No. 11-____

IN THE

Supreme Court of the United States

PAMELA HARRIS et al.,
Petitioners,

v.

PAT QUINN, in His Official Capacity as Governor of the State of Illinois et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a State, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

2. Did the lower court err in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Seventh Circuit were Plaintiffs-Appellants Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers and Defendants-Appellees Pat Quinn, in his official capacity as governor of the State of Illinois, SEIU Healthcare Illinois & Indiana, SEIU Local 73, and AFSCME Council 31.

CORPORATE DISCLOSURE STATEMENT

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Pamela Harris, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on 1 September 2011. (App. 1a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated 1 September 2011 is reported at 656 F.3d 692 (7th Cir. 2011). (App. 1a). The opinion of the United States District Court for the Northern District of Illinois is reported at 189

L.R.R.M. (BNA) 2900, 2010 WL 4736500 (12 Nov. 2010). (App. 18a).

JURISDICTION

On 1 September 2011, the Seventh Circuit entered a judgment that affirmed a district court judgment dismissing the Complaint of the Petitioners-Appellants. (App. 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The state provisions involved are Illinois Public Act 93-204, 2003 Ill. Legis. Serv. 93-204 (App. 40a); Illinois Executive Order 2003-08 (4 Mar. 2003) (App. 45a); and Illinois Executive Order 2009-15 (29 June 2009) (App. 48a).

STATEMENT OF THE CASE

The State of Illinois requires that individuals who provide in-home care to Medicaid recipients accept and support an exclusive representative to petition the State over its reimbursement rates for that care. Petitioners assert that compelling them to associate for purposes of petitioning government about a public-aid program infringes on their right to free expressive association guaranteed by the First Amendment.

I. Illinois' Home-Based Medicaid Programs

The federal Medicaid Home and Community Based Service Program partially funds state programs that assist persons with disabilities with living in their homes to prevent their institutionalization. *See* 42 U.S.C. § 1396n(c).[1] Illinois operates two such programs through its Department of Human Services ("DHS"): (1) the Home Services Program ("Rehabilitation Program"), 20 Ill. Comp. Stat. 2405 et seq.; and (2) the Home Based Support Services Program ("Disabilities Program"), 405 Ill. Comp. Stat. 80/2-1 et seq. Among other things, these programs subsidize a program participant's costs of employing a "provider" or "personal assistant" to provide in-home personal care.

Under the Rehabilitation Program, a "Personal Assistant (PA)" is "an individual employed by the customer to provide . . . varied services that have been approved by the customer's physician." 89 Ill. Admin. Code § 676.30(p). The program participant or "customer" is "the employer of the PA," and is "responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." *Id*. at § 676.30(b); *see also id.* at § 684.20(b) (similar).

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[1] General information about these types of programs can be found at Janet O'Keefe et al *Understanding Medicaid Home & Community Services: A Primer*, (U.S. Dep't of Health & Human Serv., 2010 ed., 29 Oct. 2010) (available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf) (accessed on 21 Nov. 2010).

The Rehabilitation Program will pay for those personal assistant services deemed necessary in a physician-approved service plan. *Id*. at §§ 684.10, 684.50, 686.40. However, "[a]lthough DHS shall be responsible for ensuring that the funds available under the [Rehabilitation Program] are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants." *Id*. at § 676.10(c).

The Disabilities Program operates in a similar fashion. Persons with disabilities or their guardians may employ providers to provide in-home personal care, and are responsible for their hiring, firing, and supervision. DHS pays for these in-home services to the extent permitted by a service plan. *See* 405 Ill. Comp. Stat. 80/2-6; 59 Ill. Admin. Code §§ 117 et seq.

Petitioners (the "Providers") are providers who serve participants in either the Rehabilitation or Disabilities programs. All but one Provider cares for a disabled family member. Several provide this care within their own homes.

II. The State Compels Personal Assistants to Support a Representative to Petition the State over Its Rehabilitation Program

In 1985, the Illinois State Labor Relations Board held that personal assistants are not public employees of the State under Illinois' Public Labor Relations Act. *See State of Ill. (Dep't of Cent. Mgmt. Serv. & Rehab. Serv.)*, 2 PERI P 2007 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. The Board found that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois

pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." 2 PERI P 2007, at *2.

On 4 March 2003, former Illinois Governor Blagojevich issued Executive Order ("EO") 2003-08, which called for state recognition of an exclusive representative for personal assistants. (App. 45a). Blagojevich's order asserted that it is "essential for the State to receive feedback from personal assistants in order to effectively and efficiently deliver home services," and that personal assistants "cannot effectively voice their concerns about the organization of the Home Services Program, their role in the program, or the terms and conditions of their employment under the Program without representation." (App. 46a).

On 16 July 2003, Governor Blagojevich codified EO 2003-08 by signing Illinois Public Act 93-204, 2003 Ill. Legis. Serv. 93-204. (App. 40a). The Act recognized "the right of the persons receiving services defined in this Section to hire and fire . . . personal assistants or supervise them within the limitations set by the Home Services Program." 20 Ill. Comp. Stat. 2405/3(f). (App. 44a). Nevertheless, it designated personal assistants to be "public employees" of the State *"[s]olely* for the purposes of coverage under the Illinois Public Labor Relations Act," and for no other purpose, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." *Id*. (emphasis added) (App. 43a-44a); *see also* 5 Ill. Comp. Stat. 315/3(n) (similar) (App. 41a-42a).

About 26 July 2003, the State designated SEIU Healthcare Illinois-Indiana ("SEIU") to be the personal assistants' exclusive representative for purpose

of bargaining with the State over its Rehabilitation Program. The State and SEIU then entered into agreements that require, among other things, that all personal assistants pay compulsory fees to the SEIU. These fees are directly deducted from the Medicaid monies paid to the assistants for caring for program participants. As a result, each year more than 20,000 personal assistants in Illinois are forced to pay over $3.6 million to the SEIU to petition the State.

In June 2009, current Illinois Governor Pat Quinn issued EO 2009-15, which is almost identical to EO 2003-08, but targets providers in the Disabilities Program. (App. 48a). It calls for the designation of an exclusive representative for these providers pursuant to either an election or card-check, and is similarly predicated on the proposition that providers "cannot effectively voice their concerns . . . without representation." (App. 49a-50a).

Despite Governor Quinn's support for mandatory representation, Disabilities Program providers defeated efforts by SEIU Local 73 and AFSCME Council 31 to become their representative in a mail-ballot election that concluded on 19 October 2009. However, EO 2009-15 remains in effect. These providers thus remain under threat of the State designating an organization to act as their representative vis-à-vis the State.

III. Proceedings Below

On 22 April 2010, the Providers filed a class action lawsuit alleging that the First Amendment prohibits the State from compelling them to support a representative to petition the State about its Medicaid programs. On 12 November 2010, the district court dismissed their complaint. (App. 39a). On 1 Septem-

ber 2011, the Seventh Circuit affirmed the dismissal on two grounds. (App. 17a).[2]

First, the court reasoned that, if personal assistants can be considered "employees" of the State, then the case law that permits the designation of exclusive representatives for public employees controls. (App. 9a). The court found that the State can be considered the personal assistants' "joint employer," along with the Medicaid recipients who hire, fire and supervise them, because the State pays for their services and controls what services it will reimburse. (App. 10-11a). *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was thus held to control (*id.*), despite the court's acknowledgement that *Abood* was never previously applied in this context. (App. 10a).

Second, the claims of the Providers in the Disabilities Program were held to be premature because it is possible that these Providers will not be compelled to support a mandatory representative under EO 2009-15. (App. 15a-16a).

REASONS FOR GRANTING THE WRIT

This case presents the extraordinary circumstance of citizens being forced to petition a state for more benefits from a public-aid program through an advocate the state itself designated. This is grievously offensive to the First Amendment, which guarantees all individuals the freedom to choose with whom they associate to "petition the Government for a redress of grievances." U.S. Const. amend. I. Indeed, it turns the basic precepts of republican democracy on their

[2] The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, and the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

head. Instead of citizens choosing their representatives in government, government chooses representatives for its citizens. Given that similar schemes have been imposed on care providers in at least a dozen states, *see* n.10, *infra*, immediate review by this Court is warranted.

I. The Court of Appeals Has Decided an Important Federal Constitutional Question in a Way That Conflicts with This Court's First Amendment Decisions by Permitting Illinois to Force Individuals to Associate for the Sole Purpose of Petitioning Government

The First Amendment guarantees individuals the right to associate for the expressive purposes of "speech" and "'petition[ing] the Government for a redress of grievances." U.S. Const. amend. I. Of course, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). State compelled association for expressive purposes is thus subject to strict constitutional scrutiny. *Id*. at 623; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

This Court has reviewed the constitutionality of compelled expressive association in several contexts. These include government compelling public employees to associate with political parties, *Elrod v. Burns*, 427 U.S. 347 (1976); public employees to associate with unions, *Abood*, 431 U.S. 209; private groups to associate with individuals, *Roberts*, 468 U.S. 609*, Dale*, 530 U.S. 640; attorneys to associate with bar associations, *Keller v. State Bar of California*, 496 U.S. 1 (1990); companies to associate with marketing cooperatives, *United States v. United Foods*, 533 U.S. 405, 411 (2001); and contractors to

associate with political parties, *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

This case presents a new and pernicious form of compelled expressive association in which individuals who provide services to government-aid recipients are forced to associate with a private organization to petition the government over its subsidies for the services. Here, personal assistants are simply individuals whose services to persons with disabilities are paid for by a Medicaid program. They are like doctors, nurses, and other practitioners who care for Medicaid recipients. Illinois is forcing these personal care providers to accept and financially support a designated representative to deal with the State over its Medicaid reimbursement rates and policies.

The State thus compels association for the *very purpose* of "petition[ing] the Government for a redress of grievances" within the meaning of the First Amendment. *Cf. Borough of Duryea v. Guarnieri*, __ U.S. __, 131 S. Ct. 2488, 2495 (2011) ("[t]he right to petition is generally concerned with expression directed to the government."). It is little different from a state forcing all doctors or hospitals to lobby the state for greater Medicaid reimbursement rates through a state-appointed lobbyist.

Compelling association for the purpose of petitioning government inflicts the greatest harm to First Amendment values. The "right to petition [is] one of 'the most precious of the liberties safeguarded by the Bill of Rights,' and . . . is implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (citations omitted); *see also Guarnieri*, 131 S. Ct. at 2494-95, 2498-2500; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *De*

Jonge v. State of Or., 299 U.S. 353, 364-65 (1937). Indeed, compelling support for an advocacy group is no different from compelling support for a political party, which would be unconstitutional. *See O'Hare,* 518 U.S. at 725-26. In either case, association is compelled for the purposes of influencing government policy.

Illinois' stated justification for forcing providers to petition it through a State-designated advocate—that providers supposedly "cannot effectively voice their concerns . . . without representation," EO 2003-08 (App. 46a); EO 2009-15 (App. 49a)—is particularly abhorrent to the First Amendment. This Court has steadfastly rejected the "paternalistic premise" that expressive activities can be regulated because persons "are incapable of deciding for themselves the most effective way to exercise their First Amendment rights." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790 (1988). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91.

