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

BRIEF FOR RESPONDENT PAT QUINN

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's established First Amendment precedent to Illinois' regulatory scheme to hold that personal assistants providing home-based care to Medicaid recipients are public employees under Illinois law and thus may be required to pay their fair share of union representation.

2. Whether the court of appeals correctly held that other personal assistants do not have a ripe First Amendment claim because they are not represented by a union and do not pay any fair-share fees.

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BRIEF FOR RESPONDENT PAT QUINN

STATEMENT

1. Medicaid is a government program designed to provide access to medical care for those unable to afford it. 42 U.S.C. § 1396-1. It is administered by the States consistent with federal limitations and criteria. *Ibid*. Medicaid generally will pay the costs of caring for individuals who require continual or long-term care in institutions. 305 ILCS 5/5-5.5 (2012). The federal government also allows States to provide home-based medical services in lieu of institutionalization, but only if the costs of the services do not exceed those of institutionalized care. 42 U.S.C. § 1396n(c)(1), (c)(2)(D).

2. The Illinois General Assembly created the Home Services Program ("Program") to provide medical services to disabled adults under sixty years of age in a home-based setting "as a reasonable, lower-cost alternative" to institutional care. 305 ILCS 5/5-5a (2012); 89 Ill. Admin. Code § 682.100(d)-(e). The Program "enabl[es] [Medicaid-eligible individuals] to remain in their own homes," thus "prevent[ing] unnecessary or premature institutionalization." 20 ILCS 2405/3(f) (eff. Aug. 17, 2012). The Illinois Department of Human Services ("Department") calculates "the maximum amount that may be expended for services through the [Program] for an individual who chooses [home-care] services over institutionalization." 89 Ill. Admin. Code § 679.50(a).

Those who receive services under the Program are called "customers." *Id*. § 676.30(b). A Department-employed counselor develops a Service Plan for each customer, which the customer and counselor then sign, and the counselor submits the Plan to the customer's physician for approval. *Id.*

§§ 676.30(c), 684.10(a), 684.10(c). The Plan lists "all services to be provided to [the customer] through [the Program]," including "the type of service(s) to be provided * * *, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." *Id.* §§ 676.30(u), 684.10(a), 684.50. The State will pay only for the types and number of services permitted by the Plan. *Id.* §§ 676.200, 684.10(a).

"Personal assistants" perform many of the services outlined in the State-created Service Plan, including "household tasks, shopping, or personal care," "monitoring to ensure health and safety of the customer," and other "incidental health care tasks." *Id.* § 686.20. After the Department counselor assigned to the customer determines that the tasks in the Plan can be performed by a personal assistant, the customer may select one who meets the qualifications established by the State. *Id.* §§ 684.20, 684.30. Those qualifications include age and work-hour limits, pre-hire recommendations, and comparable experience and/or training. *Id.* § 686.10(b)-(c), (f). On request, the counselor must identify qualified candidates for the customer to interview. *Id.* § 684.20(b). The counselor also must evaluate the applicant's communication skills and ability to follow directions before any personal assistant is hired. *Id.* § 686.10(d)-(e).

Once the Department approves a personal assistant for hiring, both the customer and the assistant sign a Department-drafted agreement detailing the assistant's job responsibilities. *Id.* § 686.10(h). After hiring, the counselor helps the customer complete an annual review of the assistant, evaluating his or her

performance using metrics that include attendance, use of work time, accuracy of work, cleanliness, and responsibility and attitude toward the customer. *Id.* § 686.30(a)-(b). The counselor also works with the customer and personal assistant to resolve any conflicts, including by replacing the personal assistant if necessary. *Id.* § 686.30(c).

The State pays the personal assistants' salaries directly and withholds federal social security taxes and state and federal income taxes. *Id.* §§ 686.10(h)(10), 686.40(b). Customers neither pay their personal assistants, nor may they vary the wage rate established by the State. *Id.* § 676.200; 42 C.F.R. § 447.15. And "payment may only be made" to personal assistants who meet state standards. 89 Ill. Admin. Code § 677.40(d). The State may withhold funding (or disqualify a personal assistant from participating in the Program) if the customer is unable to manage the assistant, the assistant engages in neglect, abuse, or financial exploitation, or there is fraud or other violation of Program policies. See Ill. Dep't of Human Servs., Customer Guidance for Managing Providers, at 8, available at http://www.dhs.state.il.us/OneNetLibrary/27897/documents/Brochures/4365.pdf.

