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

BRIEF FOR RESPONDENTS AFSCME COUNCIL 31 AND SEIU LOCAL 73

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QUESTION PRESENTED

Whether a claim by homecare providers who are not represented by a union or required to pay fair-share fees, but who assert that their First Amendment associational rights would be infringed if in the future their bargaining unit should opt in favor of union representation and negotiate a collective bargaining agreement requiring fair-share fees, was correctly dismissed as not ripe for adjudication.

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BRIEF FOR RESPONDENTS AFSCME COUNCIL 31 AND SEIU LOCAL 73

Respondents AFSCME Council 31 and SEIU Local 73 were named as defendants in this litigation as a result of their attempt to organize homecare providers in Illinois' Home Based Support Services Program ("Disabilities Program"), notwithstanding that their efforts proved unsuccessful when these providers voted against representation by either union. After the District Court and the Court of Appeals dismissed Petitioners' claims against these two defendants as not ripe for adjudication, Petitioners sought and obtained certiorari on the question whether that holding was erroneous. As we show in this brief, the holding of the courts below was correct and should be affirmed.

In the alternative, should the Court believe that the claims against AFSCME Council 31 and SEIU Local 73 are justiciable, the judgment in their favor should be affirmed on the basis of the Seventh Circuit's holding on the merits with respect to the separate Rehabilitation Program bargaining unit. AFSCME Council 31 and SEIU Local 73, while addressing in this brief only the ripeness issue, therefore join in full the Brief of Respondent SEIU Healthcare Illinois & Indiana and incorporate the argument therein as an alternative ground for affirming the judgment in their favor.

STATEMENT

Illinois operates its Disabilities Program – like the Rehabilitation Program a Medicaid waiver program – "to provide alternatives to institutionalization of mentally disabled adults and to permit these individuals to live in their own homes." 405 Ill. Comp. Stat. 80/2-4. Like customers in the Rehabilitation Program, customers in the Disabilities Program develop a "service/ treatment plan" in conjunction with a State agency "service facilitator." Ill. Admin. Code tit. 59, §§ 117.120, 117.225(a). If the service plan includes personal care services by an individual provider, the State pays the provider for the provision of such services. *Id.*, § 117.215.

In 2009, Governor Quinn issued Executive Order 2009-15, which authorized the State to recognize and bargain collectively with a representative chosen by a majority of the providers in the Disabilities Program ("Disabilities Providers"). Petition Appendix ("Pet. App.") 48a. Two labor organizations, SEIU Local 73 and AFSCME Council 31, competed in a mail ballot election in October 2009 to become the representative

of the approximately 4,500 Disabilities Providers. Joint Appendix ("J.A.") 21, 26 (Compl. ¶¶ 18, 32.) The providers, however, voted against representation by either organization. J.A. 27 (Compl. ¶ 36). As a result, there is no collective bargaining representation, collective bargaining agreement, or fair-share requirement for Disabilities Providers.

Notwithstanding the Disabilities Providers' vote against union representation, Petitioners – most of whom are providers in the Disabilities Program, *see* J.A. 17-18 (Compl. ¶ 3) – included as part of their Complaint the allegation that these providers were "subject to an actual and ongoing threat of being compelled … to support" a labor organization. J.A. 27-28 (Compl. ¶ 37). The District Court dismissed that claim for lack of subject matter jurisdiction, on both ripeness and standing grounds. As these petitioners were not represented by a union and were not required to pay fair-share fees, they could not demonstrate any "injury-in-fact." Pet. App. 38a-39a. And, to the extent Petitioners contended that such an injury was threatened, it depended on "too many 'future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 37a.

On appeal, the Seventh Circuit affirmed that judgment (except to the extent that the Disabilities Providers' claim should have been dismissed without prejudice), because "[t]he plaintiffs' claims are contingent on events that may never occur and thus are not ripe." *Id.* at 15a. Rejecting Petitioners' argument that the mere existence of the Executive Order authorizing collective bargaining "makes it significantly

more likely that the plaintiffs will be forced to financially support" a union, *id.*, the court also found Petitioners' contention that they would have to devote time and money to combat any future union organizing efforts insufficient to create a claim that was ripe for adjudication:

> The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent.

Id. at 16a.

SUMMARY OF THE ARGUMENT

The issue whether the Disabilities Providers present a justiciable case or controversy is controlled by the well-established principle that "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998). That a party is not required "to await the consummation of threatened injury to obtain preventive relief" does not mean that the party has standing to sue – let alone a claim that is ripe for adjudication – where the threatened injury is not "cer-

tainly impending." *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Here, it is undisputed that the First Amendment injury Petitioners allege will not occur unless, at some point in the future, a majority of the Disabilities Providers opts for union representation. Nor does Petitioners' argument that they may in the future choose to spend resources in an effort to prevent that from happening suffice to create a justiciable claim.

ARGUMENT

In asking the Court to reverse the holding below that the claims of the Disabilities Providers are not ripe for adjudication, Brief for Petitioners ("Pet. Br.") 56-58, Petitioners do not and cannot contend that these providers have suffered any actual injury, or that such injury is certain – or even likely – of occurrence. It is, rather, undisputed that the Disabilities Providers will not be required to pay fair-share fees, be subject to a collective-bargaining agreement, or be represented by a union, unless a series of contingencies occurs – including, in particular, a renewed effort by AFSCME Council 31, SEIU Local 73, or some other union to organize these providers, the endorsement of the union as exclusive bargaining representative by a majority of the providers (who previously have rejected union representation), and (with regard to fees) negotiation of a collective bargaining agreement containing a fair-share requirement. Whether any of these contingencies will occur at some time in the future is, as the Seventh Circuit observed, wholly uncertain. Pet. App. 15a.