This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods,* 533 U.S. at 415. Illinois' policy of compelling providers to subsidize an organization for the purpose of petitioning the State for more benefits from a Medicaid program is an affront to fundamental constitutional values. It demands this Court's immediate attention.

II. The State's Interest in Maintaining "Labor Peace" in Its Workplaces Does Not Apply to Providers Who Petition the State as Citizens in Public Forums

This Court has found it "undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007). The Seventh Circuit has now extended this "extraordinary power," previously applicable only to actual government employees, *id*., to individuals whose services are merely subsidized by a government program. This is untenable, as the state interest in "labor peace" that makes it constitutional for government employers to control how their employees petition it in the workplace has no application to care providers who petition government as citizens in public forums.

A. The "Labor Peace" Rationale Does Not Apply to Petitioning Government Outside the Workplace

"[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) (citation omitted). "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Engquist*, 553 U.S. at 598-99; *Waters v. Churchill*, 511 U.S. 661, 671-74 (1994) (plurality opinion).

Among other things, a government employer's interest in effective human-resources management grants it significant authority to control the manner in which its employees petition it within the workplace. *See Guarnieri*, 131 S. Ct. at 2495-96, 2500-01; *cf. Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity."). Government also has far greater authority to regulate expressive activity on its property, such as within its workplaces, than it does in public forums. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

The government rationale that constitutionally justifies compelling public employees to deal with their employer about employment conditions through an exclusive representative—the need for so-called "labor peace"—arises from a state's unique interests in managing its employees within its workplaces. As described in *Abood*, labor peace is an interest in avoiding workplace disruptions caused by employee attempts to petition their employer through multiple organizations. 431 U.S. at 220-21. "Peace" is attained by requiring that all employees deal with their employer about workplace matters through only an exclusive representative. *Id.*[3]

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[3] *Abood* held that [t]he 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. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to

For example, in public schools, "the evils that the exclusivity rule . . . was designed to avoid" are the "confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id*. at 224. The "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools," as it "'serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.'" *Perry*, 460 U.S. at 52 (citation omitted).

Whatever its merits within a workplace, the labor peace rationale has no application outside of it. The very essence of democratic pluralism is that citizens can make competing demands on their government through multiple associations. That is a core right protected by the First Amendment:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost. The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294-95 (1981); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-11 (1982).

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reach agreements and settlements that are not subject to attack from rival labor organizations." 431 U.S. at 220-21.

States have no legitimate interest in forcing similarly-situated citizens to petition their government through one designated representative in order to quell their disparate demands. "To 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).

This is true even if competing demands from diverse groups might be disruptive to government, as expressive association to influence public affairs cannot be lawfully suppressed absent extraordinary circumstances. *See De Jonge*, 299 U.S. at 364-65; (unconstitutional for state to prevent assembly to influence public affairs, absent threat of violent overthrow of government); *Claiborne Hardware*, 458 U.S. at 908-11 (unconstitutional for state to sanction nonviolent boycotts and protests). The First Amendment demands tolerance for "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate" *Cohen v. California*, 403 U.S. 15, 24-25 (1971); *see also Snyder v. Phelps*, __ U.S. __, 131 U.S. 1207, 1219 (2011) (speech in public place on matter of public concern cannot be suppressed because it is upsetting). Moreover, "'[t]he government's interest in achieving its goals as effectively and efficiently as possible is . . . a relatively subordinate interest when it acts as sovereign,'" as opposed to a "'significant one when it acts as employer.'" *Engquist*, 553 U.S. at 598-99 (quoting *Waters*, 511 U.S. at 675); *see also Riley*, 487 U.S. at 795 ("the First Amendment does not permit the State to sacrifice speech for efficiency").

In short, while government may have a legitimate interest in using exclusive representation to attain "labor peace" amongst its employees in the workplace, government has no analogous interest in using such means to impose "political peace" on citizens in public forums.

B. Illinois Has No "Labor Peace" Interest in Quelling Competing Demands from Providers Because They Petition the State Not as Employees in a Government Workplace But as Citizens in Public Forums

The labor peace justification for forced unionism amongst employees has no application to providers because, if they petition the State for changes to its Medicaid programs through multiple organizations, this will occur in *public forums* and in their capacity as *citizens.* This expressive activity cannot impair the efficiency of internal State operations. Indeed, the State complains about an ostensible *lack* of effective petitioning by providers, not unrest caused by disruptive petitioning from various associations of them. *See* EO 2003-08 (positing that personal assistants "cannot effectively voice their concerns" to the State "without representation") (App. 46a); EO 2009-15 (same) (App. 49a). Even if provider petitioning of the State were somehow disruptive, Illinois has no lawful interest in quelling their diversity of expressive association by forcing them to petition the State through one designated organization.

First, providers do not work in government workplaces like public employees, but rather in the private homes of persons with disabilities. Thus, providers cannot disrupt the harmony of a government workplace by making competing demands on the State,

as could public employees doing the same in a State workplace. *Cf. Perry*, 460 U.S. at 52 (describing labor peace interest in preventing "schools from becoming a battlefield for inter-union squabbles"). If providers petition the State for changes to its Medicaid programs, this expressive activity will occur in *public forums*. The State has no lawful interest in quelling the constitutional right of providers or anyone else to make disparate demands on the State through diverse associations in public forums.

Not only is the labor peace problem inapplicable in public forums, but so is its solution: exclusivity of representation. It may be possible for a state employer to free itself from "the possibility of facing conflicting demands from different unions" within its workplace by exclusively dealing with one union, as it can exclude rival unions from its private property. *Abood*, 431 U.S. at 221; *cf. Perry*, 460 U.S. at 52. But states cannot truly grant any organization the exclusive right to petition it in public forums, as rival groups cannot lawfully be excluded from public forums or otherwise prevented from petitioning government. The labor peace interest is not only incognizable in public forums, it is unattainable.

Second, providers act as *citizens* petitioning their State as sovereign when seeking changes to Illinois Medicaid programs, just as doctors and nurses do when seeking the same. This expressive activity is not that of a servant speaking to a master, or an employee presenting a grievance to management, because providers are not managed by the State. They are directed by the person with disabilities who employs them. Thus, if providers choose to petition the State for greater Medicaid reimbursement rates, they do so on their own time and in their capacity as

citizens. This expressive activity cannot create managerial problems for the State. Even if it could, Illinois has no more legitimate interest in using exclusive representation to quell the right of providers to petition the State through diverse associations than it would in using these means to quell the right of doctors or hospitals to lobby the State for greater Medicaid reimbursement rates through diverse associations.

Notably, these two factors often define and limit government's authority to regulate the expressive activities of its true employees. *See Guarnieri*, 131 S. Ct. at 2500-01; *Garcetti,* 547 U.S. at 417-20. Limitations on public employees' ability to petition their government employer in their capacity as employees and within the workplace have been upheld when justified by legitimate management interests.[4] In contrast, regulation of public employees' right to petition their government employer in their capacity as citizens and in public forums has been held unconstitutional. *See City of Madison,* 429 U.S. at 174-76 (unconstitutional to prohibit public employees who were represented by a union from petitioning state

[4] *See Abood*, 431 U.S. 209 (public employees can constitutionally be required to subsidize an exclusive representative's costs of dealing with their employer on employment conditions); *Perry Educ. Ass'n*, 460 U.S. 37 (public employer can constitutionally exclude rival union from using interschool mail system); *cf. Garcetti,* 547 U.S. at 420-21 (constitutional for public employer to discipline employee for communication made pursuant to his official duties and within the workplace); *Connick v. Myers,* 461 U.S. 138, 153 (1983) (constitutional for public employer to discipline employee for creating and circulating a communication within office, on work time, that disrupted the workplace).

employer in public forum).[5] As *Abood* recognized, "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions." 431 U.S. at 230.

Thus, even public employees cannot be compelled to support union efforts to lobby government about public programs that affect them, due in part to the inapplicability of the labor peace interest in public forums:

> Labor peace is not especially served by allowing [unions to charge employees for its lobbying expenses] because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are *public fora* open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them *in the workplace*.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991) (emphasis added) (plurality opinion); *accord id.* at 559 (Scalia, J.) (unconstitutional to compel public employees to support union lobbying activities). Moreover, "[t]he burden upon freedom of expression is particularly great where . . . the compelled speech is in a public context." *Id*. at 522. "The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion." *Id*.

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[5] *Cf., e.g., Pickering*, 391 U.S. at 571-72 (unconstitutional to discipline public school teacher for criticizing his government employer's policies in a public forum); *Perry v. Sindermann*, 408 U.S. 593 (1972) (similar).

Here, providers that petition for changes to Illinois' Medicaid programs necessarily act as citizens in public forums—and not as employees in a government workplace—because they are neither managed by the State nor work in State workplaces. Illinois has no cognizable interest in avoiding "the possibility of facing conflicting demands," *Abood*, 431 U.S. at 221, from multiple groups of providers or any other citizens in this context. Accordingly, the labor peace interest that justifies compulsory representation for employees in the workplace has no application to personal care providers.[6]

C. The Seventh Circuit's Application of *Abood* to Providers Is Flawed and Inconsistent with This Court's Decision in *O'Hare*

The Seventh Circuit erred in concluding that the applicability of *Abood* and the labor peace interest turns on whether providers can generically be considered State "employees" in some sense. (App. 9a, 13a). This Court has refused to make constitutional rights dependent on such labels, "which [are] at best a very poor proxy for the interests at stake." *O'Hare*, 518 U.S. at 721 (citation omitted) (service provider's constitutional claim for violation of freedom of association does not turn on whether he is deemed an "employee" or "independent contractor").[7]

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[6] A simple example proves the point. If two organizations representing personal assistants lobbied the State for different changes to its Rehabilitation Program, does the State have any lawful interest in quelling this diverse expressive activity through the imposition of an exclusive representative? Basic constitutional principles dictate that the answer to this question is "no."

[7] To the extent relevant, providers are *not* State employees under the common law factors delineated in *Community for*

The lower court's error is particularly apparent from its finding it constitutionally dispositive that providers are like employees in that the State controls how much they are paid to perform certain services. (App. 13a). But that fact alone does not justify infringing on providers' First Amendment rights. Nor does it logically make the labor peace rationale applicable to providers. Government cannot compel association merely because it pays for someone's services. The same could equally be said of all government contractors or providers of services to public-aid recipients.

In *O'Hare*, this Court rejected the proposition that a service provider's constitutional claims depend on the degree to which it is dependent on government income. 518 U.S. at 722-23. "If results were to turn on these sorts of distinctions, courts would have to inquire into the extent to which the government dominates various job markets as employer or as contractor." *Id*. "We have been, and we remain, unwilling to send courts down that path." *Id*. at 723. Yet, that is the path that the Seventh Circuit traveled down here.

Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989). Illinois itself does not consider personal assistants to be its "employees" except for the sole purpose of collectivization. 20 Ill. Comp. Stat. 2405/3(f). It is not even completely accurate to describe providers as State "contractors," as they do not contract directly with the State, but rather with the persons with disabilities who hire and employ them. As the Illinois State Labor Relations Board accurately recognized in *Department of Central Management Services:* "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." 2 PERI P 2007, at *2.

