, the conservative National Right to Work Foundation filed suit on behalf of eight workers who objected to paying SEIU agency fees. In a 5-4 decision, with an opinion authored by Justice Samuel Alito for the conservative majority, the Supreme Court ruled that compulsory “agency fees” violated the workers’ First Amendment rights.<sup>32</sup> In reaching this ruling, the Court concluded that its 1977 decision in *Abood v. Detroit Board of Education*<sup>33</sup> was not controlling. In *Abood*, the Court held that states can require public employees to contribute fair share fees to compensate unions for their representation activities even if the employees do not elect to join the union.<sup>34</sup> The *Harris* Court reasoned that *Abood* did not apply to the Illinois home care workers in question because, in light of the consumer-

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28. *Harris*, 573 U.S. at 624-25 (the Illinois legislature eventually codified the executive order under the state’s public sector labor law).

29. *See id.* at 666-67 (Kagan, J., dissenting) (discussing the duty of fair representation); *see also* *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-03 (1944) (concluding in the context of the Railway Labor Act that a labor organization must act “without hostile discrimination” amongst members and must “represent all its members, the majority as well as the minority”); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (extending this duty to the National Labor Relations Act).

30. *Harris*, 573 U.S. at 638 (defining such fees as “a provision under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union”). For an excellent account of the significance of the First Amendment to agency fees, see Benjamin Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046 (2018).

31. Such fees eliminate the free-rider problem by ensuring that non-union members pay their fair share for the benefits and protections that the union negotiates on behalf of all workers. *See Harris*, 573 U.S. at 627 (“The primary purpose of permitting unions to collect fees from nonmembers . . . is to prevent nonmembers from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred.” (internal citations omitted)).

32. *Harris*, 573 U.S. at 656.

33. 431 U.S. 209 (1977), *overruled by* *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S.Ct. 2448 (2018).

34. *Abood*, 431 U.S. at 222.

driven nature of the state's home care program, the workers were employed by care recipients and were not actually state employees. As the Court reasoned, they were not "full-fledged public employees" but "quasi-public employees" or "partial-public employees."<sup>35</sup> The Court held that compelling such workers to pay agency fees violated their First Amendment rights because it requires them to pay a fee to a union that they do not wish to support.<sup>36</sup>

In casting state-paid home care workers as a special sub-class of state workers, the Court minimizes the vital contributions of these workers to the economy and downplays the importance of the state in structuring and controlling the services that they perform on behalf of consumers. As the dissent pointed out, although the Illinois home care program treats care recipients as the workers' employers with respect to key aspects of their relationship, the state also serves as their employer. The recipients and the state function as joint employers.<sup>37</sup> By denying the employment relationship that exists between the state and the workers, the majority sidesteps the fact that the state, not care recipients, has the power to establish the most important terms of the workers' employment including compensation and benefits.

The majority's decision to treat state-paid home care workers as "quasi" state employees who are less deserving of labor protection than "full-fledged" state employees also taps into and reproduces the legal marginalization of individuals who perform domestic work in the home.<sup>38</sup> Because home care includes the performance of domestic activities inside

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35. *Harris*, 573 U.S. at 646.

36. *Id.*

37. *Id.* at 660 (Kagan, J., dissenting) ("[E]ach caregiver has joint employers—the State and the customer—with each controlling significant aspects of the assistant's work").

38. For insightful commentary on *Harris v. Quinn*, see Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439 (2015). See also Sam Bagenstos, *Harris v. Quinn Symposium: The Coming Conflict in Public Employee Speech Law and the Immediate Risks to People with Disabilities*, SCOTUSBLOG (June 30, 2014, 9:46 PM), <https://www.scotusblog.com/2014/06/harris-v-quinn-symposium-the-coming-conflict-in-public-employee-speech-law-and-the-immediate-risks-to-people-with-disabilities/> [https://perma.cc/DN2F-L5KA]; Catherine Fisk, *Harris v. Quinn Symposium: Court Departs from Federalism, First Amendment Jurisprudence*, SCOTUSBLOG (July 3, 2014), <https://www.scotusblog.com/2014/07/harris-v-quinn-symposium-court-departs-from-federalism-first-amendment-jurisprudence/> [https://perma.cc/5QVU-NC3B]; Charlotte Garden, *Harris v. Quinn Symposium: Decision Will Affect Workers & Limit States' Ability to Effectively Manage Their Workforces*, SCOTUSBLOG (July 2, 2014, 1:08 PM), <http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces> [https://perma.cc/UP38-HBXX].

the homes of individual clients, the law regards it as a form of domestic work. Historically labor and employment laws excluded this work from coverage. This was true with respect to workplace laws enacted during the Progressive Era and as part of the New Deal. Over time, some of these exclusions have gone by the wayside, although where coverage exists, laws commonly provide domestic workers with a reduction in coverage. Consider, for example, the Fair Labor Standards Act of 1938 (FLSA). As originally enacted, the law did not apply to domestic work and thus excluded home care workers. A 1974 Amendment finally extended the Act's overtime and minimum wage protections to employees "engaged in domestic service" but it purposefully left out the bulk of all home care workers.<sup>39</sup> They were finally given FLSA protection in 2015 as a result of a regulatory reform. Yet, an FLSA exemption still exists for live-in home care workers.<sup>40</sup> Other legal exclusions, full or partial, include state workers' compensation statutes, the Occupational Safety and Health Act, the National Labor Relations Act, and state unemployment insurance statutes.