The beginning and end of the analysis, therefore, lies in the well-established rule – which Petitioners do not address, or even acknowledge – that "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Petitioners instead cite *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979), for the uncontroversial proposition that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 298. But in doing so they ignore the *Babbitt* Court's explanation, in the immediately following sentence, that a not-yet-consummated injury is sufficient to make a claim justiciable only "[i]f the injury is *certainly impending*." *Id.* (emphasis added).

This Court said the same thing just last Term in the other principal case on which Petitioners rely. In *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), the Court emphasized that it had "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 1147 (emphasis supplied by Court) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), and citing additional cases).

Petitioners do not and cannot suggest that the injury of which they complain is certainly impending – or anything even remotely close to that. What they assert, rather, is that as a result of Executive Order 2009-15 the Disabilities Providers "are subject to an 'actual

and ongoing threat' of being unionized." Pet. Br. 57.[1] But that is far from a sufficient basis for ripeness, or even standing. Even granting that the Executive Order is the necessary precondition for unionization and thus makes it *possible* that the Disabilities Providers could at some point become subject to union representation, collective bargaining, and fair-share fees, the Court has made clear that this is not enough to create a justiciable controversy. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 730 (1998) (holding that a challenge to the legality of a forest management plan's logging provisions was not ripe, even though promulgation of the plan "makes logging more likely," and indeed was a "precondition" for logging, which "in its absence … could not take place").

It is, in fact, undisputed that union representation, collective bargaining, and a fair-share requirement will occur only if a majority of the Disabilities Providers opts for union representation (and, with respect to fees, if the union then successfully negotiates a contract containing a fair-share provision). Accordingly, whether or not those providers will suffer the alleged constitutional injury of which they complain "re-

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[1] Petitioners rely for this point on the Eleventh Circuit's holding with respect to standing in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-91 (11th Cir. 2010), but that decision is of dubious value in light of this Court's recent dismissal as improvidently granted of the writ of certiorari in the *Mulhall* case, apparently due at least in part to doubts as to whether the plaintiff had standing to raise the claim on which the Court had granted certiorari. *See UNITE HERE Local 355 v. Mulhall*, No. 12-99, 571 U.S. ___, 2013 WL 6410851, at *1 (Dec. 10, 2013) (Breyer, J., dissenting).

quire[s] guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. As the Court reaffirmed in *Clapper*, it has "decline[d] to abandon our usual reluctance to endorse standing theories that rest on [such] speculation." *Id.*

Disregarding the substance and holding of the *Clapper* decision – and the fact that *Clapper* said nothing about ripeness but addressed only the issue of standing – Petitioners rest their argument on a footnote in which the Court recognized that in some cases standing had been found on the basis of "a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* at 1150 n.5 (citing, *inter alia*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010)).[2] But *Clapper* squarely rejected the contention that standing – not to mention ripeness – could be predicated on a party's decision to "incur[] … costs as a reasonable reaction to a risk of harm," when "the harm respondents seek to avoid is not certainly impending." 133 S. Ct. at 1151. *Clapper* thus forecloses Petitioners' attempt to create justiciability out of nothing more than the possibility that, "[i]f another election is requested, they will again have to 'expend time and money to prevent this infringement on their Constitutional rights.'" Pet. Br. 58. By Petitioners' logic, any-

[2] *Monsanto* addressed a different issue – not whether a contingent event was or was not certain to occur, but rather whether *an event that had already occurred* (an agency action allowing the use of genetically modified seeds) impacted the plaintiffs in such a way that they had standing to sue. *See* 130 S. Ct. at 2754-55.

one who feared injury from the enactment of proposed legislation, and devoted resources to lobbying against it, would have standing to challenge the constitutionality of the legislation in advance of its enactment. As *Clapper* confirms, that is not the law.

Finally, Petitioners contend that the Disabilities Providers will suffer constitutional injury from the conduct of a representation election itself, regardless of its outcome. Pet. Br. 58. Of course, it is utter speculation even whether another representation election will ever be held. In any event, Petitioners offer no explanation as to how the mere fact that an election is conducted – as opposed to whatever injury they might suffer as a result of the election – constitutes a violation of any right protected by the First Amendment.[3]

* * *

The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Union Carbide*, 473 U.S. at 580 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). In particular, the ripeness requirement furthers "the exercise of judicial restraint from unnecessary decision of constitutional issues." *Regional Rail Reorganiza-*

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[3] *Babbitt*, on which Petitioners rely, is not remotely on point. In that case the Court found justiciable a challenge to certain election *procedures*, prior to any election being held, where those procedures made it "futil[e]" for the union to seek an election. 442 U.S. at 300. Here the challenge is not to any election procedures, but rather to events that could transpire only *if* an election were held and *if* it resulted in a majority vote for union representation.

tion Act Cases, 419 U.S. 102, 138 (1974); *see also Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring) ("great gravity and delicacy" of ruling on constitutionality of legislation requires "rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies"). The courts below, applying legal principles that are beyond dispute, had no difficulty in recognizing that the Disabilities Providers' claims did not present a justiciable case or controversy. Petitioners offer no basis for departing from existing law on this issue, and the decision below accordingly should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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