The constitutionally relevant distinctions between providers and public employees relate to their *expressive activity*—here, the manner in which they petition government—and the State interests, if any, in controlling that expressive activity. As established above, providers differ from public employees in this controlling respect. A provider petitioning the State for changes to its Medicaid program is simply not the expressive equivalent of an employee presenting a grievance to management in the workplace. The Seventh Circuit's decision to the contrary must be reversed.

III. This Case Is of Exceptional Importance Because Compulsory Advocates Have Been, and Could Be, Imposed on Many Other Medicaid Providers and Other Recipients of Government Monies

1. The implications of the lower court's extension of compulsory representation to individuals whose services are merely paid for by government are staggering. In the field of home personal care alone, 48 states and the District of Columbia operated 314 home and community based service programs pursuant to a Medicaid-waiver, and 36 states covered personal care under their traditional Medicaid state plan.[8] Programs in at least 37 of these states are "participant directed," like Illinois' Rehabilitation and Disabilities Programs.[9]

All providers that serve the beneficiaries of these programs are now constitutionally susceptible to

[8] *See* O'Keefe, *supra* at 29, 26.

[9] *See* O'Keefe, *supra* at 178; *see also id*. at 181 (self-directed state Medicaid programs that provide for home-based services exist in 32 states).

being forced to accept mandatory representation under the lower court's ruling. Indeed, twelve (12) states have already passed laws or issued executive orders authorizing the collectivization of persons who provide home care to Medicaid recipients, though some of these provisions have since been repealed.[10]

If government can impose mandatory advocates on personal care providers, it can constitutionally do the same to others who provide services to Medicaid or Medicare recipients. This includes not only physicians and nurses, but also entities such as hospitals and nursing homes. For example, Oregon and Washington are already forcing those who operate foster homes for persons with disabilities to support a representative to bargain with the state over Medicaid reimbursement rates for that service.[11]

No discernible principle limits compulsory representation to the healthcare industry. Any person or entity whose services are subsidized by a government program could be targeted. Contractors who perform services directly for government, such as construction or maintenance, are an obvious example. Even those who merely serve public-aid recipients are at risk.

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[10] Cal. Welf. & Inst. Code, § 12301.6(c)(1); Conn. Exec. Order 10 (21 Sept. 2011); 20 Ill. Comp. Stat. 2405/3(f); Mass. Gen. Laws ch. 118G, § 31(b); Md. Code Ann. art. 9, §§ 15-901 et seq.; Interlocal Agreement between Mich. Dep't of Cmty. Serv. & the Tri-County Aging Consortium (10 June 2004); Mo. Rev. Stat. § 208.862(3); Ohio House Bill 1, §§ 741.01-.06 (17 July 2009) (expired); Or. Const. art. XV, § 11(f); Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (14 Sept. 2010) (rescinded); Wash. Rev. Code § 74.39A.270; Wis. Stat. §§ 111.81 et seq. (repealed).

[11] Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

This harm is not hypothetical—sixteen (16) states have already passed laws or issued executive orders that authorize compulsory representation for small businesses and individuals that provide daycare to indigent children whose care is partially subsidized by state childcare programs.[12] As with personal care providers, daycare providers are being compelled to petition states for greater subsidies for caring for public-aid recipients through state-designated advocates.

2. The Seventh Circuit attempted to downplay these ramifications, asserting that its holding is limited to personal assistants in the Rehabilitation Program. (App. 13a). This alone has broad ramifications given that similar programs exist in almost every state. The court acknowledges that, "given our holding" as to the Rehabilitation Program, the constitutional claim of providers in the Disabilities Program "will not last long" if later adjudicated. (App. 17a).

The implications of the lower court's holding are actually more expansive given its sweeping rationale that: (1) *Abood* controls if a state can be labeled a "joint employer," and (2) a state is a "joint employer"

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[12] Conn. Exec. Order 9 (21 Sept. 2011); 5 Ill. Comp. Stat. 315/3, 315/7; Iowa Exec. Order 45 (16 Jan. 2006); Kan. Exec. Order No. 07-21 (18 July 2007); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C); Md. Code Ann. art. 5, §§ 5-595 et seq.; Interlocal Agreement Between Mich. Dep't of Human Serv. & Mott Cmty. College (27 July 2006) (repealed); Minn. Exec. Order 11-31 (15 Nov. 2011); N.M. Stat. § 50-4-33; N.J. Exec. Order 23 (2 Aug. 2006); N.Y. Exec. Order No. 12 (11 May 2007); Ohio House Bill 1, §§ 741.01-.06 (17 July 2009) (expired); Or. Rev. Stat. § 657A.430; Pa. Exec. Order 2007-06 (14 June 2007); Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (codified at Wis. Stat. §§ 111.02 et seq.) (repealed).

if it pays for the provision of defined services, even if the provider of those services is hired, fired, managed, and employed by someone else. (App. 9a-11a, 13a).

This standard could encompass other healthcare providers paid under a fee-for-service Medicaid or Medicare program. For example, patients may select their physicians under Medicare Part B. 42 U.S.C. § 1395a. But physicians and other healthcare practitioners must enroll in the program subject to numerous conditions to receive payment. *See* 42 C.F.R. §§ 424.500-424.565. The federal government controls which services it will subsidize,[13] and sets the rate of payment via a fee schedule. *See* 42 C.F.R. §§ 414.1–414.68. These are the very factors that the Seventh Circuit found dispositive in concluding that personal assistants are "jointly-employed" by Illinois. (App. 10a-11a). Under the court's expansive standard, any physicians or practitioners who care for a Medicare patient could be deemed a "joint employee" of the federal government, and thus susceptible to the imposition of a compulsory representative to deal with their ostensible federal "joint employer" over its Medicare rates.

This Court has granted review on the grounds of importance when a case addresses the constitutionality of a statute or practice that exists in multiple states. *See, e.g., Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003); *Smith v. Doe*,

[13] Medicare Part B pays for only certain covered services, 42 C.F.R. § 424.5(a)(1), many of which must be certified as medically necessary. *Id.* § 424.24. Home healthcare and outpatient rehabilitation services must also be furnished according to an approved treatment plan, just as under Illinois' Rehabilitation Program. *Id.* §§ 424.22(a)(1)(iii); 424.27(a)(3).

538 U.S. 84, 89-90, 92 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982). This Court's guidance regarding the constitutionality of a practice that infringes on core First Amendment rights that has already been implemented in many states, and that could be implemented in a myriad of forms throughout the nation, is required.

IV. This Case Is of Exceptional Importance Because Compelled Association to Petition Government Is Antithetical to the Principles of Democratic Pluralism Protected by the First Amendment

It is imperative that this Court not permit governments to impose compulsory advocates on those who serve government-aid recipients. The right to petition is not only a fundamental personal liberty, but is "integral to the democratic process," *Guarnieri*, 131 S. Ct. at 2495. As this Court recognized in *United Foods*, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." 533 U.S. at 411.

Foremost, it distorts the democratic process for government to artificially empower special interest groups that support a particular policy agenda. Advocacy groups that individuals are conscripted to support will have resources that far exceed the true and voluntary degree of support that exists for the group and its agenda. This power is further amplified by the government designating the advocacy group as the official representative of others, and granting it special privileges in dealing with governmental bodies no others enjoy. Here, Illinois is forcing approximately 20,000 personal assistants to annually

pay over $3.6 million to support the SEIU as their exclusive representative for petitioning the State over its Medicaid policies, irrespective of whether they support that group's agenda or not. Government creation of such artificially powerful lobbying forces on one side of an issue inherently skews the "marketplace for the clash of different views and conflicting ideas" that this "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control*, 454 U.S. at 295.

This, in turn, undermines the First Amendment's purpose of ensuring that government is responsive to the will of its citizens. *See De Jonge*, 299 U.S. at 365. The "constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). The right to petition, in particular, was fashioned to "allow[ ] citizens to express their ideas, hopes, and concerns to their government and elected representatives." *Guarnieri*, 131 S. Ct. at 2495.

Government policy cannot be responsive to the true will of citizens when government dictates through whom they must speak, and to whom the government will listen. As Judge Learned Hand aptly stated, "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *Sullivan*, 376 U.S. at 270 (quoting *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

In short, the political collectivism that lies at the heart of Illinois' scheme—in which government dic-

tates one association through which those affected by public programs must petition government—is antithetical to principles of democratic pluralism that the First Amendment protects. It must not be permitted to stand.

V. The Seventh Court's Holding That the Claims of Providers in the Disabilities Program Are Not Ripe Conflicts with Decisions of This Court and Another Circuit

The Seventh Circuit erred in concluding that the claims of Petitioners in the Disabilities Program are not ripe for review. (App. 15a). Their cause of action to enjoin enforcement of EO 2009-15 was ripe from the moment Governor Quinn signed it, as the Executive Order's sole purpose is to authorize mandatory representation for these Providers. (App. 49a-51a). Short of a bill of attainder, it is difficult to envision a regulation that more directly targets a discrete group of persons.

The lower court's speculation that the Providers may not be forced to support a representative under EO 2009-15 proves too much. (App. 15a). These Providers will not be collectivized right up until the very moment that they are. Under the court's rationale, the claims of the Providers in the Disabilities Program will not be ripe until *after* they suffer constitutional injury. That result conflicts with this Court's long established holding that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

In *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), the Eleventh Circuit rejected the proposition that an individual (Mulhall) lacked

standing to enjoin enforcement of an agreement intended to facilitate his unionization because "it was possible that he would never be unionized." *Id.* at 1285. Contrary to the Seventh Circuit's decision here, the court there recognized that a "'probabilistic harm' is a cognizable injury for purposes of standing," and that the agreement "will substantially increase the likelihood that Mulhall will be unionized against his will." *Id.* at 1289 (citation omitted). Here, EO 2009-15 dramatically increases the chances that Disabilities Providers will be forced to support a representative in violation of their rights. Indeed, it is only because of EO 2009-15 that the Providers are under this threat at all.

The First Amendment exists to protect individual rights from the tyranny of the majority. *See Sullivan*, 376 U.S. at 270. The Seventh Circuit disregarded the Providers' interests in not having their constitutional right to free association put to repeated votes under EO 2009-15. For these reasons, the Court should also grant review on the second question presented.

CONCLUSION

A political system predicated on citizens choosing their representatives in government cannot tolerate government choosing representatives for its citizens. Illinois' policy of compelling personal care providers to support a particular advocate to petition the State about its Medicaid programs must be recognized as unconstitutional under the First Amendment. Otherwise, similar policies will continue to spread throughout the nation. The petition for writ of certiorari should be granted.

Respectfully submitted,

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29 November 2011

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

No. 10-3835

PAMELA J. HARRIS, *et al.*,
Plaintiffs-Appellants,

v.

GOVERNOR PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, *et al.*,
Defendants-Appellees.

Argued June 9, 2011
Decided Sept. 1, 2011

Before MANION, WOOD, and HAMILTON, *Circuit Judges.*

MANION, *Circuit Judge*.

The plaintiffs in this appeal provide in-home care for people with varying levels of disabilities and other health needs. They present a narrow question: Does a collective bargaining agreement that requires Medicaid home-care personal assistants to pay a fee to a union representative violate the First Amendment, regardless of the amount of those fees or how the union uses them? We hold that it does not. Because the personal assistants are employees of the State of Illinois, at least in those respects relevant to collective bargaining, the union's collection and use of fair share fees is permitted by the Supreme Court's man-

datory union fee jurisprudence in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). However, we lack jurisdiction to consider the claims of plaintiffs who have opted not to be in the union. Because they are not presently subject to mandatory fair share fees, their claims are not ripe.