None of these exclusions were inevitable. Each one represents a choice made by legislatures that in part reflected the value, or lack thereof, that they placed on the work of poor women, mainly brown and black, who increasingly hail from outside the United States. At times, most notably during the Progressive Era, the decision in favor of exclusion hinged deeply on notions that devalued "women's work" and dismissed it as a "labor of love."<sup>41</sup> At other times, those gendered notions interacted with racism as

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39. See Smith, *Aging and Caring*, *supra* note 11 at 1860-61 (discussing the history of the FLSA's domestic service exemption and the home care companionship services exemption).

40. See, e.g., Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 14 EMP. RTS. & EMP. POL'Y J. 159, 182-84 (2011) [hereinafter Smith, *Decent Work*] (questioning the blanket exclusion of live-in domestic workers from the FLSA's overtime provision relative to other residential workers who are not so excluded).

41. Women's work in the home has often been discounted and devalued by referring to it as a labor of love. As described by economist Nancy Folbre, during the nineteenth century, "[t]he moral elevation of the home was accompanied by the economic devaluation of the work performed there." ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 47 (2002); see also Mary Romero, *Bursting the Foundational Myths of Reproductive Labor Under Capitalism: A Call for Brave New Families or Brave New Villages?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 177, 191 (2000) (commenting that "[s]ince the reproductive labor defined as 'women's work' is devalued in society, rarely do we openly recognize the existence of skill involved, particularly the emotional labor of caregiving which is so often perceived as a 'labor of love'"). Unfortunately, even when domestic work is performed for pay, it continues to be undervalued as a form of women's work. Much has been written about the devaluation of caring labor. For a few useful accounts, see generally Paula England, Michelle Budig & Nancy Folbre, *Wages of*

was the case during the New Deal when African American women, who crowded the domestic work field, were cast aside to please southern racists. Today, the interplay of gender, race, and the vulnerabilities attached to the immigrant status of many workers<sup>42</sup> continues to leave countless workers to fend for themselves. The Court in *Harris* had a historical blueprint from which it did not waiver.

Although *Harris* dealt a blow to home care workers and the labor movement, commentators were quick to observe that the decision was not as sea-changing as many had expected.<sup>43</sup> Even as the *Harris* majority made its displeasure with *Abood* clear,<sup>44</sup> the Court did not overrule it. Instead, the Court limited its holding to “quasi-public” state-paid home care workers. However, in 2018, in *Janus v. AFSCME*, the Court overturned *Abood* and held that the First Amendment protected all public employees who did not wish to pay agency fees.<sup>45</sup>

Emboldened by the decisions in *Harris* and *Janus*, conservative groups have continued to use state-paid home care workers as a punching bag in the ongoing effort to gut organized labor. While many of these battles are unfolding at the state level,<sup>46</sup> conservatives are also pursuing a new national

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*Virtue: The Relative Pay of Care Work*, 49 SOC. PROBS. 455 (2002); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001); and EVELYN NAKANO-GLENN, *FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA* (2012).

42. See Leberstein et al., *supra* note 8.

43. See, e.g., Andy Kroll, *Supreme Court Delivers a Hit—But Not a “Kill Shot”—to Public-Employee Unions*, MOTHER JONES (June 30, 2014, 10:50 AM), <https://www.motherjones.com/politics/2014/05/supreme-court-harris-quinn-unions-right-to-work/> [https://perma.cc/6EZ9-RVVY]; Stephanie Simons, *For Unions, not a Fatal Verdict*, POLITICO (June 3, 2014), <https://www.politico.com/story/2014/06/supreme-court-harris-v-quinn-ruling-108428> [https://perma.cc/24DU-EDEF].

44. *Harris v. Quinn*, 573 U.S. 616, 617 (2014) (“The *Abood* Court’s analysis is questionable on several grounds”).

45. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). For an examination of various proposals on how unions might move forward post-*Janus*, see Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2019).

46. In Minnesota, the same conservative groups that backed *Janus* threw their support behind an unsuccessful effort to invalidate a state labor law that appointed SEIU as the bargaining representative for publicly subsidized home care workers in the state. See *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); see also Jim Spencer, *Home-care Providers Ask Supreme Court to Overturn Minnesota Labor Law*, STAR TRIBUNE (Dec. 13, 2018), <http://www.startribune.com/home-care-providers-ask-supreme-court-to-overturn-minnesota-law/502714952/> [https://perma.cc/BNZ4-BVNQ] (discussing the involvement of the National Right to Work Legal Defense Foundation in the *Bierman* case). The Pennsylvania Supreme Court upheld a challenge to a gubernatorial executive order that allowed state-paid home workers to elect a representative organization for the purpose of discussing home care policy issues, including working conditions, with the state’s Department of Human Services. See *Markham v.*

strategy to undermine home care unions by eliminating workers' ability to deduct union dues from their paychecks.

