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

BRIEF IN OPPOSITION OF RESPONDENTS SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31

Scott A. Kronland
Counsel of Record
Caroline P. Cincotta
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altshulerberzon.com

Counsel for Respondent SEIU Healthcare Illinois & Indiana

[Additional Counsel Listed on Signature Page]

February 3, 2012

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the fair-share provision in the collective bargaining agreement covering workers paid by the State of Illinois to provide in-home care to disabled adults to carry out a state program does not violate the First Amendment.

2. Whether the court of appeals correctly concluded that homecare workers who voted against union representation did not have a justiciable challenge to a hypothetical fair-share requirement.

CORPORATE DISCLOSURE

Respondents submitting this Brief in Opposition are SEIU Healthcare Illinois & Indiana, SEIU Local 73, and AFSCME Council 31. Respondents have no parent corporations and no publicly held company owns any stock in these respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
1. Facts	1
2. Proceedings Below	5
REASONS THE PETITION SHOULD BE DENIED	6
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Bd. of Education,
431 U.S. 209 (1977) 5, 6, 9

City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employee Relations Comm'n,
429 U.S. 167 (1976) 9

Elrod v. Burns,
427 U.S. 347 (1976) 10

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 9

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984) 9

Mulhall v. UNITE HERE Local 355,
618 F.3d 1279 (11th Cir. 2010) 11

O'Hare Truck Serv., Inc. v. City of Northlake,
518 U.S. 712 (1996) 10

FEDERAL STATUTES AND REGULATIONS

42 C.F.R. §447.15 2

STATE STATUTES AND REGULATIONS

5 ILCS 315/3 3

5 ILCS 315/6 .... 3, 8

5 ILCS 315/9 3

20 ILCS 2405/1 *et seq.* 1

TABLE OF AUTHORITIES—Continued

Page

405 ILCS 80/2-1 *et seq.* 4

59 Ill. Admin. Code 117.100 *et seq.* 4

89 Ill. Admin. Code 676.10 *et seq.* 1, 2

89 Ill. Admin. Code 676.30 2

89 Ill. Admin. Code 676.200 2

89 Ill. Admin. Code 677.40 2

89 Ill. Admin. Code 682.100 1

89 Ill. Admin. Code 684.10 2

89 Ill. Admin. Code 684.20 3

89 Ill. Admin. Code 684.50 2

89 Ill. Admin. Code 686.10 .... 2, 3

89 Ill. Admin. Code 686.40 2

IN THE

Supreme Court of the United States

No. 11-681

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

BRIEF IN OPPOSITION OF RESPONDENTS SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, AND AFSCME COUNCIL 31

STATEMENT OF THE CASE

1. Facts

a. The State of Illinois pays personal care assistants ("providers") to deliver in-home care to disabled individuals who might otherwise face institutionalization. Approximately 20,000 providers are paid by the State to perform this work as part of the Home Services Program administered by Illinois' Division of Rehabilitation Services ("Rehabilitation Program"). *See* 20 ILCS 2405/1 et seq. & 89 Ill. Admin. Code 676.10 et seq.; Complaint (Dist. Ct. Doc. 1) ¶12. The Rehabilitation Program serves adults under 60 years of age with long-term disabilities, brain injuries, or low cognitive functions. 89 Ill. Admin. Code 682.100(d)-(g). The program is "designed to prevent

the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State." 89 Ill. Admin. Code 676.10(a).

The State pays providers to assist clients with "Activities of Daily Living," which can include bathing, dressing, and lifting the customer; cooking, cleaning, and shopping; and certain health care procedures. 89 Ill. Admin. Code 676.30. The specific services performed by each provider are determined by a Department-employed counselor and codified in a "service plan." 89 Ill. Admin. Code 684.10, 684.50. The service plan delineates "the type of service(s) to be provided to the customer, the specific tasks involved, the frequency with which the specific tasks are to be provided, [and] the number of hours each task is to be provided per month." 89 Ill. Admin. Code 684.10, 684.50. The State pays providers only to perform the tasks and to work the hours provided for in the service plan. *Id.*

The State sets the wage rate for providers and pays them directly to perform services. 89 Ill. Admin. Code 686.40(a)-(b). Clients do not receive the payments for their providers. 89 Ill. Admin. Code 676.200. Nor can clients increase or vary the wage rate set by the State. 89 Ill. Admin. Code 677.40(d); 42 C.F.R. §447.15.