I.

The plaintiffs in this case all provide in-home care to disabled individuals through Medicaid-waiver programs run by the Illinois Department of Human Services. Some are part of the Home Services Program administered by the Division of Rehabilitation Services. The others are part of the Home Based Support Services Program administered by the Division of Developmental Disabilities. We will call these groups the Rehabilitation Program plaintiffs and Disabilities Program plaintiffs respectively.

A. *Home-Based Medicaid Waiver Program Features*

These programs subsidize the costs of home-based services for disabled patients who might otherwise face institutionalization. The programs offer flexibility and self-direction for services that are tailored to patients' individual needs. In the Rehabilitation Program, each patient works with a counselor to develop an individual service plan, which specifies "the type of service(s) to be provided to the patient, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." 89 Ill. Admin. Code 684.50. The service plan must be certified by the patient's physician and approved by the State. *Id.* § 684.10.

Once a counselor identifies the type of personal assistant the patient needs for the service plan, the patient is free to select almost any personal assistant who meets the qualifications set by the State. *Id.* §§ 684.20, 684.30 The State, in turn, requires personal assistants to comply with age and work-hour limitations, provide written or oral recommendations from past employers, have related work experience or training, and satisfy the patient and counselor that they can communicate and follow directions. *Id.* § 686.10. Personal assistants sign employment agreements directly with patients, although the terms of the agreement are set by the State. *Id.* The State sets wages and pays personal assistants directly, withholding Social Security as well as federal and state taxes. *Id.* §§ 686.10, 686.40.

The Disabilities Program functions similarly. Each patient works with a State "service facilitator" to develop a "service/treatment plan." 59 Ill. Admin. Code 117.120, 117.225(a). The State then pays for services provided under the plan, including personal care services. *Id.* at 117.215. The record is much less developed on the exact relationship between the State and the Disabilities Program personal assistants. And for good reason: the district court dismissed the claims on jurisdictional grounds, so no court has yet considered the merits of those claims.[1]

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[1] The details of the relationship between the State and the Disabilities Program personal assistants are unimportant for this appeal. As elaborated *infra*, we agree with the district court that the Disabilities Program claims are not yet ripe. But even if the claims were ripe, we would not consider the merits at this stage because the defendants have not cross-appealed seeking an expanded judgment on the merits. *See Greenlaw v. United States*, 554 U.S. 237, 128 S.Ct. 2559, 2564, 171 L.Ed.2d 399

B. *Rehabilitation Program Unionization*

In the mid-1980s, personal assistants in the Rehabilitation Program sought to unionize and, under the Illinois Public Labor Relations Act, collectively bargain with the State. The State Labor Relations Board, however, found that the personal assistants were in a unique employment relationship and that it lacked jurisdiction over that relationship because the State was not their sole employer. The personal assistants thus could not unionize until 2003, when the Illinois Public Labor Relations Act was amended to designate "personal care attendants and personal assistants working under the Home Services Program" as State employees for purposes of collective bargaining. 20 Ill. Comp. Stat. 2405/3. Then-Governor Blagojevich issued an executive order directing the State to recognize an exclusive representative for Rehabilitation Program personal assistants if they designated one by majority vote and to engage in collective bargaining concerning all employment terms within the State's control. According to the Governor, this was important because each patient employed only one or two personal assistants. Thus, only the State could control the economic terms of employment and the widely dispersed personal assistants could not "effectively voice their concerns" about the program or their employment terms without representation.

Later that year, a majority of the approximately 20,000 Rehabilitation Program personal assistants voted to designate SEIU Healthcare Illinois & Indiana as their collective bargaining representative with the

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(2008) ("Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. . . . [without] a cross-appeal.").

State. The Union and the State negotiated a collective bargaining agreement which sets the pay rates, creates a health benefits fund for personal assistants, and establishes a joint Union-State committee to develop training programs. The agreement also contains other typical collective bargaining agreement provisions, including the union security clause that has given rise to this lawsuit and appeal. This "fair share" provision requires "all Personal Assistants who are not members of the Union . . . to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment."

C. *Disabilities Program Attempted Unionization*

In 2009, Governor Pat Quinn issued an executive order directing the State to recognize an exclusive representative for the Disabilities Program personal assistants, if a majority so chose. *See* Ill. Exec. Order 2009-15. SEIU Local 713 petitioned for an election to become that representative, and AFSCME Council 31 intervened in the election as a rival candidate. In a mail ballot election, however, a majority of the approximately 4,500 Disabilities Program personal assistants rejected representation by either union. But that victory is not permanent: the unions can request new elections in the future, and, under Illinois labor law, may bypass an election altogether if they collect a sufficient number of union cards from the personal assistants. *See id.;* 80 Ill. Admin. Code 1210.100(b).[2]

[2] While the plaintiffs allege that the unions have used coercive tactics to get them and others to join, and to lobby state officials, the constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement.

D. *Current Litigation*

The following year, the personal assistants from both groups filed a two-count complaint against the Governor and the three unions involved. The Rehabilitation Program plaintiffs claimed that the fair share fees they were required to pay violated the First Amendment by compelling their association with, and speech through, the Union. The Disabilities Program plaintiffs argued that although they did not yet pay fees, they are harmed by the mere threat of an agreement requiring fair share fees. The district court dismissed the Rehabilitation Program plaintiffs' claims for failure to state a claim upon which relief could be granted. It dismissed the Disabilities Program plaintiffs' claims for lack of subject matter jurisdiction because they lacked standing and their claims were not ripe. The plaintiffs appeal both dismissals.

II.

The two sets of plaintiffs in this case stand in very different positions. The Rehabilitation Program plaintiffs are currently subject to a collective bargaining agreement that requires them to pay fair share fees to their union representative. The Disabilities Program plaintiffs have successfully rejected unionization and are not subject to fair share fees, but fear that may change at any time. This difference has important consequences: we have jurisdiction to consider the Rehabilitation Program plaintiffs' claims, which we discuss in the first part of the analysis. But we must dismiss the Disabilities Program plaintiffs' claims for lack of jurisdiction because they are not ripe for adjudication. We explain these holdings in order.

A. *Rehabilitation Program Claims*

The Rehabilitation Program plaintiffs mount a facial challenge to the fair share fees. That is, they do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining.[3] Their only argument is that they may not be forced to financially support collective bargaining with the State under any circumstances. They present a two-step argument. First, they argue that this case does not fall under the line of Supreme Court cases permitting mandatory fees to support collective bargaining representation because personal assistants are employed by individual Medicaid patients, not the State. Second, they argue that no compelling state interests justify extending these collective bargaining cases to reach personal assistants.

We first set out the controlling precedent. The Supreme Court has long approved collective bargaining agreements that compel even dissenting, non-union members to financially support the costs of collective bargaining representation, as well as other closely related costs, as long as they are not used to support political candidates or views, or other ideological causes. First in *Railway Employees' Dep't v. Hanson*, the Court refused to enjoin a "union shop" agreement between a railroad company and a union that required all employees of the railroad to become nominal, dues-paying members of the union as a con-

[3] The plaintiffs do argue that in the Medicaid context, collective bargaining with the State amounts to political advocacy. The Supreme Court has rejected this argument in the employment context, so it falls with our conclusion that personal assistants are State employees. *See generally, Abood*, 431 U.S. 209, 97 S.Ct. 1782.

dition of employment.[4] 351 U.S. at 227, 76 S.Ct. 714. Although a "right to work" provision in the Nebraska Constitution outlawed such agreements, the Court held that the federal Railway Labor Act permitted union shop agreements and thus superseded state law to the contrary. Along the way, it held that this provision of the Act was justified by Congress's interest in supporting "industrial peace and stabilized labor-management" and in distributing the costs of collective bargaining to all those who benefit from it. *Id.* at 234, 238, 76 S.Ct. 714. It declined to consider hypothetical First Amendment issues that might arise if the union engaged in partisan or ideological speech. *Id.* at 238, 76 S.Ct. 714.

Then, in *Abood v. Detroit Bd. of Educ.*, the Court extended the scope of its holding in *Hanson* to include public employees and attempted to set out limits on the use of fees collected from dissenting employees. 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261. It held that an "agency shop" clause in an agreement between the Detroit Board of Education and its teachers' union could require teachers who were not union members to financially support the union's collective bargaining, contract administration, grievance-adjustment procedures, and other activities "germane to its duties as

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[4] In a "union shop," an "employer may hire nonunion employees on the condition that they join a union within a specified time"; in an "agency shop," discussed below, "a union acts as an agent for the employees, regardless of the union membership." *Black's Law Dictionary* 1504 (9th ed.2009). The Supreme Court has treated union and agency shops as "practical equivalent[s]." *See Abood*, 431 U.S. at 219 n. 10, 97 S.Ct. 1782. In an open shop, union membership is permitted but is not a condition of securing or maintaining employment. Under a state right-to-work law, "employees are not to be required to join a union as a condition of receiving or retaining a job." *Black's* at 1504.

collective-bargaining representative." *Id.* at 232, 235, 97 S.Ct. 1782. Since *Abood*, the Court has continued to refine its approach to the appropriate use of fees from non-union members in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (outlining appropriate procedures to protect non-member fees), and *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (elaborating specific charges that can and cannot be funded with union donations). But it has not wavered from its position that, as a general matter, employees may be compelled to support legitimate, non-ideological, union activities germane to collective-bargaining representation.

Against this backdrop, we next consider whether the personal assistants are, as the defendants contend, State employees. If so, this case is controlled by *Abood* and the plaintiffs' claims fail. As an initial matter, we note that we pay no particular heed to the State legislature's designation of personal assistants as State employees solely for purposes of collective bargaining under Illinois law. *See* 20 Ill. Comp. Stat. 2405/3(f). The label affixed by a state, whether in statute, regulation, or order, is not sufficient to designate the relationship "employment." Whether someone is an employee of the state has a host of implications—under both state and federal law—beyond whether mandatory union fees are permitted. Because of this, the Illinois legislature may have designated personal assistants as employees or not for reasons entirely unrelated to compelled speech under the First Amendment. Rather than accept either party's characterization of the relationship, we must consider the relationship itself and decide whether the State is an employer for purposes of compelling support for collective bargaining.

Two sources inform our analysis. First, neither *Hanson* nor *Abood* discusses the definition of employer, so we will assume the Court meant to give the word its ordinary meaning: "A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Black's* at 604. Second, we draw from labor relations law the notion that more than one person or company may be an individual's employer. *Cf. Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964) (discussing joint employment determination by NLRB); *DiMucci Const. Co. v. NLRB*, 24 F.3d 949, 952 (7th Cir.1994) (listing factors courts consider in reviewing an NLRB determination of joint employment). We are aware of no cases specifically discussing *Abood* in a joint-employment situation. But it is not an uncommon situation for a single individual to find himself with more than one employer for the same job. This undermines the plaintiffs' attempt to distinguish between the typical employer-employee relationship, on one hand, and every other imaginable labor relationship, on the other. Thus, both the home-care patient and the State may be employers if they each exercise significant control over the personal assistants.