In July 2018, the Trump administration issued a Department of Health and Human Services rule that requires the CMS to prohibit home health workers, paid directly by Medicaid, from having their union dues automatically deducted from their paychecks.<sup>47</sup> Known as the Reassignment of Medicaid Provider Claims, the final rule was issued in May 2019,<sup>48</sup> and is expected to adversely affect “more than half a million workers in California alone, and several hundred thousand more in 10 other states.”<sup>49</sup>

The Social Security Act requires states to make direct payment to providers, such as home care workers, who deliver services to Medicaid recipients. In particular, section 1902(a)(32) of the Act provides that no payment shall be made to anyone other than to the individual or institution providing care or service to a recipient unless certain exceptions are met.<sup>50</sup> Congress included this provision to prevent fraudulent practices.<sup>51</sup> In 2012, CMS implemented an exception that authorized states, in their role as the primary source of revenue for state-paid home care workers, to withhold

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Wolf, 190 A.3d 1175 (Pa. 2018); see also Andrew Sheeler, *California Union Contracts Targeted in New LawsUIT Challenging How Workers Quit Paying Dues*, SACRAMENTO BEE (July 17, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article232729022.html> (“Conservative groups are suing the union representing in-home caretakers, alleging that the union is violating workers’ First Amendment rights by restricting when members can leave the labor organization.”).

Various of the post-*Janus* lawsuits involving home care workers seek reimbursement of union dues previously paid. See, e.g., *Lawsuit Seeks Reimbursement for Home Care Worker Union Dues*, SEATTLE TIMES (July 3, 2018), <https://www.seattletimes.com/seattle-news/apxlawsuit-seeks-reimbursement-for-home-care-worker-union-dues> [<https://perma.cc/QD63-ZY6c>] (commenting on a lawsuit to force Washington State and a union to reimburse home care workers for union fees paid). On the issue of whether unions are retroactively liable for dues previously paid, see generally William Baude & Eugene Volokh, *The Supreme Court, 2017 Term: Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171–72 (2018) (arguing that unions are liable for the agency fees that union-represented workers previously paid); Erwin Chemerinsky & Catherine Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (2018) (disagreeing with Baude and Volokh, and maintaining that unions are not retroactively liable).

47. Medicaid Program; Reassignment of Medicaid Provider Claims, 83 Fed. Reg. 32252 (proposed July 12, 2018) (to be codified at 42 C.F.R. pt. 447); see also Luthra, *supra* note 4.

48. Medicaid Program; Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19718 (May 6, 2019) (to be codified at 42 C.F.R. pt. 447) [hereinafter Medicaid Program Reassignment].

49. Rachel M. Cohen, *GOP-Led Efforts to Crush Unions Have a New Target: Home Health Care Workers*, INTERCEPT (May 16, 2019, 6:00 AM), <https://theintercept.com/2019/05/16/lawsuit-home-care-workers-union-dues/> [<https://perma.cc/R4B5-ACRB>].

50. Social Security Act § 1902(a), 42 U.S.C. § 1396a(a)(32) (2010).

51. *Id.*

and remit payments to third parties, on behalf of the workers, “for health and welfare benefit contributions, training costs, and other benefits customary for employees.”<sup>52</sup> Those third-party payments included union dues. As a result, in those states where home care workers belong to a union, the exception allowed a state to withhold membership fees from the workers’ paychecks and transfer the fees to the union.

CMS offered a detailed account to explain why it was important to allow states to assign payments to third parties:

[T]he ability of the State to ensure a stable and qualified workforce may be adversely affected by the inability to withhold funds and make payments on behalf of the individual practitioner for health and welfare benefit contributions, training costs, and other benefits customary for employees. Withholding funds for these purposes is an efficient and effective method for ensuring that the workforce has provision for basic needs and is adequately trained for their functions. Direct payment of funds to third parties on behalf of the practitioner may simplify program operations for the State and be viewed as advantageous by the practitioner. In addition, direct payment of funds to third parties on behalf of the practitioners may ensure that beneficiaries have greater access to such practitioners and higher quality services.<sup>53</sup>

In short, CMS viewed the 2012 exception as beneficial to individual workers, the state, home care recipients, and the home care industry more generally.

Some commentators have suggested that the new Trump administration rule, which reversed the exception, was necessary to reduce rising Medicaid costs. Yet this justification lacks any merit. Limiting home care workers’ ability to have their union dues automatically deducted from their earnings will not lead to reduced Medicaid costs since states must still pay

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52. Medicaid Program: State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Setting Requirements for Community First Choice, 77 Fed. Reg. 26362, 26364 (proposed May 3, 2012) (codified at 42 C.F.R. pt. 430).