3. The Illinois Public Labor Relations Act ("IPLRA") authorizes certain state employees to join unions and bargain collectively with their public employer, through an elected representative, "on questions of wages, hours, and other conditions of employment." 5 ILCS 315/6(a) (2012). The IPLRA also gives employees the right, by majority vote, to reject representation entirely. *Id.* 315/9(d). A collective bargaining agreement between a public employer and

the exclusive representative of its employees may require "employees covered by the agreement 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." *Id.* 315/6(e). The public employer collects these "fair share" fees and remits them to the union, *ibid.*, which must "represent[] the interests of all public employees in [a bargaining] unit," *id.* 315/6(d).

4. Throughout the 1970s and into the early 1980s, home care services in Illinois were provided by state workers classified as "Homemaker[s]," whose duties included "laundry, grocery shopping, dressing, grooming and routine household chores" for Medicaid recipients. *State of Ill. (Dep't's of Cent. Mgmt. Servs. & Rehab. Servs.)*, No. S-RC-115, 2 PERI ¶ 2007, 1985 WL 1144994, at *10 (Dec. 18, 1985). The State engaged in collective bargaining with a representative of these workers over the terms and conditions of their employment. *Ibid.*

In the mid-1980s, a few years after the Program was established, personal assistants sought to unionize and engage in collective bargaining with the State under the IPLRA. Pet. App. 4a. A hearing officer with the State Labor Relations Board found that the State and the customers are "joint employers" of the personal assistants, because each has "the 'right to control' different but essential elements of the employment relationship." *State of Ill. (Dep't's of Cent. Mgmt. Servs. & Rehab. Servs.)*, 1985 WL 1144994, at *11-*12. The hearing officer also held, however, that the IPLRA did not allow the Board to assert jurisdiction "in a joint employment situation where it has jurisdiction over

only one employer." *Id.* at *12. The State Labor Relations Board "agree[d]" with the Hearing Officer that it lacked jurisdiction, "[w]ithout reaching the specific conclusions of the Hearing Officer as to the joint employer status." *Id.* at *1. The Board determined that the State "does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the [IPLRA], their 'employer' or, at least, their sole employer." *Id.* at *2.

In 2003, the Illinois Governor issued an executive order allowing a majority of personal assistants to designate an exclusive representative with "all the rights and duties granted such representatives by the [IPLRA]." Pet. App. 46a-47a. The Governor explained that each customer "employs only one or two personal assistants," "does not control the economic terms of their employment under the [Program,] and therefore cannot effectively address concerns common to all personal assistants." Pet. App. 46a. Because negotiation with the assistants is "essential" for the State to "effectively and efficiently deliver home services," the Governor adopted a model previously used on an informal basis in Illinois and "successfully * * * implemented * * * in other states." *Ibid.* The Governor directed the State to recognize an exclusive representative if a majority of the assistants designated one and to engage in collective bargaining over the State-controlled employment terms. Pet. App. 46a-47a.

A few months later, the Illinois General Assembly codified that executive order by amending the IPLRA and the Disabled Persons Rehabilitation Act, 20 ILCS 2405/1 *et seq*. (2012), to provide that "[s]olely for the purposes of coverage under the [IPLRA]," "personal

assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer." Pet. App. 40a-41a, 43a-44a. Personal assistants are not public employees for other purposes, including "vicarious liability in tort and * * * statutory retirement or health insurance benefits." Pet. App. 42a, 44a.