And in the Rehabilitation Program, the State does have significant control over virtually every aspect of a personal assistant's job. While the home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient's choice. 89 Ill. Admin. Code § 686.10. And while only the patient may technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State's standards. *Id.* § 677.40. When it comes to con-

trolling the day-to-day work of a personal assistant, the State exercises its control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance. *Id.* §§ 686.10, 686.30. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistant after withholding federal and state taxes. *Id.* In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*.

The plaintiffs raise two objections. First, they claim that the patient, not the State, employs them. But as we have explained, even if the patient is properly considered an employer, that would not prevent the State from being a joint employer. Second, they argue that, however we characterize the State's relationship with personal assistants, the interests in collective bargaining that *Abood* identified does not apply here. They claim that the differences between the personal assistants here and the typical employment situation at issue in *Abood* undermine the State's claimed interest in labor peace. Specifically, the plaintiffs characterize *Abood*'s labor peace interest thus: "that disruptions caused by diverse employee expressive association within a workplace could be solved by giving a union a monopoly over employee speech vis-à-vis their employer." Pl. brief at 20. Thus, they assert that because the personal assistants are "outside the workplace" and they cannot be compelled

to speak to the State with a single voice, the labor peace interest does not apply.[5]

We do not accept the plaintiffs' narrow characterization of the labor peace interest. In *Hanson*, the Supreme Court reasoned that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex" and a question of policy outside of the judiciary's concern. 351 U.S. at 234, 76 S.Ct. 714. The Court thus envisioned labor peace to include "stabilized labor-management relations," which are at issue in any employer-employee relationship, regardless of whether employees share the same workplace. The Court expanded its description of labor peace in *Abood:*

> The 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. It prevents inter-union rivalries from creating dissension with the work force and eliminating the advantages of employee collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

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[5] The plaintiffs further argue that outside the workplace, the government has no lawful interest in quelling diverse, even disruptive, speech or association. But we do not understand the complaint to allege that the State has quelled any of the plaintiffs' speech, merely that they have been forced to financially support a single bargaining representative. Employee speech jurisprudence is entirely distinct from that of compelled association, as are the interests that justify (or not) each respective intrusion into employees' freedom of speech.

431 U.S. at 224, 97 S.Ct. 1782. Given our conclusion that the State employs the personal assistants, with extensive control over the terms and conditions of employment, and has chosen (wisely or not) to establish some of those terms and conditions through negotiation rather than regulation, the interests identified by the Court in *Abood* are identical to those advanced by the State in this case. The plaintiffs' attempts to distinguish *Abood* are unavailing.

Thus, because of the significant control the state exercises over all aspects of the personal assistants' jobs, we conclude that personal assistants are employees of the State and reject the plaintiffs' arguments that the State's interests in collective bargaining do not apply to the unique circumstances of personal assistants. As such, the fair share fees in this case withstand First Amendment scrutiny—at least against a facial challenge to the imposition of the fees itself.

We once again stress the narrowness of our decision today. We hold that personal assistants in the Illinois home-care Medicaid waiver program are State employees solely for purposes of applying *Abood*. We thus have no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context. We do not consider whether *Abood* would still control if the personal assistants were properly labeled independent contractors rather than employees. And we certainly do not consider whether and how a state might force union representation for other health care providers who are not state employees, as the plaintiffs fear. We hold simply that the State may compel the personal assistants, as *employees*—not contractors, health care providers, or citizens—to financially support a

single representative's exclusive collective bargaining representation.

B. *Disabilities Program Claims*

While the underlying legal issues raised by the Disabilities Program plaintiffs are similar to those we considered above, the district court dismissed their claims on ripeness and standing grounds. This is because the Disabilities Program plaintiffs are in a fundamentally different position. As we have noted, the Rehabilitation Program personal assistants have chosen to be represented by a union. Illinois is not a "right to work" state where paying dues for union membership is optional for each worker, and thus under state law the minority of caregivers opposed to the union may be required to pay their fair share of the dues used to bargain for pay, working conditions, and other universal benefits. The Disabilities Program personal assistants, on the other hand, have opted not to have union representation. By exercising that option, they have prevented collective bargaining and are not required to pay any fair share requirement. But because they are not subject to an agreement mandating fair share payments, we agree with the district court that the Disabilities Program plaintiffs' claims are not ripe, and we lack jurisdiction to consider the complaint.

A claim is not ripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir.2008) (quoting *Texas v. United States*, 523 U.S. 296, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). The Disabilities Program plaintiffs complain of the same conduct as the Rehabilitation Program plaintiffs: that one of the unions and the State will enter into an agreement that will require all personal

assistants to pay a fair share fee to support that union's collective bargaining activity. But unlike the Rehabilitation Program, the Disabilities Program personal assistants have rejected union representation, and there is no certainty that the Disabilities Program personal assistants will ever unionize. Hence, the State has no representative to recognize and cannot agree to compel the plaintiffs to pay fair share fees at all. The plaintiffs' claims are contingent on events that may never occur and thus are not ripe.

The plaintiffs argue that the very existence of the executive order committing the State to recognizing an exclusive union representative makes it significantly more likely that the plaintiffs will be forced to financially support that union's speech. Thus, there is a reasonable probability of future harm to the plaintiffs' constitutional interests, which the plaintiffs feel they should not have to spend resources to defeat. And they argue the courts can redress this harm by declaring that the plaintiffs may not be compelled to support a union, and by enjoining the State from enforcing its laws and executive orders in such a way that compels the plaintiffs to support a union.

But the plaintiffs do not allege that the mere existence of the executive order violates their rights, only that it makes such a violation more likely. Their argument thus confuses this increased likelihood of a future *violation* of their constitutional rights with the probabilistic future *harm* which is sufficient to meet the minimal injury-in-fact requirements of standing. The cases on which the plaintiffs rely stand only for the rule that a constitutional violation now may merely increase the likelihood of injury later. That would be a question of constitutional standing and inapplicable to the issue of ripeness we have before

us. *E.g., Southworth v. Board of Regents*, 307 F.3d 566, 580-81 (7th Cir.2002) (students had standing to challenge a facially unconstitutional system for allocating student fees); *Majors v. Abell*, 317 F.3d 719, 721-22 (7th Cir.2003) (candidates had standing to challenge unconstitutional regulation of political ads despite lack of enforcement); *Mulhall v. UNITE Local 355*, 618 F.3d 1279, 1286-87 (11th Cir.2010) (employee had standing to challenge unlawful agreement to facilitate unionization despite possibility that it would never occur). This case is different because the only violations alleged by the plaintiffs may never occur.

The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent. *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir.2008) ("[R]ipeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement.").

The district court did err in one respect however. After holding that the Disabilities Program plaintiffs' claims were not yet ripe, it dismissed the complaint with prejudice. Generally, when a complaint is dismissed because it is not ripe (or because the plaintiffs lack standing, for that matter) it is dismissed without prejudice unless it appears beyond a doubt that there

is no way the plaintiffs' grievance could ever mature into justiciable claims. *Chattanoga Mfg., Inc. v. Nike, Inc.*, 301 F.3d 789, 796 (7th Cir.2002) (holding that district court erred in dismissing counterclaims with prejudice because "[i]f a dispute ripens between the parties, [the counterclaimant] should have the opportunity to litigate its claims."). If the Disabilities Program personal assistants ever do vote to unionize and enter an agreement with the State mandating fair share fees, the plaintiffs will have a ripe claim. Given our holding above, it may be that such a claim will not last long, but we will not prejudge the issue in this case. Therefore, we will remand the case to the district court with instructions to dismiss the claims of the Disabilities Program plaintiffs without prejudice.

III.

For these reasons, we reject the plaintiffs' First Amendment claims. The Disabilities Program plaintiffs do not allege that a constitutional violation has yet occurred. Thus, their claim is not ripe and we lack jurisdiction to consider it. But because the claim is unripe, it should be dismissed *without* prejudice, so we remand with instructions for the district court to correct the order of dismissal. The Rehabilitation Program plaintiffs do allege a justiciable claim, but we reject it on the narrow grounds that Supreme Court precedent permits the State, as a joint employer, to compel fair share fees in the interest of stable labor relations. The judgment of the district court is therefore AFFIRMED in part and REMANDED in part with instructions.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS,
EASTERN DIVISION

No. 10-cv-02477

PAMELA J. HARRIS, ELLEN BRONFELD, CAROLE GULO, MICHELLE HARRIS, WENDY PARTRIDGE, THERESA RIFFEY, GORDON P. STIEFEL, SUSAN WATTS, PATRICIA WITHERS, STEPHANIE YENCER-PRICE, AND A CLASS OF SIMILARLY SITUATED,
Plaintiffs,

v.

GOVERNOR PAT QUINN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31,
Defendants.

Nov. 12, 2010

MEMORANDUM OPINION AND ORDER

SHARON JOHNSON COLEMAN, *District Judge*.

In this proposed class action lawsuit, Plaintiffs are individuals who provide in-home care to disabled participants in one of two Illinois Medicaid-waiver programs: (1) the Home Services Program administered by the Division of Rehabilitation Services of the Illinois Department of Human Services ("Rehabilitation

Program"); or (2) the Home Based Support Services Program for Mentally Disabled Adults administered by the Division of Developmental Disabilities of the Illinois Department of Human Services ("Disabilities Program"). Plaintiffs Theresa Riffey, Susan Watts, and Stephanie Yencer-Price ("Rehabilitation Plaintiffs") provide services to disabled participants in the Rehabilitation Program and allege that Defendant SEIU Healthcare Illinois & Indiana ("SEIU HII") violated the constitutional rights of these Plaintiffs by compelling them to pay SEIU HII compulsory union fees. Plaintiffs Pamela J. Harris, Ellen Bronfeld, Michelle Harris, Carole Gulo, Wendy Partridge, and Patricia Withers ("Disabilities Plaintiffs")[1] provide services to disabled participants in the Disabilities Program. The Disabilities Plaintiffs allege that Defendants Governor Pat Quinn ("Governor Quinn"), SEIU Local 73, and AFSCME Council 31 ("AFSCME") violated the constitutional rights of the Disabilities Plaintiffs by threatening to compel them to financially support either SEIU Local 73 or AFSCME. The Rehabilitation Plaintiffs and the Disabilities Plaintiffs seek monetary damages, injunctive relief, and a declaratory judgment that certain conduct, portions of two Illinois Executive Orders, and an Illinois Public Act are unconstitutional. In a consolidated motion, all Defendants moved for dismissal of Counts I and II pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) respectively. (Dkt. No. 30.) Defendants SEIU Local 73 and AFSCME moved for dismissal on the additional basis that the claims against them fail to establish state action. Governor Quinn moved for dismissal of any claim seeking mon-

[1] Plaintiffs have filed notice with the Court of the voluntary dismissal of Gordon P. Stiefel. (Dkt. No. 49.)

etary damages against him on the additional basis of the immunity protections provided by the Eleventh Amendment. The Court conducted a hearing on the pending motion on November 5, 2010. For the reasons stated below, the Court grants Defendants' Consolidated Motion to Dismiss.

