No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS *et al.*,
Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,
Respondents.

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

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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Presenting the views of the United States, the Solicitor General assumes the answer to the fundamental question before this Court: what legal standard determines whether individuals can be collectivized for purposes of petitioning government under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)? Like the Court of Appeals below, the Solicitor General argues that this inquiry turns on a common-law agency analysis. U.S. Br., 13-15. However, also like the appellate court, the Solicitor General offers no reasons justifying application of this test. He simply declares it to be controlling, *ipse dixit*.

As shown below, this test is both inapposite and overly inclusive. *See also* Pet. Reply to State Opp. Br., 2-6. Because an ever-increasing variety of publicly-funded service providers are being forced to associate with mandatory representatives, the Court should take this case to establish a proper legal standard that requires that states demonstrate a compelling interest before dictating how citizens petition government.

I. The Solicitor General's Standard for Evaluating the Constitutionality of Compelled Representation Is Inappropriate and Too Expansive

In *Knox v. SEIU Local 1000*, this Court reiterated that "mandatory associations are permissible only when they serve a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" 132 S. Ct. 2277, 2289 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). A common law employment test has no place in this constitutional analysis because it does not address whether compulsory representation serves a compelling interest. Indeed, in *O'Hare Truck Service v. City of Northlake*, this Court explained at length that associational rights do not turn on such common law distinctions. 518 U.S. 712, 722-24 (1996). The test supported by the Solicitor General is inappropriate under both *Knox* and *O'Hare*.

Even if common law factors were controlling, the Solicitor General and lower court erase the distinction between "employees" and "contractors" by asserting that providers can be deemed jointly employed by government if only some indicia of an employment relationship are present. U.S. Br., 14-

17. But, when a hiring party's overall degree of control falls short of establishing an employment relationship, that results in merely a contract relationship at common law. *See Community for Creative Non-Violence v. Reid ("CCNV")*, 490 U.S. 730, 751-52 (1989). The Solicitor General's partial-employment concept robs "employee" of its meaning, and could encompass almost any minimal contracting relationship.

For example here, the Solicitor General concedes that Illinois does not "exclusively exercise the complete range of authority characteristic of an employer." U.S. Br., 17. This means that personal assistants are *not* employed by the State at common law, but rather that a lesser contracting relationship may exist between them. *Compare CCNV*, 490 U.S. at 751-52 (finding that a sculptor paid to perform a task is a contractor because the hiring organization did not exercise enough overall control to make it an employer). But, according to the Solicitor General, Illinois' limited degree of authority just makes it a joint employer of personal assistants.[1]

The ramifications of this elastic concept of partial-employment are immense. States could designate mandatory advocates for anyone who merely shares *some* characteristics of a public employee, or perhaps

[1] The Solicitor General suggests that it is relevant that persons with disabilities who hire personal assistants may not have all characteristics of an employer, such as control over reimbursement rates. *See* U.S. Br. at 17-19. It is not relevant because personal assistants are being forced to support a representative to deal only with *the State*, and not with their clients. Thus, the pertinent issue is whether Illinois' relationship with personal assistants is sufficient to constitutionally justify compulsory representation vis-à-vis the State.

just one. Consider the three factors that the Solicitor General asserts renders Illinois a co-employer of personal assistants: that its Medicaid program (1) pays for their services, U.S. Br., 16; (2) specifies which services for which it will pay, *id*. at 15; and (3) sets minimum qualifications for who it will pay to perform those services, *id*. at 17. If that is all that is necessary to make someone a public "employee" and justify compulsory representation vis-à-vis a state, then the associational rights of anyone accepting government money for their services are at grave risk. *See* Pet. 21; *Amicus* Br. of the Cato Institute et al., 18-21.[2]

The threat is not hypothetical. Twelve (12) states have already authorized mandatory representation for individuals providing home-based care to Medicaid recipients, and sixteen (16) states have authorized mandatory representation for small businesses or family members providing daycare to children on public assistance programs, though some provisions have since been repealed. Pet. 22-23. The situation continues to evolve. For example, California is currently considering a bill to designate compulsory representatives for those providing interpretation and translation services in connection with its Medicaid program. *See* CA Assembly Bill No. 1263 (2013-14).

It is therefore imperative that this Court reject the partial-employment test adopted by the lower court and Solicitor General—as it both fails to consider

[2] The Solicitor General's reliance on these three factors also aptly illustrates why its common law test is inappropriate for adjudicating constitutional rights. Not one of these factors proves that Illinois has a compelling reason for forcing personal assistants to support the SEIU.

constitutionally relevant factors and is overly inclusive—and establish a proper legal test for determining when government can appoint mandatory representatives to speak for citizens.

II. A Proper Legal Standard Must Focus on Whether the State Has a Compelling Interest in Requiring Exclusive Representation

The test for whether mandatory representation is constitutional must focus not on common law factors, but rather on a state's interest, if any, in regulating the expressive activity. Namely, a state must demonstrate that it possesses a "compelling . . . interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms" for requiring that individuals petition it through a designated representative. *Knox*, 132 S.Ct. at 2289, 2291.

