No. 11-681

In the

Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, et al.,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amici Center for Constitutional Jurisprudence and Pacific Legal Foundation have received consent to file this amicus brief from Petitioner and all but one of the Respondents. Counsel for Respondent SEIU Local 73 has declined to respond to requests for consent thus necessitating this motion.

Amici believe the issue presented in this petition goes to the heart of the First Amendment. At issue is the attempted compelled support of a political organization. If permitted, amicus will argue that the protection of this compulsion violates core principles of the First Amendment. The First Amendment Freedom of Speech protects against more than simple censorship. It also protects freedom of conscience for individuals. The Founders thought that a representative democracy required government to follow public opinion. Compelled membership in political organizations, however, creates counterfeit political opinion and distorts the message to our elected officials

WHEREFORE, the Center for Constitutional Jurisprudence and Pacific Legal Foundaiton seeks leave to file the accompanying brief amicus curiae.

DATED: January, 2012.

Respectfully submitted,

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QUESTION PRESENTED

Home health care workers are hired by individuals eligible for benefits under the Medicaid waiver program. The workers are paid directly by the state and must meet state licensing requirements, but are hired and fired by the individuals who qualify for the home health care benefit.

May a state, consistent with the First and Fourteenth Amendments, compel these home health care providers to support a political organization as their "exclusive bargaining representative" on state license and budget issues?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for freedom of conscience enshrined in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Federal Election Commission*, __ U.S. __, 130 S. Ct. 826 (2010), *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811 (2010), and *Siefert v. Alexander*, No. 10-405 (2011). The Center is vitally interested in limiting the ability of government to compel membership in and financial support of political organizations.

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing consent to file this brief of all but one respondent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Service Employees International Union, Local 1000* (No. 10-1121, pending).

SUMMARY OF ARGUMENT

The decision below obliterates the hazy line between political activity and collective bargaining activity. It does this by expanding employment to include any activity where government regulates the profession and governs reimbursement rates. In reaching its decision, however, the court below failed to take account of the fundamental values underlying the First Amendment. Review should be granted to examine how fundamental constitutional liberties will be affected by the expansive definition of "employer" used by the court below.

REASONS FOR GRANTING REVIEW

I. THE STATE'S ACTION TRENCHES ON FUNDAMENTAL FIRST AMENDMENT LIBERTIES

In his dissent in *Lathrop v. Donohue*, Justice Black noted: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). Yet, for the better part of two centuries this Court struggled with the question of whether the First Amendment protected freedom of conscience or, conversely, imposed no barrier to government backed compelled support of ideological activities.[2]

Evidence of congressional intent or ratification arguments concerning the Free Speech Clause is scarce, at best. There was clear consensus that the measure prohibited "censorship" but there was debate about the extent that government could punish speech after it was published. That debate is made clear in the sources recounting the debates

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[2] Amici here use the term "ideological" in its broadest sense. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S. at 231-32: "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."

over the Sedition Act of 1798. *See* History of Congress, February, 1799 at 2988; *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress, p. 934 (1794)). But did the founding generation intend the First Amendment to protect against compelled speech? For that answer we must resort to the "practices and beliefs of the Founders" in general. *McIntyre v. Ohio Election Comm'n*, 514 US 334, 361 (1995) (Thomas, J., concurring).

While there was no discussion of compelled support for political activity, there was a debate over compelled financial support of churches. We have records of significant debates in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779) in 5 The Founders Constitution, University of Chicago Press (1987) at 77; quoted in *Keller v. State Bar*, 496 U.S. at 10; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305, n.15 (1986) *Abood*, 431 U.S. at 234-35 n.31; *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). Jefferson went on to note, "That even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

James Madison was another prominent voice in this debate, and again this Court has quoted from

his arguments in the Virginia debate: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments in 5 The Founders Constitution at 82; quoted in *Chicago Teachers Union*, 475 U.S. at 305, n.15; *Abood*, 431 U.S. at 234-35 n.31.

Although these statements were made in the context of compelled religious assessments, this Court had no problem applying them to compelled political assessments in *Chicago Teachers* and *Abood*. This makes sense. Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801) in 5 The Founders Constitution at 152. The theme of his address was unity after a bitterly partisan election, and goal he expressed was "representative government" — a government responsive to the force of public opinion. *Id.*; Thomas Jefferson Letter to Edward Carrington (1787) in 5 The Founders Constitution at 122 (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion unless individuals retain the freedom to reject politically favored groups?