I. Factual Background

The Plaintiffs are providers of home care service to disabled individuals enrolled in either the Disabilities Program or the Rehabilitation Program.[2] (Dkt. No. p. 2.) Both programs are Medicaid-waiver programs administered by the Illinois Department of Human Services, which subsidize the costs of providing home-based services to individuals with severe disabilities. (*Id.* at ¶¶ 7, 13.) The Plaintiffs provide personal care and certain health care services to program participants to allow the participants to remain in their homes and prevent their unnecessary institutionalization. (*Id.*) The program participants may select and hire any provider who meets certain minimum requirements as set by the State of Illinois ("State"). (Compl. ¶¶ 10, 16.) The participants supervise, discipline, and control certain terms and conditions of the providers they hire. (*Id.*) The State subsidizes a participant's cost of hiring a provider, ensures that providers meet certain minimum requirements, and controls the economic terms of the providers' employment. (Compl.¶¶ 10-11, 17.)

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[2] Providers in the Rehabilitation Program are generally referred to as "personal assistants" while providers in the Disabilities Program are generally referred to as "individual providers." (Dkt. No. 1 ¶¶ 9, 31.)

A. Providers in The Rehabilitation Program

In March 2003, former Illinois Governor Blagojevich issued "Executive Order on Collective Bargaining By Personal Assistants" ("EO 2003-08"), which recognized that the State was not the "sole employer" of the personal assistants who provide home services under the Rehabilitation Program. (Dkt. No. 32-1.) EO 2003-08 also recognized the importance of preserving the participants' "control over the hiring, in-home supervision, and termination of the personal assistants" while at the same time preserving the "State's ability to ensure efficient and effective delivery of personal care services and [to] control the economic terms of the personal assistants' employment." (*Id.*) In recognition of these twin objectives, EO 2003-08 provided that the State shall recognize a representative designated by the majority of the personal assistants as the exclusive representative of all personal assistants for the purposes of engaging in collective bargaining with the representative concerning the terms and conditions of employment "that are within the State's control." (*Id.;* Compl. ¶ 20.)

In July 2003, the Illinois General Assembly codified EO 2003-08 by enacting Public Act 0903-204, An Act Concerning Disabled Persons ("the 2003 Act"), which amended Section 3 of the Disabled Persons Rehabilitation Act. (Compl. ¶ 21; Dkt. No. 32-10.) Section 3(f) of the 2003 Act provided:

> [P]ersonal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered their employer. (Dkt. No. 32-10.)

The 2003 Act also provided for a "Fair share agreement" which required all employees in a collective bargaining unit to pay "their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and other conditions of employment." (*Id.* at Sect. 3(g).) The fair share agreement specifically excluded payment of "any fees for contributions related to the election or support of any candidate for political office." (*Id.*)

Shortly after the 2003 Act was enacted, the majority of personal assistants in the Rehabilitation Program designated SEIU HII as the exclusive representative for all personal assistants and the State and SEIU HII subsequently entered into a collective bargaining agreement ("CBA") effective August 1, 2003 to December 31, 2007. (Compl.¶¶ 22-24.) In 2008, the State and SEIU HII entered into a new CBA effective January 1, 2008 to June 30, 2012. (*Id.* at ¶ 24; Dkt. No. 32-3 p. 2.) The CBA allows the State, upon the written authorization of the personal assistant, to deduct union dues and initiation fees from the personal assistant's wages and remit such fees to SEIU HII. (Dkt. No. 32-3 p. 8.) The CBA also contains a fair share provision in Section 6 of Article X, which tracks the language in the 2003 Act and requires that all personal assistants who are not SEIU HII members pay "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours, and other conditions of employment." (Compl. ¶ 25; Dkt. No. 32-4 p. 7.)

The Rehabilitation Plaintiffs are personal assistants in the Rehabilitation Program who have either paid union dues or fair share fees through payroll de-

ductions that were ultimately remitted to SEIU HII. (Compl.¶ 38.) The Rehabilitation Plaintiffs allege that they, and other similarly situated personal assistants, are compelled to financially support SEIU HII for purposes of speaking to, petitioning, and otherwise lobbying the State with respect to the Rehabilitation Program and that the compelled association abridges their right to freedom of association, freedom of speech, and to petition the government for redress of grievances under the First Amendment to the United States Constitution, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. (Compl.¶ 46.)

B. Providers in the Disabilities Program

On June 29, 2009, Governor Quinn issued Executive Order 2009-15 ("EO 2009-15" or "the Order") titled "Collective Bargaining By Individual Providers of Home-Based Support Services." (Compl. ¶ 31; Dkt. No 32-2.) EO 2009-15 recognized that the individual providers of home-based services under the Disabilities Program are not State employees but that the "State controls the economic terms of their provision of services." (Dkt. No. 32-2 p. 2.) The Order also recognized the fact that the State had productively dealt with an exclusive representative of personal assistants in the Rehabilitation Program for many years. (*Id.*) EO 2009-15 authorized the State to recognize a representative designated by the majority of the individual providers in the Home-Based Support Services Program as the exclusive representative for collective bargaining purposes. (Compl ¶ 31.)

In October 2009, Defendants SEIU Local 73 and AFSCME unsuccessfully attempted to become the exclusive representative of the individual providers in the Disabilities Program. (*Id.* ¶ 32.) As a result, the

individual providers in the Disabilities program are not represented by any union. (*Id.* at 33.) The Disabilities Plaintiffs allege that they devoted time, and in some cases money, to campaign against union representation. (*Id.* at 35.) These Plaintiffs also allege that SEIU Local 73 and AFSCME are continuing their efforts to become the exclusive representative pursuant to EO 2009-15 and that these ongoing efforts threaten to violate the constitutional rights of the Disabilities Plaintiffs and others similarly situated. (*Id.* at ¶¶ 36-37.)

II. Standard of Review

A. Motion To Dismiss for Failure To State a Claim

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *Christensen v. County* of Boone, 483 F.3d 454, 458 (7th Cir.2007). Pursuant to the federal notice pleading standard, a complaint need only provide a short and plain statement of the claim showing that the plaintiff is entitled to relief and sufficient to provide the defendant with fair notice of the claim and its basis. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). When evaluating the sufficiency of a complaint, a district court must construe the complaint in the light most favorable to the nonmoving party. *Id.* The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "To survive a motion to dismiss, 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*, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). For a claim to have facial plausibility, a

plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* As such, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

A Rule 12(b)(6) motion must be decided solely on the face of the complaint and any attachments that accompanied its filing. *Miller v. Herman*, 600 F.3d 726, 732 (7th Cir.2010). Pursuant to Federal Rule of Civil Procedure 12(d), a district court cannot consider material outside of the complaint and its attachments without converting a Rule 12(b)(6) motion to a motion for summary judgment. *See* Fed. R. Civ. P 12(d) ("[i]f on motion under Rule 12(b)(6) or 12(c)), matters outside of the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"). A court may, however, consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998). Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper. *Id.; see also* Fed.R.Evid. 201.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When reviewing a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir.1999). The district court is not, however, bound to accept as true the allegations of the complaint which tend to establish jurisdiction

where an opposing party properly raises a factual question concerning the jurisdiction of the district court to proceed with the action. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979). The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists. *Long*, 182 F.3d at 554.

C. Request for Judicial Notice

Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the complaint and are central to the claims. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998). Defendants requested that the Court take judicial notice of ten documents in support of their motion to dismiss. (Dkt. No. 32.) Plaintiffs do not oppose Defendants' request for judicial notice and indeed the Complaint relies upon several of the documents presented by the Defendants in their request for judicial notice. (*See* Dkt. No. 1 ¶¶ 20, 21, 24, 31.) The Court therefore takes judicial notice of the following documents because they are matters of public record and because they are central to Plaintiffs' claims: (1) Executive Order No.2003-8 (Defendants' Request for Judicial Notice ("RJN"), Ex. A); (2) Executive Order No.2009-15 (*id.* at Ex. B); (3) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective January 1, 2008 to June 30, 2012 (*id.* at Ex. C); (4) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective August 1, 2003 to December 31, 2007) (*id.* at Ex. D); and (5) Illinois Public Act 93-0204 (2003) (*id.* at Ex. J). The Court also takes judicial notice of the August 30, 2002 Order in *West v. Serv. Employees*

Int'l Union Local 434B in the United States District Court for the Central Division of California, Western Division, (*id.* at Ex. F). *See, e.g., Opoka v. INS*, 94 F.3d 392, 394 (7th Cir.1996) ("it is a well-settled principle that the decision of another court or agency . . . is a proper subject of judicial notice"). The Court declines to take judicial notice of the April 11, 2009 Arbitration Decision (RJN, Ex. E), the December 18, 1985 decision of the Illinois State Labor Relations Board (*id.* at Ex. G), the April 23, 2007 decision of the Illinois Labor Board (*id.* at Ex. H), and the March 18, 2002 decision of the State of Illinois Industrial Commission (*id.* at Ex. I) because Defendants have not established that these documents are necessary for resolution of their motion.

III. Analysis

A. Count I—Rehabilitation Plaintiffs

Count I, asserted on behalf of the Rehabilitation Plaintiffs, alleges the system of exclusive representation established by the State that allows Defendant SEIU HII to impose and collect fair share fees violates the Plaintiffs' First Amendment rights. Defendants move for dismissal of Count I alleging that the U.S. Supreme Court has held that collective bargaining arrangements permitting fair share fees are consistent with the First Amendment. (Dkt. No. 31 p. 13.) Defendants claim that a long and unbroken line of Supreme Court cases about collective bargaining have held that such arrangements are justified by the state's legitimate interest in establishing a harmonious system for labor relations. (*Id.*) Defendants also argue fair share fees have been found to fairly distribute the costs associated with collective bargaining among all who benefit to avoid the risk of "free riders." (*Id.*) Defendants rely upon *Hanson*

and its progeny for the proposition that exclusive representation arrangements, while imposing some burden on an individual's First Amendment rights, are justified by the employer's interest in "labor peace." *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 238, 76 S.Ct. 714, 100 L.Ed. 1112 (1961) (holding "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work" does not violate the First Amendment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding fair share fees used to finance expenditures germane to collective bargaining serve an important government interest in labor relations and are constitutionally justified); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (holding that a union could constitutionally charge dissenting employees for their share of union activities appurtenant to collective bargaining and contract implementation). Defendants find additional support in a recent decision dismissing a similar action on nearly identical facts. (Order Granting SEIU Local 434B's Motion to Dismiss Counts One Through Four, *West v. Serv. Employees Int'l Union Local 434B*, No. 01-cv-10862-CAS-FMO (C.D.Cal. Aug. 30, 2002), submitted as RJN, Ex. F.)

As noted by the Defendants, the Supreme Court has held that employees can be required to contribute fair share fees to compensate unions for their representational activities. *See, e.g., Lehnert*, 500 U.S. at 519. A line is drawn for First Amendment purposes between fair share fees, which pay for representational or collective-bargaining activities, and full union dues that often support nonrepresentational activities. Unions cannot force employees to pay for "the support of ideological causes not germane to its

duties as collective-bargaining agent." *See Abood*, 431 U.S. at 235-36; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In a recent decision, the Seventh Circuit explained that fair share fees are permitted under the First Amendment because this forced speech promotes peaceful labor relations and serves legitimate government purposes for the benefit of both union members and non-members. *Kingstad v. State Bar of Wisc.*, No. 09-4080 (7th Cir. Sept. 9, 2010) (slip opinion pp. 10-11). Without a showing that fair share fees are used to fund ideological conformity or imposed for reasons unrelated to collective bargaining, these fees do not violate the First Amendment. *Hanson*, 351 U.S. at 235-38.