53. *Id.* at 26392.

the workers. Money that the states would have automatically deducted for union dues will now go directly to the workers in the form of wages.<sup>54</sup>

To be sure, workers can, of their own accord, pay their dues directly to the union, but doing so will now require them to take an extra step by, for example, sending payments by check or setting up automatic monthly deductions from a bank or credit card account.<sup>55</sup> How realistic is this expectation? One commentator offers an apt analogy to the federal government deciding not to automatically deduct federal income taxes from employee paychecks and leaving it to individual workers to pay the taxes that they owe. Such a change would result in countless workers failing “to set aside enough money each year for Uncle Sam.”<sup>56</sup> The same is true here, perhaps with even greater force. Most home care workers, even with the increased compensation afforded by union membership, still struggle financially to make ends meet, and as a result, many are unlikely to have a bank account or a credit card.<sup>57</sup> Others may simply eschew paying union dues in favor of purchasing food, clothes, or other immediate necessities.

Bottom line, under the new rule, workers are going to be less likely to pay dues and as a result, unions may see their economic and political power diminished.<sup>58</sup> Critics of the new rule point out that this result is the real motive behind the rule change and its intended consequence.<sup>59</sup> Indeed, representatives of the National Right to Work Foundation and the Freedom Foundation, two anti-union groups, have stated that their organizations lobbied the Trump administration to stop the third-party payments with the hopes of declawing organized labor.<sup>60</sup> It is thus no coincidence that the new

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54. Cohen, *supra* note 49.

55. See Luthra, *supra* note 4 (discussing possible implications of the rule change); Valerie VanBooven, *CMS Deals Blow to Unions That Had Been Automatically Deducting Dues from Medicaid-Paid Home Healthcare Workers*, HOME CARE DAILY (May 14, 2019), <https://www.homecaredaily.com/2019/05/14/cms-deals-blow-to-unions-that-had-been-automatically-deducting-dues-from-medicaid-paid-home-healthcare-workers/> [<https://perma.cc/B89S-645Q>] (same).

56. Editorial, *Fight Back against Trump’s Attack on Unions and Home Health Care Workers*, CHI. SUN TIMES (May 24, 2019), <https://chicago.suntimes.com/2019/5/24/18634461/medicaid-union-dues-home-health-care-workers-seiu-cms> [<https://perma.cc/B5FN-LHAE>] [hereinafter SUN TIMES Editorial].

57. *Id.*; see also Luthra, *supra* note 4.

58. See Luthra, *supra* note 4.

59. SUN TIMES Editorial, *supra* note 56.

60. Claire Withycombe, *Oregon Public Employee Unions Threatened by Changes*, MAIL TRIBUNE (May 21, 2019), <https://mailtribune.com/news/top-stories/oregons-public-employee-unions-threatened-by-changes> [<https://perma.cc/FV5Y-VF9G>] (reporting on the efforts of right-to-work groups that advocated for the rule change); SUN TIMES Editorial, *supra* note 56 (same).

rule only affects the very group of home care workers who are most likely to belong to a union, those independent providers who receive Medicaid dollars to deliver services to recipients receiving publicly subsidized care.<sup>61</sup>

The new rule is extremely insidious. While targeted at union fees, it sweeps more broadly and may prevent workers from taking advantage of automatic payroll deductions for other benefits, including retirement contributions, health insurance, as well as vision and dental insurance.<sup>62</sup> These benefits are rare in the home care industry, and for those unionized workers who enjoy them, they represent hard fought gains which may now be in jeopardy. Consider, for example, the situation in Oregon, the first state in the country to allow independent, government-funded home care workers to participate in a state-sponsored Roth IRA retirement plan.<sup>63</sup> Both workers and the State can contribute to the plan. As a result of the original CMS exception, Oregon was able to take workers' contributions from their paychecks after taxes, thereby permitting workers tax-free withdrawals during retirement.<sup>64</sup> Under the new rule, these contributions would qualify as impermissible "diversion[s] to . . . third parties . . ."<sup>65</sup>

CMS rationalizes this shocking outcome by declaring that adversely affected home care workers "are not employees of the state" and that they "do not receive salaries or wages from the state."<sup>66</sup> In making this debatable assertion, it appears that CMS relied on the Court's conclusion in *Harris*. But even if the Court correctly concluded that the workers in Illinois were not state employees, such a determination stems from a fact-driven inquiry

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61. The new rule change would not impact those home care workers who provide services funded by Medicaid but who are employed by home care agencies rather than by individual consumers. See Complaint-In-Intervention at 25, *California v. Azar*, No. 3:19-cv-02552-VC (N.D. Cal. July 31, 2019) [hereinafter *California v. Azar Complaint-In-Intervention*].

62. Medicaid Program: Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19718, 19718 (May 6, 2019) (codified at 42 C.F.R. pt. 447) (prohibiting states from making third-party payments from Medicaid on behalf of publicly subsidized workers "for benefits such as "health insurance, skills training, and other benefits customary for employees"); Withycombe, *supra* note 60 (discussing the potential impact of the new rule on the ability of home care workers to participate in state retirement savings accounts).

