No. 11-681

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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This case presents the extraordinary circumstance of citizens being forced to lobby a state for more benefits from a public-aid program through an advocate the state itself has designated. The Respondent Unions attempt to disguise the constitutional significance of this action with a superficial application of labor law terminology. However, semantics cannot obscure the reality that the State of Illinois is compelling personal care providers to associate with an organization for the very purpose of "petition[ing] the Government for a redress of grievances." U.S. Const. amend I.

1. Foremost, calling providers State "employees" because their services to persons with disabilities are paid for by a State Medicaid program is both inaccurate and immaterial. (Unions' Br., 7). It is inaccurate because "[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)." *State of Ill. (Dep't of Cent. Mgmt. Serv. & Rehab. Serv.)*, 2 PERI P 2007, at *2 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. Indeed, Illinois itself does not consider providers to be its employees, except for the sole purpose of collectivization. *See* 20 Ill. Comp. Stat. 2405/3(f); 89 Ill. Admin. Code § 676.10(c). Providers are truly employed only by the persons with disabilities who hire, train, direct, and supervise them. *See* 89 Ill. Admin. Code §§ 676.30(b), (p).

In any event, labeling providers State "employees" is immaterial because a government service provider's constitutional rights do not turn on such labels. *See O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 721 (1996). Nor do they turn on the degree to which a provider is dependent on government sources for income. *Id*. at 721-22. Thus, the fact that providers' services are paid for by a Medicaid program does not render them less than full "citizens" in their dealings with the State, as the Unions assert. (Union Br., 7). Indeed, if that were true, the constitutional rights of most of the medical profession would be diminished as a result of serving patients enrolled in Medicaid or Medicare. (*See* Petition, 24).

Most important here, that the State pays for providers' services does not give it a "labor peace" interest in using exclusive representation to quell "conflicting demands" from diverse groups of providers regarding their reimbursement rates. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 221 (1977). As explained in the Petition for Certiorari, this managerial interest in avoiding workplace disruptions applies only to petitioning that occurs within the narrow confines of a master-servant relationship and a government workplace. It is inapplicable here because providers do not work in State workplaces or under State direction, but for disabled persons in their private homes. Thus, their expressive activities cannot disrupt any State workplace. If providers choose to petition the State over their Medicaid reimbursement rates through multiple associations, this will occur in public forums and in their capacity as citizens. In this forum, the State has no more legitimate interest in suppressing competing demands from providers than it does in imposing an exclusive representative on doctors to prevent them from lobbying the State for greater Medicaid reimbursements through multiple associations. (Petition, 11-21). Tellingly, the Unions proffer no rebuttal to this dispositive point.[1]

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[1] In fact, the Unions' brief only proves that the labor peace rationale is inapplicable here. The Unions acknowledge that the State's designation of the SEIU as the providers' representative does not prevent providers from petitioning the State through other organizations. (Unions' Br., 9). Thus, they acknowledge that the State has not freed itself from "the possibility of facing conflicting demands" from diverse groups of providers through its actions. *Abood*, 431 U.S. at 221. As this Court recognized in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), labor peace is unattainable in public forums because, unlike in a government workplace, the ability of individuals to petition through

Second, referring to providers' State-designated advocate as a "labor organization that the majority of providers chose as their representative" gets the Unions nowhere. (Union Br., 8). It does not alter the reality that the State is forcing *all* of the approximately 20,000 providers who care for participants in the Rehabilitation Program to accept and subsidize the SEIU as their representative vis-à-vis the State. Even if a majority of providers supported the SEIU in 2003, which is unknown,[2] it would not diminish the constitutional injury inflicted on each provider who does not want to associate with the SEIU. Indeed, the very purpose of the First Amendment is to protect individual rights from the tyranny of the majority. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Third, calling Medicaid reimbursement rates for home personal care "wages" or "terms of employment" has no legal significance. (Union Br., 8). Petitioning on this subject remains "a matter of public concern" entitled to full protection under the First Amendment, *see Borough of Duryea v. Guarnieri*, __ U.S. __ , 131 S. Ct. 2488, 2495 (2011), just as petitioning by doctors for greater Medicaid reimbursement would regard a matter of public concern. This is not a matter of "purely private concern" for providers. *Id*. at 2500.