Plaintiffs do not deny that fair share fees in the collective bargaining context have been found constitutional. Rather, Plaintiffs argue that the exclusive representation arrangement here is "nothing short of compulsory political representation" that violates Plaintiffs' First Amendment rights by compelling them to support a state-designated entity for purposes of lobbying the State for additional benefits from a government program. (Dkt. No. 33 at pp. 9-10.) Plaintiffs also allege that fair share fees imposed under this arrangement are not justified by a vital government interest.

The Plaintiffs' claim that they are compelled by the State to support a state-designated representative to speak on their behalf for the purpose of getting more benefits from a government program is unsound. First, the State did not designate any entity to serve as the Plaintiffs' exclusive representative. Instead, as set forth in the Complaint, the State "recognize[d] a representative designated by a majority of the

personal assistants as the exclusive representative of all personal assistants." (Dkt. No. 1 ¶ 20.) Second, the Complaint alleges that the disabled individuals, not the Plaintiffs, are the recipients of a government program that subsidizes the cost of their in-home care. (Dkt. No. 1 ¶¶ 2-3, 7, 13.) Third, the Complaint is bereft of any allegation that the Plaintiffs are prevented from independently lobbying the State for any purpose. Finally, the authorities that Plaintiffs cite to support their claim found compelled support of beliefs or ideology unconstitutional; this is not the case that Plaintiffs find themselves in.[3] *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 74-75, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (holding any personnel decisions based upon support of political party violate First Amendment); *Abood*, 431 U.S. at 233-34 (holding union fees that support ideological activities violate First Amendment); *Elrod v. Burns*, 427 U.S. 347, 356-57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (holding policy that conditions employment on support of a political party violates First Amendment).

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[3] Plaintiffs filed a Citation to Supplemental Authorities in Support of Their Opposition to Defendants' Motion to Dismiss (Dkt. No. 39) after the close of briefing on the instant motion and without seeking leave of the Court. The filing consisted of a July 14, 2010 Order in *Schlaud v. Granholm*, Case No. 10-cv-147 (Dkt. No. 32) pending in the United States District Court for the Western District of Michigan, along with excerpts from a July 13, 2010 hearing in the same matter. No reasoning was included in the July 14, 2010 Order. During the November 5, 2010 hearing in the case *sub judice*, Plaintiff's counsel conceded that he speculated as to the district court's reasoning in *Schlaud.* The Court declines to speculate about the court's reasoning in *Schlaud* and thus the Court will not consider this supplemental filing in ruling on Defendants' Consolidated Motion to Dismiss.

Defendants contend the State's legitimate interest in establishing effective collective bargaining justifies a system of exclusive representation and fair share fees. (Dkt. No. 31. p. 17.) Plaintiffs counter that such arrangements are only constitutional when justified by a vital government interest and that none exists here. (Dkt. No. 33. p. 11.) Plaintiffs once again rely upon *Elrod* and *Rutan*, both of which considered infringements on First Amendment rights outside of the collective bargaining environment.

Plaintiffs also claim *Lehnert* provides support for their claim. Plaintiffs' reliance upon *Lehnert*, however, is puzzling. The *Lehnert* plaintiffs were employees of a state college who challenged compelled union fees that were used for purposes *other* than collective bargaining. 500 U.S. at 513. In addressing plaintiffs' challenge, the Court first emphasized that its previous decisions recognized that the compelled financial support of a union's collective bargaining activities was constitutionally permissible. *Id.* at 516. The Court then articulated a three prong test for determining the range of fees that a union could constitutionally charge non-members consistent with the First Amendment. *Id.* at 519. Plaintiffs quote from a portion of this test when arguing that the State must demonstrate that a vital interest, rather than a legitimate interest as Defendants assert, justifies the fair share fees at issue here. (Dkt. No. 33 p. 11.) The full test set forth in *Lehnert* provides:

> [A]lthough the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union may constitutionally charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations . . . chargeable activities

> must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, 500 U.S. at 519. Read in full context, *Lehnert* explains that the government's interest in labor peace and avoiding free riders is a vital government interest. While Defendants may have characterized the State's interest in establishing a harmonious system for labor relations as a legitimate interest, this interest is considered vital in accordance with Supreme Court precedent. Plaintiffs' claim that no vital interest exists here lacks merit.

Throughout the hearing, Plaintiff's counsel repeatedly referred to the collective bargaining activities before the Court as "lobbying." Counsel argued that collective bargaining absent an employer-employee relationship is lobbying and that since no employment relationship exists between the State and the personal assistants in the Rehabilitation Program, that the fair share fees here support compulsory lobbying. This argument is flawed as the Complaint alleges that: (1) the State pays the providers (Dkt. No. 1 ¶¶ 11, 26); (2) the State controls certain terms and conditions of the providers' employment (*id.* at ¶¶ 10-11, 22, 26); and (3) the 20,000 providers are considered State employees solely for the purpose of collective bargaining (*id.* at ¶¶ 12, 21).

Although Plaintiff's counsel provided no authority to support this argument, *Lehnert* provides guidance on the sometimes "hazy line" between lobbying and collective bargaining in the public sector. *Lehnert*, 500 U.S. at 518-520. The Court explained that in

public sector employment, unions must necessarily concern themselves not only with negotiations at the bargaining table but also with those activities necessary to ensure the agreement's implementation. *Id.* at 520. These additional activities include efforts to secure ratification and acquire appropriations from the proper state body. *Id.* These post-negotiating activities are "pertinent to the duties of the union as a bargaining representative" and are an "indispensable prerequisite" to ensuring contract implementation. *Id.* at 519-520. The Court recognized that the question of whether these additional activities are lobbying is "a close one." *Id.* at 520. The Court held, however, that employees may be constitutionally compelled to subsidize legislative lobbying within the context of contract ratification or implementation. *Id.* at 522. Thus, characterizing the fair share fees here as "compulsory lobbying" does not, without more, implicate any First Amendment concerns. *Id.* at 517.

Plaintiffs' also claim that the labor peace justification does not apply here because the personal assistants are not State employees. Yet, the personal assistants have been designated as public employees for the purpose of collective bargaining. (Dkt. No. 1 ¶ 19.) There can be no doubt that the State has a vital interest in establishing peaceful labor relations with the 20,000 personal assistants paid with State subsidized funds. Plaintiffs next argue that First Amendment values should predominate over the State's interest because a contrary approach would inflict harm by causing individuals to support views and beliefs against their will thereby harming the democratic process that the First Amendment protects. (Dkt. No. 33 p. 36.) Plaintiffs' argument fails because they have not alleged either in the Complaint or in their Opposition Motion that Plaintiffs have been

forced to support any ideology or viewpoint with which they disagree.

In their briefs, both Plaintiffs and Defendants refer to the order entered by the district court in *West v. SEIU Local 434B*. Defendants argue that *West* supports their claim that the system of collective bargaining established by the State of Illinois comports with the First Amendment while the Plaintiffs argue that *West* rests on faulty reasoning. (Dkt. No. 31 p. 26; Dkt. No. 33. p. 34.) While certainly not binding on this Court, we find the reasoning in *West* persuasive. The *West* plaintiffs provided in-home support services to low income elderly and disabled persons, who received benefits to fund these services through a statewide public entitlement program. (RJN, Ex. F at p. 4.) By statute, the plaintiff providers were designated as state employees and were thereby subject to an exclusive bargaining agreement, which permitted the defendant union to collect agency fees. (*Id.* at pp. 1-2.) The plaintiffs asserted a constitutional challenge to the statute alleging that it violated the First Amendment rights of the providers and impinged upon their right to free association. (*Id.* at 2.) The union sought dismissal arguing that the statutory framework was enacted to clarify that the public body was the employer of the providers for collective bargaining purposes only and that the program recipients were the employers of the providers for all other purposes. (*Id.* at 15.) The union also argued that under *Hanson* and *Abood*, the union could constitutionally collect agency fees to support the costs of collective bargaining. (*Id.* at 16-17.) The plaintiffs argued that the challenged statutory provisions constituted illegal content and viewpoint based regulations subject to strict scrutiny to be constitutional. (*Id.* at 18.) The plaintiffs further contended that no

public employer-employee relationship existed to justify an exclusive bargaining arrangement and that any such justification must be the least restrictive means available. (*Id.* at 20.)

The district court concluded that the plaintiffs were incorrect about the standard of scrutiny that applies to collective bargaining agreements. The court explained that "[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace." (*Id.* at 21.) The court found that the statutory framework classifying the providers as public employees subject to exclusive bargaining agreements was in accordance with longstanding Supreme Court precedent. (*Id.* at 22.) The district court dismissed the plaintiffs' claims with prejudice and noted that the plaintiffs failed to articulate any impermissible way in which the statutory scheme impinged upon their First Amendment rights. (*Id.* at 22-23.)

Similarly, Plaintiffs have not alleged that the exclusive representation system here has imposed any burden on Plaintiffs beyond supporting the collective bargaining arrangement from which they benefit. There are no allegations that the fair share fees here are used to support any political or ideological activities. The Complaint alleges only that the Rehabilitation Plaintiffs pay a compulsory fee to SEIU HII for "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." (Dkt. No. 1 ¶ 25.) These costs are constitutional under *Lehnert* and other longstanding Supreme Court precedent. The Complaint fails to state a plausible claim that the fair-share fee arrangement violates the First

Amendment and thus the Court dismisses Count I with prejudice.

B. Count II—Disabilities Plaintiffs

Count II, asserted on behalf of the Disabilities Plaintiffs, alleges that Defendants Governor Quinn, SEIU Local 73, and AFSCME have threatened to violate Plaintiffs' First Amendment rights by attempting to unionize the individual providers in the Disabilities Program. (Dkt. No. 1 pp. 16-17.) Defendants seek dismissal of Count II arguing that the Court lacks subject matter jurisdiction because the claim is not ripe and the Plaintiffs lack standing. (Dkt. No. 31 p. 33.) Plaintiffs counter that because the threat to their First Amendment rights is imminent, they have standing to enjoin enforcement of the statutory framework which would subject them to exclusive representation and fair share fees. (Dkt. No. 33 pp. 40-41.)

Article III of the U.S. Constitution limits the authority of the federal courts to "cases or controversies." From that requirement flow two closely related concepts: ripeness and standing. *Rock Energy Coop. v. Village of Rockton*, 614 F.3d 745, 748 (7th Cir.2010). Both of these doctrines bar a plaintiff from asserting an injury that depends on so many future events that a judicial opinion would be advice about remote contingencies. *Id.* To determine whether an actual controversy exists, a court must look at whether the facts alleged show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief. *Rock Energy*, 614 F.3d at 748.