Because of the intimate nature of the services, the Rehabilitation Program permits clients to choose and supervise their providers. The State, however, ultimately controls who it will pay to work as a provider and the type of services for which it will pay. Providers must comply with certain age and work-hour limitations, provide written or oral recommendations from previous employers or other unrelated adults, have previous experience in the field, agree to a Department-drafted employment agreement, and satisfy the Department-appointed counselor that they can communicate and follow direc-

tions adequately. 89 Ill. Admin. Code 686.10. Counselors employed by the State provide referrals of qualified provider candidates to clients. 89 Ill. Admin. Code 684.20.

b. In 2003, the Illinois Legislature amended the Illinois Public Labor Relations Act to include "personal assistants working under the [Rehabilitation] Program" as "[p]ublic employee[s]" of the State for purposes of collective bargaining under the Act. 5 ILCS 315/3(n)-(o). The Act permits the majority of providers to choose a representative "to bargain collectively . . . on questions of wages, hours, and other conditions of employment" with the State. 5 ILCS 315/6(a)-(c). Providers have the right to select the representative of their choice, or to reject representation altogether. 5 ILCS 315/9(d). Shortly after the Act was amended, the majority of Rehabilitation Program providers chose to be represented by SEIU Healthcare Illinois & Indiana ("SEIU HCII"). Pet. App. 22a.

The 2008-2012 collective bargaining agreement ("CBA") between SEIU HCII and the State provides for the pay rates for providers to be increased from $9.35/hour to $11.55/hour during the course of the agreement. CBA, Art. VII, Sec. 1 (Dist. Ct. Doc. 32-3). The CBA also requires the State to notify providers before reducing the number of authorized hours for which they will be paid. CBA, Art. XII, Sec. 7. The CBA commits the State to contribute $37,000,000 to a health benefits fund for providers. CBA, Art. VII, Sec. 2(a). The CBA further contains a commitment that the State will provide an additional $18,000,000 over the course of the agreement to be allocated between wages and other benefit funds. CBA, Art. VII, Sec. 2(b). The CBA establishes a joint committee through which the State and SEIU HCII will work together in developing training programs and "study health and safety issues" for providers. CBA, Art. IX. The CBA provides for the creation of a Joint Personal Assistant

Registry Committee to implement a registry system to improve procedures for referring providers to customers. CBA at 13 (side letter).

The CBA also contains various other provisions typically found in collective bargaining agreements, including a no strike/no lockout provision, a grievance/arbitration procedure to resolve any "dispute regarding the meaning or implementation of a specific provision of [the CBA]," and a "fair-share" provision. CBA, Art. XII, Sec. 5; Art. XI; Art. X, Sec. 6. The 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, but not to exceed the dues uniformly required of members." CBA, Art. X, Sec. 6.

c. Illinois pays a different group of providers to deliver home-based care to mentally disabled adults as part of the Home-Based Support Services Program administered by its Division of Developmental Disabilities ("Disabilities Program"). *See* 405 ILCS 80/2-1 et seq. & 59 Ill. Admin. Code 117.100 et seq. An Executive Order authorizes these providers to select a representative for purposes of collective bargaining or to reject representation altogether. Pet. App. 5a.

In 2009, respondent SEIU Local 73 petitioned for an election to become the representative of the approximately 4,500 Disabilities Program providers. Complaint ¶¶18, 32. Respondent AFSCME Council 31 intervened in that election as a rival candidate seeking to become the providers' representative. *Id.* A mail ballot election was held in October 2009, and the providers voted against representation by either union. *Id.* As a result, there presently is no union representation or collective-bargaining agreement or fair-share fee for Disabilities Program providers.

