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

REPLY TO RESPONDENT PAT QUINN'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioners

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This petition does not "ask[ ] the Court to apply established legal principles to the specifics of this case," as the State of Illinois asserts. (State Br., 1). Instead, it asks the Court to establish what legal principles apply to the new, but increasingly common circumstance of states compelling individuals whose services are paid for by public-aid programs to support exclusive representatives to petition the State for more benefits from those programs. Specifically, what aspects of a public employment relationship must be present for the "labor peace" interest

recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) to justify exclusive representation vis-à-vis government? This is an issue of exceptional and recurring importance that warrants this Court's immediate attention.

I. The Seventh Circuit's Legal Standard for Determining When Association Can Be Compelled For Purposes of Petitioning Government is Overly Broad and Inconsistent With This Court's Precedents

Legal standards must first be established before they can be applied to any given set of facts. The standard adopted by the lower court to determine when government can force individuals to associate with an exclusive representative to "petition the Government for a redress of grievances" is as erroneous as it is permissive. U.S. Const. amend. I. First, it wrongfully focuses on individuals' economic relationship with government, instead of whether government has a compelling interest for regulating how it can be petitioned. Second, the standard expansively redefines the labor peace interest in a manner inconsistent with this Court's precedents.

A. The Seventh Circuit's Legal Standard for Who Can Be Deemed a Public Employee Under *Abood* Incorrectly Focuses on Economic Factors and Could Encompass Anyone Who Accepts Government Money for Their Services

The State and lower court maintain that individuals can be deemed government "employees" for purposes of collectivization under *Abood* if a state program exerts "significant control" over their job, to wit it: (1) reimburses them for their services;

(2) defines which specific services are eligible for reimbursement; and (3) defines who is eligible to receive reimbursement. (State Br., 11) (App. 10a-11a). That an individual may be hired, managed, supervised, and otherwise employed by someone other than the state is considered irrelevant. (App. 11a).

These factors do not establish a common-law employment relationship with a state, *see Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-53 (1989), but only evidence that a state has chosen to subsidize particular services. The second and third factors do not suggest more, as the State contends. *See id*. at 752 ("the extent of control . . . [a] party exercises over the details of the product is not dispositive" in establishing an employment relationship). Any entity that pays for a service necessarily defines *what* services it will pay for and *who* it will pay to perform them. Thus, that Illinois' Rehabilitation Program pays only for services deemed necessary in a physician approved "service plan," and which are performed by personal assistants with minimal "qualifications," does not establish a master-servant relationship between the State and personal assistants. (*Id*.) (quoting App. 10a-11a). These are merely descriptions of w*hat* services are eligible for reimbursement under that Medicaid program.[1]

Such limits are common not only in home care programs, but fee-for-service Medicaid and Medicare programs generally. (*See* Pet., 24; *Amicus* Br. of Cato

[1] For this reason, Petitioners characterization of the Seventh Circuit's holding as being that "a state is a joint employer if it pays for the provision of *defined* services" is completely accurate. (Pet. 23-24) (emphasis added).

Institute et al., 23). They are also inherent in government contracting, where government necessarily controls which services it wants performed and who it will pay to perform them. The ostensible state "control" that the Seventh Circuit held permits compulsory representation for personal assistants could be found to exist with almost any person or contractor who accepts money from government for performing particular services. (*Id*. at 21-25; *Amicus* Br. of Cato Institute et al., 22-24).

This result is unconscionable given that these economic factors are not justifications for infringing on individuals' First Amendment right to free expressive association. *See O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712, 722-23 (1996) (constitutional rights do not turn on common law distinctions between employees and independent contractors or the degree to which an individual is economically dependent on government).[2] Specifically, that a state program reimburses qualified individuals for performing certain services does not establish, or even bear upon, whether the state has a labor peace justification for requiring that individuals petition it through an exclusive representative.

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[2] The State attempts to distinguish *O'Hare* on the grounds that personal assistants are not being compelled to support political views, but rather collective bargaining under *Abood*. (State Br., 19). The contention fails because personal assistants *are* being compelled to support "political or ideological activities," (*id*. at 5), namely SEIU efforts to petition the State over its Medicaid programs. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) (unconstitutional to compel support for lobbying) (plurality opinion); *accord id.* at 559 (Scalia, J.) (same). At the very least, the State's contention only begs the question before the Court.