Later that year,"a majority of the approximately 20,000" personal assistants in the Program "voted to designate" Service Employees International Union Healthcare Illinois & Indiana ("SEIU") as their collective bargaining representative. Pet. App. 4a.[1] The State entered into a collective bargaining agreement with SEIU in August 2003, D.Ct. Dkt. 32-5, a renewed agreement in 2008, J.A. 35-60, and a third agreement in 2012.[2]

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[1] The State designated SEIU the exclusive representative after adding the number of personal assistants who, payroll records showed, already were dues-paying members of SEIU to the number of additional personal assistants on whose behalf SEIU submitted signed membership cards. The total number showed that a majority wanted to be represented by SEIU. See Letter from Benno Weisberg, Ill. Dep't of Cent. Mgmt. Servs., to Justin Hegy, Ill. Policy Institute (Nov. 21, 2013), available at http://illinoispolicy.org/wp-content /uploads/2013/11/WeisbergLetter.pdf. Thus, amici's statement that "Rehabilitation Providers never had an opportunity to vote on whether to join the union," Ill. Policy Inst. Br. 10 n.6, is misleading.

[2] The most recent collective bargaining agreement is available at http://www2.illinois.gov/cms/Employees/ Personnel/Documents/emp_seiupast.pdf.

5. The 2003 agreement (like both subsequent agreements) provided for wage increases (from $7.00 per hour in 2003 to $13.00 per hour beginning in 2014), and it created a joint union-state committee to develop training programs and study health and safety issues, required the State to provide safety gloves for the personal assistants' protection, established a grievance procedure to resolve disputes over the agreement's meaning and implementation, and included a no-strike provision. D.Ct. Dkt. 32-5 (Arts. VII, IX, XI, XII § 5); 2012 CBA (Art. VII § 1).

The 2008 agreement provided the personal assistants with state-funded health insurance coverage, allocated $2 million for personal assistant training, and established a joint committee to form a personal assistant referral registry. J.A. 44 (Art. VII § 2(a)); J.A. 47 (Art. IX § 1); J.A. 57-58 (Side Letter).

And the 2012 agreement required that all newly hired assistants complete a "comprehensive orientation" to the Program, and that all assistants submit to background checks and undergo an annual in-person training program with State-determined "courses and curricula." 2012 CBA (Art. XI § 1 & Side Letter 2). The 2012 CBA also restructured the State's contributions to the health benefit fund to more accurately reflect the cost of providing health insurance coverage. 2012 CBA (Art. VII § 2). Finally, all three agreements provide customers with the "sole right to supervise, terminate and/or discipline Personal Assistants" but reserve to the State "the right to condition any future funding based on credible allegations concerning Customer welfare or safety," "includ[ing] but not limited to, credible allegations of abuse, neglect or financial exploitation of a Customer by

a Personal Assistant." *E.g.*, J.A. 55 (Art. XII § 6). In such circumstances, the State may restrict the employment of the personal assistant or monitor the services provided. *Ibid.*

The agreements also require the State to deduct union dues and membership fees from the wages of union members "[u]pon receipt * * * of written authorization from the Personal Assistant," and to deduct from the wages of non-members "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." *E.g.*, J.A. 49-51 (Art. X §§ 5-6).

6. Petitioners, who include personal assistants in the Program, sued the union and Illinois Governor Pat Quinn, alleging that the deduction of fair-share fees from their paychecks violated the First Amendment. J.A. 30 (¶ 46); see also J.A. 33. They did not allege, however, that "the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining." Pet. App. 7a.

The district court dismissed the complaint, holding that the fair-share fees did not "impose[ ] any burden on [petitioners] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App. 35a. Petitioners did not allege that the "fair share fees * * * are used to support any political or ideological activities." *Ibid.* The district court thus concluded that the fees are "constitutional under * * * longstanding Supreme Court precedent." *Ibid.*

7. Noting that "the constitutional claim in this appeal is confined to the payment or potential payment

of the fair share requirement," Pet. App. 5a n.2, the Seventh Circuit affirmed in a unanimous decision. The court began by "set[ting] out the controlling precedent"—*Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—which hold that, "as a general matter, employees may be compelled [through fair-share fees] to support legitimate, non-ideological union activities germane to collective-bargaining representation." Pet. App. 7a-9a. The Seventh Circuit thus "consider[ed] whether the personal assistants are * * * State employees," which it did by measuring the degree to which the State "exercise[s] * * * control over" them. Pet. App. 9a, 10a.