63. *OregonSaves Provides Homecare Workers with a Pathway to Retirement*, SEIU503, <https://seiu503.org/oregonsaves-provides-homecare-workers-with-a-pathway-to-retirement/> [<https://perma.cc/RLA8-ZR2N>] [hereinafter SEIU503].

64. Damian Davilia, *Retirement Plan Laws in Oregon: The Basics of OregonSaves 2019*, HUM. INTEREST (Feb. 16, 2017), <https://humaninterest.com/blog/retirement-plan-laws-oregon-basics-oregonsaves-2017/> [<https://perma.cc/TVE9-3HB3>]; see also SEIU503, *supra* note 63.

65. Medicaid Program Reassignment, *supra* note 48, at 19721.

66. *Id.*

that, as the Court recognized, turns on the substance of the relationship that any given group of workers has with the particular state in question.<sup>67</sup> In other words, it remains to be determined whether unionized home care workers in other states who receive Medicaid payments for their services are state employees.<sup>68</sup>

Because the money spent on labor dues comes from money earned by the workers, the workers should be able to decide if they want some portion of it deducted and automatically allocated to union dues. CMS goes so far as to claim that the rule change will “put[] [the workers] back in control” of the reimbursements they receive for providing care.<sup>69</sup> Nothing could be further from the truth, as the change leads to the exact opposite outcome. As one home care worker asked, “Why is it OK for police officers, firefighters and teachers to pay union dues through paycheck deductions, but not us?”<sup>70</sup> In establishing such a double standard, CMS has tapped into the vulnerability of state-paid home care workers, and exploited the harsh reality that employment policies repeatedly marginalize these workers and subject them to inferior treatment.

States and organized labor, however, are pushing back and challenging this latest assault on home care workers. The attorneys general of five states (California, Connecticut, Massachusetts, Oregon, and Washington) have filed a lawsuit against the Trump administration contending that the new rule “frustrates the States’ public health interests by attempting to disrupt the collective-bargaining process that the States have established with respect to independent Medicaid homecare providers.”<sup>71</sup> The states raise several causes of action, all based on the proposition that the new rule violates section 706 of the Administrative Procedure Act.<sup>72</sup> First, they contend that the type of third-party payments prohibited by the Medicaid

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67. *Harris v. Quinn*, 573 U.S. 616, 641 n.10 (“What is significant is not the label that the State assigns to the personal assistants but the substance of their relationship to the customers and the State.”).

68. *California v. Azar* Complaint-In-Intervention at 19-20.

69. Medicaid Program Reassignment, *supra* note 48, at 19720.

70. Kay Wright, *A New Rule Would Bar Home Care Workers from Deducting Union Dues from Paychecks. It's Unfair*, HARTFORD COURANT (June 7, 2019), <https://www.courant.com/opinion/oped/hc-op-wright-seiu-payroll-deductions-0607-20190607-yknjvmn5avaozpgbb47altx3u-story.html> [<https://perma.cc/UY6P-HSKT>].

71. Amended Complaint for Declaratory and Injunctive Relief at 6, *California v. Azar*, Case No. 3:19-cv-02552-VC (N.D. Cal. May 13, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/ca-v-azar-complaint-medicare-provider-payments.pdf> [<https://perma.cc/8289-5HME>].

72. 5 U.S.C. § 706 (2018).

provisions of the Social Security Act do not include voluntary and routine deductions for union dues.<sup>73</sup> Plaintiffs also allege that CMS acted arbitrarily and capriciously, and abused its discretion by promulgating the new rule. In support of this allegation, plaintiffs assert that CMS adopted the new rule by relying on factors, such as anti-union sentiment, that do not implicate Congressional concerns with fraud and abuse.<sup>74</sup>

Since the suit's initial filing, a group of home care workers, along with the unions that represent them, have filed a successful motion to intervene.<sup>75</sup> The intervenor plaintiffs have raised several additional noteworthy claims including the argument that the rule violates their First Amendment rights "to associate with each other and their union."<sup>76</sup> To support this claim, plaintiffs argue that by prohibiting the deductions, CMS has targeted union members' ability to speak. In *Harris* and *Janus*, the Court held a state violates the First Amendment when it requires an employee to pay agency fees to a union, because such a requirement compels the employee to subsidize speech with which she disagrees. Plaintiffs' argument here is that by refusing to allow the deductions, CMS is preventing the workers from using their money to support the expression of speech with which they do agree.<sup>77</sup>

### III. MOVING FORWARD: PRELIMINARY THOUGHTS

The assault on home care workers highlights the need to rethink current approaches to transforming home care into a decent job, one capable of attracting and retaining workers. As noted earlier, organized labor has made considerable gains in helping with this transformation process. Yet even before *Harris* and *Janus*, labor was never positioned to reach the many workers who live in states hostile to unions.

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73. Amended Compliant, *supra* note 71 at 8-9.