2. Proceedings Below

a. Petitioners are nine providers paid to care for disabled individuals enrolled in either the Rehabilitation Program or Disabilities Program. Pet. App. 20a. The Rehabilitation Program petitioners alleged that the fair-share fee provision in their collective bargaining agreement violates the First Amendment. Complaint ¶¶ 46-47. The Disabilities Program petitioners alleged that respondents were threatening to violate their First Amendment rights by entering into a collective bargaining agreement that would require them to pay fair-share fees. *Id.* ¶¶ 48-49.

b. The district court dismissed the Rehabilitation petitioners' claim on the merits. The district court started its analysis by recognizing that this "Court has held that employees can be required to contribute fair share fees to compensate unions for their representational activities." Pet. App. 28a; *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). The district court concluded that the State controlled the key employment terms for the Rehabilitation providers, paid them for their work, had "a vital interest in establishing peaceful labor relations with" them, and functioned as their employer for purposes of collective bargaining, so the CBA's fair-share provision fell squarely within this "longstanding Supreme Court precedent." Pet. App. 33a-35a. Petitioners did not allege that the fair-share fees were collected for activities other than collective bargaining representation. Pet. App. 35a ("There are no allegations that the fair share fees here are used to support any political or ideological activities.").

The district court dismissed the Disabilities petitioners' claim for lack of subject matter jurisdiction. These petitioners were not represented by a union and had not paid fair share fees, so they lacked an "injury-in-fact" sufficient to confer standing to sue. Pet. App. 38a-39a. The district court rejected petitioners' argument that they

were threatened with such injury, concluding that it depended on "too many future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 37a (citation, internal quotation marks omitted).

c. The court of appeals affirmed the dismissal of the case in a unanimous decision by Senior Judge Manion.

With respect to the Rehabilitation petitioners, the court of appeals also began its analysis with the settled law that fair-share fees are permissible in the employment context when limited to the costs of collective bargaining representation. Pet. App. 7a-9a. The court of appeals considered the operation of the Rehabilitation program and, "because of the significant control the state exercises over all aspects of the personal assistants' jobs," *id.* at 13a, the court of appeals had "no difficulty concluding that the State employs [the] personal assistants within the meaning of *Abood*," *id.* at 11a. Therefore, "the fair share fees in this case withstand First Amendment scrutiny – at least against a facial challenge to the imposition of the fees." *Id.* at 13a. The court of appeals "stress[ed] the narrowness of [its] decision" and that it had "no reason to consider" whether fair-share arrangements are permissible beyond the specific facts of Illinois' Rehabilitation Program. *Id.*

The court of appeals agreed with the district court that the Disabilities petitioners' challenge to a purely hypothetical fair-share arrangement was not justiciable. Pet. App. 14a-17a.

REASONS THE PETITION SHOULD BE DENIED

Petitioners and their amici do not accurately describe the facts of this case or the narrow legal claim presented to and addressed by courts below. As both lower courts concluded, the State of Illinois functions in all relevant respects as an employer of these home-care providers.

The first question presented therefore does not involve a novel First Amendment issue, as the Petition contends, but only an application of settled law that fair-share fees are permissible to support collective bargaining about wages, benefits and other employment terms. Nor is the second question presented, concerning justiciability, worthy of the Court's review. The Petition therefore should be denied.

1. Petitioners do not contend that there is any conflict in the lower courts as to the first question presented and, indeed, no judge has found merit in their argument.[1] Petitioners instead assert that review is justified because "[t]his 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." Pet. 7. Every part of this assertion is inaccurate or misleading.

First, the approximately 20,000 providers in the Rehabilitation Program are not mere "citizens" in this context, but employees whom the State is paying by the hour to deliver homecare services to disabled adults on behalf of the State pursuant to state-approved service plans and within a state medical assistance program. As a result of these services, the State avoids the much higher cost of providing nursing home care. The court of appeals explained:

> [T]he State [has] 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

[1] Petitioners' argument was rejected not only by the district judge and three court of appeals judges in this case but also by a district court judge in California in a prior case raising the same argument with regard to that state's similar program. *See* Pet. App. 34a-35a.

> qualifications and evaluates the patient's choice. 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. When it comes to controlling 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. 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 assistants after withholding federal and state taxes. *In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of* Abood.

Pet. App. 11a (emphasis supplied).

Second, SEIU HCII is not "an advocate the state itself designated" (Pet. 7) but the labor organization that the majority of providers chose as their representative to engage in collective bargaining about their wages, health benefits and other employment terms. Pet. App. 4a-5a.