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rival organizations cannot be suppressed. *Id*. at 521 (plurality opinion); (*see also* Petition, 16).

[2] Governor Blagojevich, in Executive Order 2003-08, recognized the SEIU as the representative of providers in the Rehabilitation Program *without* an election. (App. 46a-47a). It is not known at this stage of the proceedings if a majority of providers supported the SEIU at that time.

Fourth, to call the expressive activity that providers must support "collective bargaining" does not diminish its expressive nature. (Union Br., 10). Providers are compelled to subsidize private speech directed to the State to influence its Medicaid reimbursement rates and policies. This speech constitutes "petition[ing] the Government for a redress of grievances" within the meaning of the First Amendment. *See Guarnieri*, 131 S. Ct. at 2495. It is as much an expressive and political activity as is lobbying for greater Medicaid reimbursement rates.

The mere fact that the State is willing to listen to the SEIU's "speech" and be receptive to its efforts to "petition the Government" in a bargaining process does not change this reality. Nor does it justify compelling providers to support this expressive activity. Government cannot compel citizens to support an advocacy group by simply bargaining with it over policy issues that affect those citizens.

Finally, the Unions' attempt to dress up Illinois' scheme to look like that upheld in *Abood* fails because they are missing its most critical article: a compelling government interest in "labor peace." It is only because of this underlying interest that public employees can be compelled to support an exclusive representative to collectively bargain with their employer. *Abood*, 431 U.S. at 220-21, 224. As explained in the Petition and never rebutted by the Unions, this managerial interest in quelling disruptive petitioning within the workplace is absent here because providers do not work under State direction or in State workplaces. (Petition, 11-21). Accordingly, irrespective of what other parallels may or may not exist between providers and employees, they differ in the critical respect that the State has no compelling

justification for infringing on providers' First Amendment right to free expressive association.

2. The Unions' reliance on semantics is not only unavailing on the merits, but begs the question before this Court: Who can be deemed a government "employee" and subjected to exclusive representation under *Abood*? Who can be compelled to "collectively bargain" with the State, and over what subjects?

These are questions of exceptional importance that warrant this Court's immediate attention due to the ever increasing extension of exclusive representation beyond traditional public employees to individuals whose services are merely paid for by government. As explained in the Petition and by the *amici*, several states at the behest of the SEIU and AFSCME have already collectivized individuals who provide personal care to Medicaid recipients or who provide childcare to public-aid recipients. (Petition, 22-23; *Amicus* Brief of the Cato Institute et al., 18-21). These schemes will continue to spread to other states, and to other types of service providers. (Petition, 21-25; *Amicus* Brief of Cato Institute et al. 22-24). Notably, the Unions never dispute that this is their intention.

This extension of compulsory representation vis-à-vis government is inflicting significant and irreparable injury on the First Amendment rights of hundreds of thousands of personal care and childcare providers across the nation. The number of victims will only grow over time.

This Court should act now to stop this practice of government designating mandatory representatives for citizens before it takes even greater root, and further corrupts the democratic process. (*See*

Petition, 25-27). As this Court recognized in *United States v. United Foods,* 533 U.S. 405, 411 (2001), "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."

At the very least, the lower courts need guidance as to what factors determine the outer limits of the compelled association permitted under *Abood*. Is a full employment relationship necessary? If not, what aspects of an employment relationship must be present to justify compulsory representation? Is government paying for the performance of a service itself sufficient? Given that these issues will be extensively litigated, this Court's immediate guidance is necessary.

For these reasons and those previously stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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