74. *Id.*; see also Benjamin Sachs, *Hypocrisy on Agency Fees: Why the CMS Home Care Rule is Arbitrary and Capricious*, ON LAB. (July 13, 2018), <https://onlabor.org/hypocrisy-on-agency-fees-why-the-cms-home-care-rule-is-arbitrary-and-capricious/> [https://perma.cc/EV3J-ACDQ].

75. *California v. Azar*, No. 3:19-cv-02552-VC (N.D. Cal. July 30, 2019) (order regarding motions to intervene).

76. *California v. Azar* Complaint-In-Intervention.

77. Sachs, *supra* note 74 (advancing this argument to conclude that the final rule is capricious and arbitrary).

The labor movement will continue to strategize new approaches to sustain existing improvements made on behalf of unionized home care workers and consumers. That said, it is imperative, now more than ever, to double down on efforts to extend basic labor and employment protections to home care workers. The National Domestic Workers Alliance (NDWA) has led the charge to make this goal a reality. Founded in 2007, the NDWA works to “build[] a floor of basic legal protections for domestic workers—a place from which workers and organizers can begin to advocate.”<sup>78</sup> In 2010, NDWA’s campaign on this front resulted in New York becoming the first state in the nation to pass a domestic workers bill of rights. That first bill of rights gave domestic workers overtime pay, one day off per week, three paid vacation days per year, and protection under New York’s Human Rights Law.<sup>79</sup>

Since then, eight additional states, as well as two municipalities, have passed bills of rights for domestic workers.<sup>80</sup> In 2018, a national Domestic Workers Bill of Rights was introduced in Congress. The proposed legislation would extend protection to domestic workers under a range of existing federal employment laws including those related to discrimination and harassment, safety and health, and overtime. It would also establish affordable healthcare and retirement benefits and provide grants for workforce training.<sup>81</sup>

Although home care workers who provide publicly subsidized care are domestic workers, the aforementioned state and local legislation has not

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78. Lauren Hilgers, *Out of the Shadows*, N.Y. TIMES MAGAZINE (Feb. 1, 2019), <https://www.nytimes.com/interactive/2019/02/21/magazine/national-domestic-workers-alliance.html> [<https://perma.cc/K3YN-2XYL>].

79. A1470B/S2311E, 2010 Gen. Assemb., 2010 Sess. (N.Y. 2010).

80. Madeline Joung, *Domestic Workers Aren’t Protected by Anti-Discrimination Law. This New Bill Would Change That*, TIME (July 15, 2019), <https://time.com/5626156/domestic-workers-anti-discrimination-law-ndwa/> [<https://perma.cc/VF84-G7JX>] (noting that in addition to New York, similar legislation has been enacted in California, Massachusetts, Connecticut, Illinois, Nevada, Oregon, Hawaii, New Mexico, and the city of Seattle). A domestic workers bill of rights has also been introduced in Philadelphia, where it has been approved by the Philadelphia City Council. See Ayana Jones, *City Council Passes Bill to Extend Labor Protections for Domestic Workers*, PHILA. TRIB. (Oct. 31, 2019), [https://www.phillytrib.com/news/local\\_news/city-council-passes-bill-to-extend-labor-protections-for-domestic/article\\_8c00be62-5d64-5f93-98b9-9bd2f698a392.html](https://www.phillytrib.com/news/local_news/city-council-passes-bill-to-extend-labor-protections-for-domestic/article_8c00be62-5d64-5f93-98b9-9bd2f698a392.html) [<https://perma.cc/AD66-KC27>].

81. Domestic Workers Bill of Rights Act, S. 2112, 116th Cong. (2019–2020); Domestic Workers Bill of Rights Act, H.R. 3760, 116th Cong. (2019); see also Ai-jen Poo, *They Look After Your Children. They Deserve Basic Rights*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/opinion/harris-jayapal-domestic-workers.html> [<https://perma.cc/84QN-SR8J>] (discussing the need for the proposed legislation).

consistently included them and at times has expressly excluded them. Consider, for example, Connecticut’s bill of rights which excludes home care workers “providing services under a state-funded program.”<sup>82</sup> Similar restrictions exist in other versions of the bill-of-rights legislation.<sup>83</sup>

Such exclusions are not surprising given that the bill of rights, similar to most other labor and employment legislation, hinges on a worker’s status as an “employee” as opposed to a self-employed independent contractor.<sup>84</sup> Although a home care worker operating under a consumer-directed care program is the employee of the care recipient, it is less clear if the worker is also an employee of the state. As the opposing viewpoints in the *Harris* majority and dissenting opinions highlight, this issue is often fraught. That said, even if the state does not employ the worker, an employment relationship exists between the worker and the consumer. Yet home care advocates are understandably opposed to using this relationship as the basis for providing workers with essential workplace protections such as increased compensation, retirement benefits, or healthcare. It would be unseemly to expect that consumers receiving publicly-funded home care services should shoulder the cost of providing their care workers with protections such as decent pay and economic benefits like health insurance and retirement plans. As I have noted elsewhere, “[a]s between . . . consumers and government-sponsored home care programs, the latter can

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82. S.B. 393 (2016), 2016 Gen. Assemb., 2016 Sess. (Conn.), <https://www.cga.ct.gov/2016/ba/2016SB-00393-R000331-BA.htm> [<https://perma.cc/CGX4-6N5H>].