Third, the collective bargaining agreement between SEIU HCII and the State does not address the "benefits" offered by "a public-aid program" (Pet. 7), but the typical subjects of employee collective bargaining: hourly wages, health care coverage, training, safety, and a grievance/arbitration process. *See* pp. 3-4, *supra.* The governing Illinois statute authorizes collective bargaining solely "on questions of wages, hours, and other conditions of employment." 5 ILCS 315/6(a)-(c). Nothing in the providers' collective bargaining agreement deals with "changes to Illinois Medicaid programs" (Pet. 16) in the

sense of changes to the program rules about eligibility for services or which services are provided to beneficiaries.

Fourth, Rehabilitation Program providers who choose not to become members of SEIU HCII are not "forced to petition [the] state" (Pet. 7) through SEIU HCII, nor is the State "quelling [their] constitutional right . . . to make disparate demands on the State through diverse associations in public forums" (*id.* at 16). The Court's decisions already establish that the government's recognition of an "exclusive representative" for purposes of collective bargaining cannot prevent public employees from petitioning the government in opposition to that representative or otherwise exercising their affirmative First Amendment petition rights in "public forums."[2] Petitioners did not allege any interference with *those* First Amendment rights in the lower courts. Pet. App. 5a n.2 ("the constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement").

---

[2] *Abood*, 431 U.S. at 230 ("[W]e recognize[] that 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 concerning labor relations."); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employee Relations Comm'n*, 429 U.S. 167, 176 n. 10 (1976) ("no one would question the absolute right of the nonunion teachers to . . . communicate [their] views to the public . . . [or] directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands"). The government's mere decision to recognize an exclusive bargaining representative does not violate the First Amendment because "the state [is] free to consult or not consult whomever it pleases." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also id.* at 288 ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").

Because petitioners' challenge was limited to the payment of the fair-share fee for collective bargaining, moreover, this case does not implicate the line of authority that, as a general matter, protects both public employees and independent contractors against retaliation for their political affiliations or activities. *See Elrod v. Burns*, 427 U.S. 347 (1976); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996). Petitioners did not allege that they were required to become members of any labor organization, and "there [were] no allegations that the fair share fees here are used to support any political or ideological activities." Pet. App. 35a.

All that being so, the court of appeals recognized that the case presented "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?" Pet. App. 1a. The court of appeals' answer to that question was equally narrow and dictated by the facts of this case: "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 mandatory union fee jurisprudence." Pet. App. 1a-2a. The court of appeals explicitly limited its decision to the employment context, and "ha[d] no reason to consider whether the State's interests in labor relations justify mandatory fees *outside* the employment context." Pet. App. 13a (emphasis supplied).[3] This case therefore would not be a vehicle for considering that issue.

---

[3] The court of appeals stated in the clearest possible language that the general legality of hypothetical fair-share arrangements for "contractors, health care providers, or citizens" was not before the court. *See* Pet. App. 13a.

2. The second question presented is whether the district court correctly dismissed the claim of the Disabilities Program providers as non-justiciable. The providers in that program voted against union representation and, therefore: (i) they are not represented by a union, (ii) there is no collective bargaining agreement, and (iii) there is no fair-share provision in a collective bargaining agreement obligating these workers to provide financial support to any union, let alone to the respondent unions. As such, the justiciability question essentially answers itself. The decision that petitioners rely upon as creating a conflict, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), was correctly distinguished by the court of appeals as involving an allegedly unlawful agreement that already existed. Pet. App. 16a ("This case is different because the only violations alleged by the plaintiffs may never occur."). In any event, the second question is too fact specific to merit further review.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

Scott A. Kronland
Counsel of Record
Caroline P. Cincotta
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altshulerberzon.com
Counsel for Respondent SEIU Healthcare Illinois & Indiana

John M. West
BREDHOFF & KAISER P.L.L.C.
805 Fifteenth Street, NW
Suite 1000
Washington, DC 20005
(202) 842-2600
jwest@bredhoff.com
Counsel for Respondent
AFSCME Council 31

Joel D'Alba
Margaret Angelucci
ASHER, GITTLER & D'ALBA
200 West Jackson Blvd
Suite 1900
Chicago, Illinois 60606
(312) 263-1500
maa@ulaw.com
Counsel for Respondent
SEIU Local 73

February 3, 2011