Madison too noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must

be obeyed by the government," according to Madison — but the process for the formation of that opinion is important. James Madison, Public Opinion (1791) in 1 The Founders Constitution at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id*. The concern was that "real opinion" would be "counterfeited." *Id*.

Madison's concern for "counterfeited" opinion was based on his fear that the voice of the individual would be lost as the nation expanded. There are other ways to lose the voice of the individual, however. Compelling the individual to support a political organization he opposes is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy and losing his freedom in fell swoop.

This is exactly the concern presented in this action. Petitioners are being forced to give financial support to a political organization they oppose — they are forced not only to acquiesce, but to support financially the creation of "counterfeit" public opinion. Justice Douglas echoed these concerns in his dissenting opinion in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952). He argued that the "First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief." *Id*. at 468 (Douglas, J., dissenting).

Freedom of conscience and the dignity of the individual -- these are the themes behind the liberty enshrined in the First Amendment. They lay at the core of Jefferson's and Madison's arguments that have influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting) ("The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.")), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few.

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There, Justice Jackson writing for the Court observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Yet reaching this conclusion was not easy for the Court. Just three years earlier the Court upheld a compulsory flag salute law in *Minersville School District v. Gobitis*. That decision prompted Justice Stone to observe that "The very essence of the liberty … is the freedom of the individual from compulsion as to what he shall think and what he shall say." *Id.* at 604 (Stone, J. dissenting).

This Court has found violations of the freedom of conscience and human dignity in compelled flag salutes (*Barnette*, 319 U.S. at 641), required membership in a political party (*Elrod v. Burns*, 427 U.S. 347, 356-57 (plurality) (1976)), compelled

display of state messages on license plate frames (*Wooley v. Maynard*, 430 U.S. 705, 713 (1977)), required distribution of other organization's newsletters (*Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 17-18 (1986)), and compelled contributions for political activities (*Abood*, 431 U.S. at 233-35; *Keller*, 496 U.S. at 16).

The amount of compelled support is irrelevant to the constitutional injury. As Madison noted, even "three pence" is too much to compel. Madison, Remonstrance, *supra* at 82. Jefferson noted that freedom of conscience is violated when people are taxed to pay simple living expenses for their own pastors. Jefferson, Religious Freedom, *supra* at 77, *see also Pacific Gas & Electric Co.*, 475 U.S. at 24 (Marshall, J. concurring). There is no exception for activity that was not "political" or "ideological." This Court has agreed that the First Amendment protects far more than speech that can be labeled as political. *Abood*, 432 U.S. at 231-32. In any event, the activity at issue in this case — state regulation of home health care workers and decisions regarding allocation of state budgetary resources — are core political issues.

In this action, petitioners and others are compelled to pay a political organization to bargain with the state over licensure requirements for home health care workers and the portion of the state budget that will be dedicated to this benefit under the Medicaid program. Based on its broad definition of "employer," the Seventh Circuit ruled that these compelled payments could be justified by a state interest in "labor peace." But the lower court never analyzed the nature of "labor peace" necessary to

justify such a significant intrusion on First Amendment liberties.

This Court in *Abood* noted that government compelled support of labor organizations in the earlier union fee cases was based on the need to have a single organization represent the employees to avoid the confusion of agreements with different unions and the dissension that could be caused by "inter-union rivalries." *Abood*, 431 U.S. at 220. The court below, however, never considered whether those same state interests are at issue in this case. Unlike the situation in *Abood*, there is no risk of "dissension" in the work place since the workplace is in individual homes. There is no bargaining with the true employer - the person receiving the home health care service. There is no grievance process and no need for the services of "lawyers, expert negotiators, economists, and a research staff." *See id*. at 221.

Rather than the typical limited scope of interests for employees in a particular workplace, the so-called bargaining at issue here involves questions of how the state will exercise its police power. Extending the reasoning of *Street* and *Abood* to state licensing and budget decisions, as was done by the court below, will lead to compelled financial support of political organizations for any profession licensed by the state or any group that receives a state financed benefit.

II. THE DECISION OF THE LOWER COURT WILL HAVE WIDE-RANGING IMPACTS

Under the Seventh Circuit's decision, all that is necessary to permit compelled membership in and financial support of a political organization is

government control of the amount of payment and some control over entitlement to receipt of the payment. According to the court below, that creates an "employment" relationship. Once such a relationship is established, the state is then free to compel membership in and financial support of political organizations that seek to influence the state's elected representatives on budget and regulatory issues.