1. Ripeness

Defendants argue that Count II is not ripe because there are several contingencies that must occur, that are not certain to occur, before the individual providers in the Disabilities Program would be subject to a fair share arrangement. The Complaint alleges that the majority of individual providers in the Disabilities Program elected not to designate any union as their exclusive representative in October 2009. (Dkt. No. 1 ¶¶ 32, 36.) Plaintiffs have not alleged that another election has been scheduled or that either Defendant SEIU Local 73 or Defendant AFSCME has petitioned to hold such an election. Further, as the Defendants asserted, the Disabilities providers could once again choose not to be represented by a labor organization. Even allowing for an election designating some union as the exclusive representative, a collective bargaining agreement that included a fair share fee provision would then need to be negotiated. Furthermore, Defendants SEIU Local 73 and AFSCME may choose not to participate in an election if one were to be held. Notwithstanding Plaintiffs' argument that an election is likely, there are simply too many "future events that may not occur as anticipated, or indeed may not occur at all" to find that the threatened alleged violation is imminent, and thus ripe for adjudication. *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir.2008). Count II is dismissed because the claim is not ripe.

2. Standing

Defendants argue that no plaintiff has standing to assert Count II for the same reason that the claim is not ripe. Plaintiffs counter that they have standing because they can show a "reasonable probability" of suffering tangible harm and that they have expended

time and money to prevent "Defendants' attempts to impose a compulsory representative upon them in violation of their constitutional rights." (Dkt. No. 33. p. 42.)

The required elements of Article III standing are: (1) an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (2) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir.2004).

To satisfy the injury-in-fact requirement, the Disabilities Plaintiffs must establish that they have sustained or are immediately in danger of sustaining some direct injury. *Id.; Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir.2001). This the Plaintiffs cannot do. Plaintiffs have couched their claim as involving an injury that the Defendants are "threatening." (Dkt. No. 1 p. 16.) Thus, the alleged injury is not actual and, as discussed above, it is not imminent given the multiple contingencies that may or may not occur. The fact that the Disabilities Plaintiffs voluntarily spent money to prevent what they perceive as a threatened violation of their First Amendment rights does not establish an injury-in-fact. *See, e.g. Forbes v. Wells Fargo Bank, N.A.*, 420 F.Supp.2d 1018, 1021 (D.Minn.2006) (granting summary judgment where plaintiffs' "expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."). Having failed to establish an

injury-in-fact, Plaintiffs cannot meet the remaining requirements necessary to establish standing.

The Court lacks subject matter jurisdiction over Count II because the claim is not ripe and Plaintiffs lack standing. As a result, the Court dismisses Count II against all Defendants with prejudice.[4]

C. Claims for Damages Against Governor Quinn

Defendants also move for dismissal of all claims against Defendant Governor Quinn that seek monetary relief on the ground that the Eleventh Amendment bars such claims. (Dkt. No. 31 p. 38.) Plaintiffs did not address this argument in their Opposition Motion. Since the Court has concluded that Counts I and II must be dismissed with prejudice, the Court need not reach the issue of sovereign immunity.

IV. CONCLUSION

For the above stated reasons, this Court GRANTS Defendants' Consolidated Motion to Dismiss.

IT IS SO ORDERED.

[4] To the extent that Defendants argue that Count II should be dismissed against SEIU Local 73 and AFSCME for lack of state action, the Court's ruling dismissing all Defendants from Count II renders this argument moot.

APPENDIX C

Illinois Public Act 93-204 (2003)
Ill. Legis. Serv. P.A. 93-204 (2003)

[*Relevant Provisions Only*]

Illinois Public Labor Relations Act—Personal Care Attendants or Personal Assistants—Representation; Employee Status; Collective Bargaining

AN ACT concerning disabled persons.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Public Labor Relations Act is amended by changing Sections 3 and 7 as follows:

(5 ILCS 315/3) (from Ch. 48, par. 1603)

Sec. 3. Definitions. As used in this Act, unless the context otherwise requires:

* * *

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, or (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the Board, that the labor

organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; *or (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003B8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section*.

* * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including interns and residents at public hospitals *and, as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act*, *subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act*, but excluding all of the following: employees of the General Assembly of the State of Illinois; elected officials; executive heads of a department; members of boards or commissions; employees of any agency, board or commission created by this Act; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions except firefighters and peace officers employed by a state university; managerial employees; short term employees; confidential employees; independent contractors; and supervisors except as provided in this Act.

Personal care attendants and personal assistants shall not be considered public employees for

any purposes not specifically provided for in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19716 (5 ILCS 375/).

* * *

(o) "Public employer" or "employer" means the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees. *As of the effective date of this amendatory Act of the 93rd General Assembly, but not before, the State of Illinois shall be considered the employer of the personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided for in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19717 (5 ILCS 375/).*

* * *

(5 ILCS 315/7) (from Ch. 48, par. 1607)

Sec. 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

* * *

Collective bargaining for personal care attendants and personal assistants under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 93rd General Assembly.

* * *

Section 10. The Disabled Persons Rehabilitation Act is amended by changing Section 3 as follows:

(20 ILCS 2405/3) (from Ch. 23, par. 3434).

§ 3. Powers and duties. The Department shall have the powers and duties enumerated herein:

* * *

(f) To establish a program of services to prevent unnecessary institutionalization of persons with Alzheimer's disease and related disorders or persons in need of long term care who are established as blind or disabled as defined by the Social Security Act, thereby enabling them to remain in their own homes or other living arrangements.

* * *

Solely for the purposes of coverage under the Illinois Public Labor Relations Act1 (5 ILCS 315/), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public

employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire personal care attendants and personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 19712 (5 ILCS 375/).

* * *

Approved: July 16, 2003
Effective: July 16, 2003

APPENDIX D

EXECUTIVE ORDER NUMBER 8 (2003)

EXECUTIVE ORDER ON COLLECTIVE BARGAINING BY PERSONAL CARE ASSISTANTS

WHEREAS, personal care assistants ("personal assistants") provide service to Illinois citizens in need ("recipients") as part of the Home Services Program under 20 ILCS 2405/3 and 89 Ill.Admin.Code section 676.10, et seq.; and

WHEREAS, in *State of Illinois (Departments of Central Management Services & Rehabilitation Services*), 2 PERI 2006 at 35 (1985), the State Labor Relations Board found that personal assistants are in a "unique" employment relationship and that the State was not "their 'employer' or, at least, their sole employer" under the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.*, and the Board therefore held that it lacked jurisdiction over the relationship between the State and the personal assistants; and

WHEREAS, the decision in *State of Illinois* left the Executive Branch with discretion over the organization of its relationship with personal assistants; and

WHEREAS, it is important to preserve the recipients' control over the hiring, in home supervision, and termination of personal assistants and, simultaneously, preserve the State's ability to ensure efficient and effective delivery of personal care services and control the economic terms of the personal assistants' employment under the Homes Services Program; and

WHEREAS, each recipient employs only one or two personal assistants and does not control the economic terms of their employment under the Homes Services Program and therefore cannot effectively address concerns common to all personal assistants; and

WHEREAS, the personal assistants work in the homes of recipients throughout Illinois and therefore cannot effectively voice their concerns about the organization of the Home Services program, their role in the program, or the terms and conditions of their employment under the Program without representation; and

WHEREAS, it is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services; and

WHEREAS, personal assistants are not State employees for purposes of eligibility to receive statutorily mandated benefits because the State does not hire, supervise or terminate the personal assistants; and

WHEREAS, the State has productively dealt with a representative of the personal assistants on an informal basis, and a system of collective bargaining has successfully been implemented with respect to similarly situated workers in other states.

THEREFORE, I hereby order the following:

1. The State shall recognize a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants, accord said representative all the rights and duties granted such representatives by the Illinois Public

Labor Relations Act, 5 ILCS 315/1 et seq., and engage in collective bargaining with said representative concerning all terms and conditions of employment of personal assistants working under the Homes Services Program that are within the State's control.

2. This Executive Order is not intended to and will not in any way alter the "unique" employment arrangement of personal assistants and recipients, nor will it in any way diminish the recipients' control over the hiring, in home supervision, and termination of personal assistants within the limits established by the Home Services Program.

This Executive Order 2003 8 shall take effect upon filing with the Secretary of State.

Rod R. Blagojevich, Governor

Issued by Governor: March 4, 2003

APPENDIX E

EXECUTIVE ORDER NUMBER 15 (2009)

COLLECTIVE BARGAINING BY INDIVIDUAL PROVIDERS OF HOME BASED SUPPORT SERVICES

WHEREAS, individual providers of home based support services ("individual providers") provide services to persons with disabilities ("consumers") in their own homes as part of the Home Based Support Services Program under 405 ILCS 80/2 1 et seq., and 59 Ill.Admin.Code part 117; and

WHEREAS, individual providers are employees of the consumers whom they serve or the consumer's parents or guardian, but are not employees of the State or any other person or entity; and

WHEREAS, it is important to preserve the relationship between consumers' control over the hiring, in home supervision, and termination of individual providers and, simultaneously, preserve the State's ability to ensure efficient and effective delivery of services and control the economic terms of compensation provided under the Home Based Support Services Program; and

WHEREAS, each consumer employs only one or two individual providers and does not control the economic terms of their employment under the Home Based Support Services Program and therefore cannot effectively address concerns commons to all individual providers; and

WHEREAS, the individual providers work in the homes of consumers throughout Illinois and therefore cannot effectively voice their concerns about the organization of the Home Based Support Services Program, their role in the Program, or the terms and conditions of their provision of services under the Program without representation; and

WHEREAS, it is essential for the State to receive feedback from the individual providers in order to effectively and efficiently deliver home based support services; and

WHEREAS, individual providers are not State employees, and are not eligible to receive statutory benefits, including but not limited to those provided under Illinois Pension Code, State Employee Group Insurance Act and Illinois Workers' Compensation Act, as the State does not hire, supervise, or terminate individual providers; and

WHEREAS, the State has productively dealt for many years with a representative of personal assistants in the Home Services Program, who are similarly situated as individual providers as they provide services to vulnerable persons in their homes, are employees of those consumers, but the State controls the economic terms of their provision of services.

THEREFORE, I hereby order the following:

1. The State shall recognize a representative designated by a majority of the individual providers in the Home Based Support Services Program as the exclusive representative of all such individual providers; accord said representative all the rights

and duties granted to such representatives by the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq.; and engage in collective bargaining with said representative concerning all terms and conditions of the provision of services under the Home Based Support Services Program that are within the State's control, including the setting of minimum rates of payment to individual providers.

2. A representative may be designated either by submission of authorization cards from a majority of individual providers or by a majority of individual providers voting in a mail ballot election. Any organization that can show that at least 30% of individual providers wish to be represented by it may participate in any election held under this order. In order to facilitate this process, the Department of Human Services shall provide to an organization interested in representing individual providers access to the names and addresses of current individual providers. The expenses of all proceedings should be borne by any participating organization(s).

3. This Executive Order is not intended to and will not in any way alter 1) the fact that individual providers are not state employees, 2) the employment arrangement of individual providers and consumers, or 3) the consumers' control over the hiring, in home supervision, and termination of individual providers within the limits established by the Home Based Support Services Program.

4. In according individual providers and their selected representative these rights, the State intends that the "State action exemption" to application of the federal antitrust laws be fully available to the State, individual providers, and their selected

representative to the extent that their activities are authorized pursuant to this Executive Order.

This Executive Order 2009 15 shall take effect upon filing with the Secretary of State.

Pat Quinn GOVERNOR

Issued by Governor: June 29, 2009
Filed with Secretary of State: June 26, 2009