83. The California legislation and the Seattle ordinance have similar provisions that expressly exclude publicly-funded home care workers. See Office of the City Clerk, CB 11926, City of Seattle (July 27, 2018), <http://seattle.legistar.com/LegislationDetail.aspx?ID=3532201&GUID=232AE887-44C6-4450-A040-84225AD4F11D> [<https://perma.cc/BTE6-CRGZ>] (excluding a “home care worker who is paid through public funds”); *The Domestic Worker Bill of Rights*, CAL. DEP’T INDUS. REL., <https://www.dir.ca.gov/dlse/DomesticWorkerBillOfRights-FAQ.html> [<https://perma.cc/BJ2P-6R9Y>] (excluding employees consist of “clients overseeing or receiving services under the In-Home Supportive Services (IHSS) program”). Philadelphia’s proposed bill of rights contains a similar express exception. See Matthew Santoni, *Domestic Worker Bill of Rights Advances in Philadelphia*, LAW360 (Oct. 31, 2019), <https://www.law360.com/health/articles/1215726/domestic-worker-bill-of-rights-advances-in-philadelphia> [<https://perma.cc/2NNU-KMU9>] (noting that the bill excludes “home health care workers paid through public funds such as Medicare or Medicaid”).

84. Marc Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 L. & INEQ. 155, 157-58 (1989) (listing various “benefits and protections conditioned on the existence of an employment relationship”).

best ensure that home care workers receive basic workplace protections as well as access to benefits such as health insurance.”<sup>85</sup>

The proposed federal Domestic Workers Bill of Rights seems to share this perspective and appropriately places responsibility on the government. First, the bill expressly includes home care workers who provide consumer-directed care funded by Medicaid in the definition of a “domestic worker.” Second, section 307 of the bill, entitled “Application to Domestic Workers who Provide Medicaid-Funded Services,”<sup>86</sup> directs the Secretary of Health and Human Services (SHHS) to develop and issue regulations on how to apply the bill’s protections to workers providing consumer-directed care funded by Medicaid. On this latter point, the bill prohibits states from requiring care recipients to use their own care-related public funds “to pay for costs resulting from the application of . . . protections and rights to domestic workers (such as paid sick time, penalties, or overtime pay) . . .”<sup>87</sup> The bill also instructs SHHS to develop mechanisms that states can use to pay for the costs of providing protections to these workers.<sup>88</sup>

The bill is ambitious, but developing a comprehensive approach that will protect home care workers and increase access to affordable care for consumers requires a sustained public commitment and investment. If enacted, the bill would also bring the United States in line with the International Labor Organization’s Convention on Decent Work for Domestic Workers. Adopted in 2011, the labor standards outlined in the Convention underscore the importance of according domestic workers substantive labor rights that match those enjoyed by workers covered under basic labor and employment law protections.<sup>89</sup>

Although the bill represents a necessary step to provide a measure of economic security to domestic workers, its chances of success do not seem promising in this politically divisive climate, especially as the bill currently

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85. Peggie R. Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J. L., ETHICS & PUB. POL’Y 537, 555 (2007) [hereinafter, Smith, *Home Sweet Home?*].

86. See S. 2112; H.R. 3760.

87. *Id.*

88. *Id.*

89. See Convention Concerning Decent Work for Domestic Workers, *opened for signature* June 16, 2011, 2955 U.N.T.S. 407. See generally Smith, *Decent Work*, *supra* note 40 (discussing the significance of the convention for U.S. laws).

lacks bipartisan support.<sup>90</sup> That said, the bill's message should not go unheeded by the many states struggling to provide their citizens with affordable quality home care including those states dealing with the challenges established by *Harris*, *Janus*, and the recent CMS ruling. Treating home care as a decent job requires at a minimum that workers be accorded basic employment protections wherever possible, comparable to those enjoyed by many other workers, and that opportunities be available to improve the quality of their work.

To help achieve this objective, states should appoint review boards to engage in a searching examination of their existing employment laws, to identify those laws that exclude domestic workers, including home care workers providing consumer-directed care, and to consider the reasons for these exclusions. The practice of excluding domestic work from labor and protection legislation, which dates back to at least the Progressive Era,<sup>91</sup> is so ubiquitous that many legislative bodies likely continue this pattern without serious consideration of its harmful consequences. State review boards should thus ask whether any particular exclusion represents longstanding and outdated assumptions about domestic work, including, for example, that such work is less valuable than other forms of labor or that it is less deserving of protection because it employs predominantly women of color, many of whom are immigrants.