The home health care workers in this case are hired by the individuals to who need assistance in their homes. The program is paid for with state and federal funds through a Medicaid waiver program. A qualified recipient under the program who needs home assistance must obtain permission from the state (if they want the program to pay for this benefit) to employ an assistant and the assistant must meet state license requirements. Under the program, the state pays the home health care workers directly while they are employed in a private home by the recipient.

Because the paycheck comes directly from the state and because the state can set qualifications (license requirements) either by regulation or negotiation, the Seventh Circuit ruled that home health care assistants are employees of the state. Petitioners Appendix at 10a-11a. Those conditions are sufficient for the state to force unwilling home health care assistants into bargaining units, and compel them to join or give financial support to the political organization negotiating the regulations and state appropriations. According to the court below, this compelled payment (otherwise a violation of the

First Amendment) is justified by the state's interest in "labor peace." *Id*. at 12a-13a.

This logic would support a federal law forcing all social security recipients into a bargaining unit to "negotiate" with Congress and the President over the amount of their benefit and the qualifications to receive that benefit. The check is sent directly from the government and the amount of the benefit and qualifications for receipt are set by the government. Under the Seventh Circuit decision, this renders Social Security recipients "employees" of the federal government and allows Congress to create a bargaining unit to which all recipients must belong and support financially. That financial support, of course, is for inherently political activity regarding allocation of benefits under the budget and qualifications for an entitlement.

An even closer analog is the Medicare and Medicaid reimbursement to medical doctors. Since the state sets the licensing requirements for medical practitioners and sets the reimbursement rates for medical services as part of the budgeting process, doctors would be classified as "employees" under the rationale of the lower court's decision. A state legislature or Congress could then force all doctors accepting Medicaid or Medicare reimbursements into a "bargaining" unit in order to bargain over the allocation of government resources for medical care.

This is no different than the situation posed by the instant case. The state does not hire these workers nor does it supervise them. The state's role is limited to the decision of whether an individual meets the requirements for licensure in order to be employed as a care giver and to appropriate the

funds required to finance the program. These are core functions of government — licensing regulation and budgeting. Thus, it is no surprise that the organizations that work at influencing government decisionmaking are themselves inherently "political" organizations. SEIU, the union involved in this case is no exception.

SEIU includes among its list of "issues" such items as "quality healthcare for all" and "immigration reform." *See* http://www.seiu-illinois.org/issues/Default.aspx. The Illinois chapter sent members to Wisconsin to join with that state's chapter in its march on the state capital to protest state legislation. *See* http://www.seiu-illinois.org/SEIU_Joins_Wisconsin_Workers_to_Protest_Union_Busting_Legislation_.aspx. That chapter also sent members to Washington, D.C. to take part in the "Occupy" protests. The Washington state chapter posted an advertisement for a "Lead Internal Organizer, Health Care" that would have duties that include "[t]rain and lead members in non-violent civil disobedience, such as occupying state buildings and banks, and peaceful resistance" in addition to organizing bargaining units of home health care workers. *See* http://www.seiu.org/2011/12/seniorlead-internal-oranizer-home-care.php.

Most of those activities (with the exception of occupying banks and government buildings), are the standard fare of political organizations and are to be expected of voluntary member organizations. These organizations are created and run by their members in order to influence government action for what they perceive to be the public good. These activities

are not collective bargaining. Nor are the activities at issue in this case.

The "bargaining" at issue here is the direct allocation of state and federal resources as part of the budgeting process and the licensure requirements for home health care workers. The bargaining representative has two choices to increase the Medicaid waiver program reimbursement rates for home health care workers — increase the share of the state budget committed to that purpose or maintain the same share while decreasing the number of poor, home-bound people who qualify for the Medicaid benefit. Either choice is a matter of fundamental public policy far removed from the adjustment of individual worker benefits and working conditions contemplated in the collective bargaining arena. The line between collective bargaining in the public sector and ideological activity may be "somewhat hazier" than in the private sector (*Abood*, 431 U.S. at 236), but the decision of the court below erases that line altogether.

Yet the court below did not consider the broad ranging impacts of its decision or how that decision could be used in other situations. As government controls an increasing share of the economy, these impacts are broad indeed.

CONCLUSION

Review should be granted because of the far-reaching impact that the decision of the lower court will have on fundamental First Amendment freedoms.

DATED: January, 2012.

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