The relevant inquiry is whether a state has a compelling reason for regulating the expressive activity—here, the manner in which individuals associate to petition government. Logically, to force individuals to petition the state through an *exclusive* representative, the state must have a compelling reason for preventing the individuals from petitioning it through *multiple* representatives. *Cf. Abood*, 431 U.S. at 220-21, 244. States have such an interest with respect to individuals that they actively manage—i.e., their employees—because their diverse petitioning can disrupt the workplace and states can lawfully dictate how their employees interact with management on work time. (Pet., 11-19). But this interest is incognizable to individuals whose petitioning of the state occurs: (1) outside of a government workplace, and thus in public forums; or (2) when they are not being actively managed by the state, and thus are acting as citizens. (*Id.*). In either circumstance, such petitioning is unlikely to disrupt a government workplace. Even if it did, states have no legitimate interest in dictating how citizens associate to petition it in public forums. (*Id.*).

This is the proper test for determining the extent of the government's interests under *Abood*. Indeed, these two factors—whether the expressive activity takes place in the workplace and on work time—generally define and limit the government's authority to regulate the expressive activity of its own employees. (*See* Pet., 17-18).

Illinois attacks the first premise by asserting that some "public employees . . . regularly work outside a centralized government workplace, including bus drivers, police officers, and sanitation workers." (State Br., 16-17). However, all generally deal with their employer and interact with one another in a

centralized government workplace, namely the police station or motor pool. All are also actively managed by the State. Unlike personal assistants, these employees could disrupt a government workplace by attempting to petition their employer through rival associations in the workplace and on work time.

Illinois attacks the second premise by asserting that, even if personal assistants are not managed by the State, they should not be treated as "'citizens petitioning their State as sovereign'" because they are otherwise state employees. (*Id*. at 15) (quoting Pet., 16). This ignores that even true public employees cannot be subjected to exclusive representation when they petition government on their own time and in public forums, because at such times they are acting as citizens and not employees. (Pet., 17-18); *see City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

Here, personal assistants *always* act as citizens when petitioning the State over its Rehabilitation Program, because they never work under State direction or in government workplaces. They work solely under the direction of persons with disabilities in their private homes.[3] Thus, irrespective of their

[3] From reading the State's brief, one would never know that persons with disabilities enrolled in the Rehabilitation Program, or "customers," are "the employer" of personal assistants ("PA") and are "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." 89 Ill. Admin. Code § 676.30(b) (emphasis added); *see also id.* at § 684.20(b) (similar). Instead, one would have the false impression that the State actively controls

economic relationship with the State, the State lacks a cognizable interest in dictating how personal assistants associate to petition it for more monies from its Rehabilitation Program.

B. The State's Definition of Labor Peace is Inconsistent with this Court's Precedents and is Practically Limitless

Unable to rely on the labor peace interest identified in *Abood*, the State attempts to expansively redefine it. The State reaches back to this Court's reference to the interest as one in "stabilized labor management relations," *Railroad Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956), and then leaps to the unsupported conclusion that these words encompass "an interest in coordinating and cooperating with the personal assistants to further the Program's goals," to include addressing "high turnover, low morale, excessive absenteeism, poor training, [or] lack of productivity" that may affect the Medicaid program. (State Br., 17).

This is not the interest in "labor peace" or "labor stability" identified by this Court, which is singularly focuses on how exclusive representation by *one* union may allow a public employer to avoid workplace problems caused by dealing with *multiple* unions.

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personal assistants as employees. (*See* State Br., 3-4, 11). State regulations expressly disclaim this conclusion. "Although 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." 89 Ill. Admin. Code § 676.10(c) (emphasis added).

> 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 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 reach agreements and settlements that are not subject to attack from rival labor organizations.

Abood, 431 U.S. at 220-21; *see also Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) ("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'") (citation omitted). In short, "[t]he confusion and conflict that could arise if rival teachers' unions . . . each sought to obtain the employer's agreement" are "the evils that the exclusivity rule . . . was designed to avoid." *Abood*, 431 U.S. at 224.