To be sure, domestic work has a relatively unique structure as compared with most other types of work because of its location within the private sphere of individual homes and the one-on-one characteristic of the relationship between the worker and employing household. Yet, for too long, legislatures have embraced a default position that uses these and other differences, real or perceived, to exclude these workers from employment protections. That default must be reversed in favor of inclusion. Where substantive differences exist that might make it difficult to apply existing protections to domestic work, legislatures should look to tailor the provision of those laws in a manner that recognizes the specificity of the work.

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90. The bill, which was introduced by Senator Kamala *Harris* (Democrat of California) and Congresswoman Pramila Jayapal (Democrat of Washington), has eight co-sponsors, all of whom are Democrats.

91. See Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999) (discussing the exclusion of domestic work from legislation enacted during the progressive era).

Of course, when it comes to consumer-directed home care services, another key distinction sets the work apart from most other employment relationships; namely, care recipients, as employers, generally lack the capacity to take on various employment obligations critical to transforming the work into a decent job. However, to the extent that states operating these programs are not joint employers of the workers, they have made a choice to structure their home care programs so as to avoid treating the workers as rights-bearing public employees.<sup>92</sup> The choice in part reflects the goal of respecting the interests of care recipients as consumers. Consumer-directed care embraces the philosophy that “individuals with long-term care needs should be empowered to make decisions about the services and supports they receive, including having primary control over the nature of the services, and who, when, and how the services are delivered . . .”<sup>93</sup>

Yet, states eschew far more workplace responsibilities to their publicly-funded, home care workers than they need to for the purpose of adhering to the tenets of consumer-directed care. Consider Illinois, for example, which, as the *Harris* Court observed, “withholds from [publicly-funded home care workers] most of the rights and benefits enjoyed by full-fledged state employees.”<sup>94</sup> Illinois excludes these workers from an astonishing array of workplace rights and protections including statutory retirement and health insurance benefits; group life insurance; paid vacation, holiday, and sick leave; the State Employee Vacation Time Act; the State Employee Health Savings Account Law; the State Employee Job Sharing Act; the State Employee Indemnification Act; the Sick Leave Bank Act; and the Illinois Whistleblower Act.<sup>95</sup> Illinois also prohibits its publicly-funded home care workers from participating in a range of state programs including a deferred compensation program; full worker’s compensation privileges; behavioral health programs; a program that allows state employees to retain health insurance for a time after leaving state

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92. See *infra* note 94 and accompanying text.

93. James R. Knickman & Robyn I. Stone, *The Public/Private Partnership Behind the Cash and Counseling Demonstration and Evaluation: Its Origins, Challenges, and Unresolved Issues*, 42 HEALTH SERV. RES. 362, 364 (2007).

94. *Harris v. Quinn*, 573 U.S. 616, 641 (2014).

95. *Id.* at 642.

employment; a commuter savings program; dental and vision programs; and a flexible spending program.<sup>96</sup>

Illinois could readily extend many of the listed benefits to its state-paid home care workers without jeopardizing consumer control and indeed could do so even if the workers are not actual employees of the state. The state could, for example, allow these workers to participate in the dental and vision programs, the commuter savings program, and the program that offers paid vacation, holiday, and sick leave without the workers needing to be state employees. I strongly suspect that Illinois' decision not to do so had little if anything to do with respecting consumers' control and everything to do with a strategy to contain the hefty costs associated with the provision of long-term care. As a report prepared for the U.S. Department of Health and Human Services observes, "[b]y carefully structuring and documenting the consumer-worker employment relationship . . . states [can] minimize[ ] the likelihood of a credible claim that the state, rather than the consumer, is the worker's employer."<sup>97</sup> A state that follows this guidance can eliminate the responsibilities and costs associated with having an employment relationship with its publicly-funded home care workers.

It was against this backdrop of exclusion and cost containment that unions came to represent such a powerful voice on behalf of state-paid home care workers. Unions pushed states like Illinois to do better for both workers and consumers and, in the process, managed to secure for workers some of the protections and benefits that they had been denied. However, organized labor accomplished only so much, and it never dismantled Illinois' two-tier workplace system that separated personal care assistants from other state workers for the purpose of workplace benefits and protections. Ironically, the state's maintenance of such a system became part of the justification for the Court in *Harris* to hold that Illinois could not compel non-union workers to pay agency fees even as *Janus* ultimately would have produced the same result.

Hopefully, states are beginning to appreciate that a refusal to accept more than passing employment responsibility for home care workers

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96. *Id.* at 640-41.

97. See Smith, *Home Sweet Home*, *supra* note 85, at 537 (discussing the desire of states to craft consumer-directed home care programs in order to avoid liability to workers under labor and employment laws).

providing consumer-directed care was never a cost-free proposition. While such a refusal may theoretically allow a state to decrease the direct costs of home care, workers pay a hefty price in poor working conditions and consumers pay a price in substandard care. Absent the ameliorating effects of organized labor, the price presumably would be even higher. Moving forward, if states are serious about fortifying and extending the successes made by organized labor, they will look to afford state-paid home care workers increased rights associated with the status of being full-fledged, state employees while still allowing consumers autonomy to direct their own care.