Illinois lacks a legitimate, much less compelling, reason for forcing personal assistants to support the SEIU to lobby the State over its Medicaid rates for homecare. *See* Pet., 10. This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United States v. United Foods*, 533 U.S. 406, 415 (2001). Here, the principal object of Illinois' scheme is to compel support for an express First Amendment activity: "petition[ing] the Government for a redress of grievances." U.S. Const. amend I.[3]

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[3] The Solicitor General wrongly asserts that Petitioners "do not contend that the financial support they provide to the union is used for any purpose other than collective bargaining activities," U.S. Br. at 14 n3, and that they do not contest the validity of imposing exclusive representation on personal assistants. *Id.* at 21. Neither is true. The very basis of Petitioners'

The State cannot claim a "labor peace" interest in requiring that personal assistants petition it through an *exclusive* representative because it cannot assert any cognizable interest in preventing them from petitioning it through *multiple* organizations or as individuals. *See* Pet., 11-19. The Solicitor General dispatches a strawman by contending that the labor peace rationale does not depend on a "centralized workplace." U.S. Br., 20. Petitioners' point is not that personal assistants' workplaces are physically dispersed. Rather, it is that these care providers do not work in government workplaces at all and are not managed by the State. Accordingly, the State cannot claim that its workplaces will be disrupted, or managerial functions impeded, if personal assistants petition the State over its Medicaid rates through diverse associations. *See* Pet., 15-19.

The Solicitor General then claims that the State's very act of granting exclusive representation to SEIU creates a labor peace interest in avoiding petitioning from rival representatives, and that in turn spawns a "free-rider" interest in forcing personal assistants to pay for that representation. U.S. Br., 21. This

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suit is that it is unconstitutional to compel them to accept and support a "state designated representative for the purposes of speaking to, petitioning, and otherwise lobbying the State and its officials." Complaint, ¶¶ 46 & 48 (1:10-cv-2477, Dkt. 1 (April 22, 2010)). That some of this speech and petitioning may include "bargaining" with State officials over Medicaid policies does not diminish the ideological and expressive nature of this petitioning. *Cf. Knox*, 132 S. Ct. at 2298 ("Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'") (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)).

circular logic is as untenable as it is limitless. Government cannot invent a problem to justify infringing on First Amendment rights. If it could, the mere act of imposing an exclusive representative on citizens would constitutionally justify itself.

Moreover, after *Knox*, the government can no longer rely on the so-called "free-rider" rationale to justify compelling support for state-appointed representatives. *Knox* held that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections," and gave as an example that "'[i]f a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.'" 132 S.Ct. at 2290-91 (quoting Summers, Book Review, Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory, 16 Comp. Labor L. J. 262, 268 (1995)). Similarly here, that SEIU chooses to lobby the State over its Medicaid rates for homecare services does not, either legally or ethically, create an obligation for all homecare providers to subsidize this expressive activity.

Finally, the Solicitor General argues that "a collective bargaining system that gives personal assistants a greater stake in both the process and outcome" can address the State's interest in "avoiding 'high turnover, low morale, excessive absenteeism, poor training, and lack of productivity.'" U.S. Br. at 21 (quoting State Br. at 17). This is not the "labor peace" interest recognized in *Abood*, 431 U.S. at 221, 224. Moreover, it defies credulity—and there is no record below to suggest—that compelled association with the SEIU fills providers with such feelings of personal empowerment that their job performance improves. Even if the Solicitor General's argument were plausible, the asserted rationale is incognizable because states

cannot force individuals into advocacy organizations just to give them a "greater stake" in the political or policy making process than they would otherwise assume on their own volition. "The government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988).[4]

Of course, in reality Illinois is forcing personal assistants to associate with the SEIU not to obtain labor peace, improve its Medicaid program, or for any other salutary policy objective. Illinois is forcing personal assistants to subsidize this special interest group to increase the political power and resources of this special interest group. This objective is antithetical to the values and democratic process that the First Amendment exists to protect. *See* Pet. 25-27; *Amicus* Br. of Center for Constitutional Jurisprudence, 3-9.

In short, no compelling interest justifies forcing personal assistants and other service providers to petition their government through state-appointed advocates. Accordingly, "[t]he general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail." *Knox*, 132 S. Ct. at 2295.

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[4] *Cf. Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (state cannot regulate a party's associational rights on grounds that it is in the party's best interests); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("reject[ing] the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

CONCLUSION

Compelling even actual public employees to support a monopoly bargaining representative is an "extraordinary" and "unusual" exercise of governmental power, *id.* at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184, 187 (2007)), that "imposes a 'significant impingement on First Amendment rights,'" *id*. at 2289 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). The Court has deemed its tolerance for this practice to be "something of an anomaly," *id*., 132 S. Ct. at 2290, and implicitly questioned "whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *Id*. at 2289.

This case squarely presents the issue of whether compulsory representation can be extended beyond actual public employees to private citizens whose services are merely paid for by public-aid programs. This is a question of the utmost importance that warrants this Court's immediate review. The writ of certiorari should be granted.

Respectfully submitted,

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22 May 2013