The State's attempt to transform "labor peace" into an amorphous "interest in coordinating and cooperating" with unions to further the goals of public-aid programs is completely unsupported by precedent. (State Br., 17). Indeed, it is nothing but a repackaging of the "feedback" rationale asserted in Illinois Executive Orders 2003-08 (4 Mar. 2003) (App. 40a) and 2009-15 (29 June 2009) (App. 45a), which is incognizable for the reasons stated on page 10 of the Petition and pages 11-12 of the *Amicus* Brief of the Cato Institute et al. States cannot compel citizens to

support an organization's petitioning of government on the grounds that it may help government officials develop better public policies.

The proposition that this Court must defer to the State with regard to what constitutes a labor peace interest is untenable. (State Br., 18). It is the prerogative of this Court to define exactly what interests are sufficiently compelling to justify infringing on citizens' First Amendment rights. The Court exercised this prerogative in *Abood* when defining the parameters of the labor peace interest. *See* 431 U.S. at 220-221. In so doing, it merely noted that it would defer to states regarding *whether* they wished to assert that interest by imposing exclusive representation on their employees. *Id*. at 228-29. But the Court certainly did not give states free license to define *what* interests will justify compelling individuals to associate to petition government.

Defining the parameters of the labor peace interest is an issue of exceptional importance, as it will largely dictate who can be subjected to exclusive representation vis-à-vis government. The definition proffered by the State is practically limitless. Logically it does not even require indicia of an employment relationship. An "interest in coordinating and cooperating with . . . [individuals] to further the Program's goals" could justify compulsory representation for anyone affected by a government program. (State Br., 17).

II. The Legal Standard Adopted by the Seventh Circuit Will Wrongfully Render Many Service Providers Susceptible to Mandatory Representation for Purposes of Petitioning Government

As the foregoing makes clear, the legal standards adopted by the Seventh Circuit and argued for by the State are so broad they render most individuals who serve public-aid recipients vulnerable to being collectivized for purposes of petitioning government. The State's argument that "the decision below is limited to Illinois' regulatory regime for personal assistants" ignores that this standard will govern all other instances of government compelled-representation in Illinois, Wisconsin, and Indiana, and elsewhere if adopted by other circuits. (State Br., 10). The Seventh Circuit itself recognized the precedential effect of its decision, acknowledging that "given our holding above" the constitutional claims of providers in Illinois' Disabilities Program "will not last long" if later adjudicated. (App. 17a).

In fact, First Amendment claims by personal assistants in the vast majority of the nation's participant-directed home care programs "will not last long" under the Seventh Circuit's permissive standard. (*Id*.). These Medicaid programs share the same basic features of the Rehabilitation Program. The programs pay in full for personal care services approved in a treatment plan, and allow participants to select, supervise, and manage the individuals who provide the care. *See* Janet O'Keefe et al, *Understanding Medicaid Home & Community Services: A Primer*, 179-189, 182 (U.S. Dep't of Health & Human Services, 2010 ed., 29 Oct. 2010) (available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf)

(accessed on 9 May 2012); 42 C.F.R. § 441.301(b) (home care services must be furnished pursuant to written plan of care).

To the extent that differences may exist between the Rehabilitation Program and other government programs in which service providers are collectivized, this is only a reason for *granting* certiorari. The differences make manifest the need for this Court to establish clear and proper legal standards governing when exclusive representation can be imposed.

For example, Illinois and fifteen (15) other states have passed laws or issued executive orders that authorize compulsory union representation for home childcare providers who serve families enrolled in government programs that subsidize their daycare costs (though some laws and orders were later repealed). (*See* Pet. 23). These daycare programs are similar in some respects to home care programs, and different in other respects. The constitutionality of these laws and orders are being challenged. *See Schlaud v. Snyder*, No. 1:10-cv-147 (W.D. Mich. 2011); *Parrish v. Dayton*, No. 12-CV-149 (D. Minn. 2012). However, the lower courts lack guidance on what factors are relevant to appraising the constitutionality of these schemes. The Court should supply that guidance by taking this case.

CONCLUSION

"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." *United States v. United Foods*, 533 U.S. 405, 411 (2001). Accordingly, the Seventh Circuit's overly-permissive standard for when government can force citizens to subsidize

a specific organization's efforts to "petition the Government" warrants this Court's immediate review. U.S. Const. amend I. The Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioners

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