After reviewing the pertinent Illinois regulations, the court concluded that "the State does have significant control over virtually every aspect of a personal assistant's job." Pet. App. 10a. Specifically, the court found that: "the State sets the qualifications and evaluates the patient's choice" of assistant; "the State may effectively [fire personal assistants] by refusing payment for services provided by personal assistants who do not meet the State's standards"; "[w]hen 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"; and "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." Pet. App. 10a-11a. Because the State was the personal

assistants' employer, "the interests identified by the Court in *Abood* are identical to those advanced by the State in this case." Pet. App. 13a.

The Seventh Circuit also "stress[ed] the narrowness of [its] decision," which turns on the court's finding that personal assistants qualify as state employees "for purposes of applying *Abood*" only because of the significant control the State exercises over their employment. *Ibid.* Given this finding, the Seventh Circuit had "no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context," including "whether *Abood* would still control if the personal assistants were properly labeled independent contractors" and "whether and how a state might force union representation for other health care providers who are not state employees." *Ibid.*

8. Illinois also hires personal assistants to care for disabled adults under the Home Based Support Services Program ("Support Services Program"). 405 ILCS 80/2-1 *et seq.* (2012); see also 59 Ill. Admin. Code §§ 117.100-117.240. In 2009, the Governor issued an executive order authorizing the State to bargain with a representative elected by the personal assistants in the Support Services Program. D.Ct. Dkt. 32-3. In October 2009, the State Labor Relations Board supervised a mail-ballot election in which two rival unions competed to become the representative of the Support Services providers. J.A. 26 ¶ 32. These personal assistants voted against representation, J.A. 27 ¶ 36, and thus are not represented by a union or covered by a collective bargaining agreement.

Petitioners' complaint alleged that the State nevertheless had violated these personal assistants' First Amendment rights by threatening to enter into an agreement that might require them to pay fair-share fees. J.A. 31 ¶ 48. Because the Support Services Program petitioners have never paid fair-share fees, however, the district court held that they had not suffered an injury sufficient to confer standing. Pet. App. 38a-39a. The Seventh Circuit agreed, noting that these petitioners had alleged no specific injury, but merely that the executive order increased the likelihood that they would suffer a future violation of their rights. Pet. App. 15a. The court held that this claim was not ripe because "courts cannot judge a hypothetical future violation * * * any more than they can judge the validity of a not-yet enacted law." Pet. App. 16a.

SUMMARY OF ARGUMENT

Illinois permits Medicaid recipients who would otherwise be institutionalized to live in their own homes where possible, with the help of state-paid "personal assistants." Given the intimate nature of the services provided, the State gives these customers discretion when choosing an assistant. To protect the customers' health and safety and to avoid fraud, however, the State retains control over the assistants' qualifications, training, hours, responsibilities, salary, and benefits. And to effectively coordinate with this widely dispersed workforce, the State gives the personal assistants the option to elect a union to negotiate with the State over the many employment terms and conditions within the State's control. Negotiations have so far resulted in agreements providing for, among other things, orientation and annual training, a committee on health and safety issues, a personal assistant referral registry, a grievance procedure, health insurance coverage, and salary increases. This cooperation between the State and the union, the Illinois legislature concluded, is the best way to ensure a workforce that will meet the needs of the State's most vulnerable residents in a professional and cost-effective manner.

Petitioners seek to remove collective bargaining from the options available to the government employer—not only in the present circumstances but in all others—by asking this Court to overrule one of its cases (*Abood*) and implicitly suggesting that it overrule others. The Court should reject this request. Public and private employers have relied for eighty years on their ability to structure employment relationships through systems of exclusive representation and fair-share fees. And if *stare decisis* principles alone are

insufficient to sustain decisions upholding these systems, the decisions should be reaffirmed on their merits, because they reach the correct balance between First Amendment rights and the government's interests as employer.

I. *Abood* is in step with cases (such as *Garcetti* and *Engquist*) that weigh the public employee's right to speak freely against the government's interest in promoting efficiency and professionalism in its workforce. But rather than treating government employers more like their private-sector counterparts, as these cases require, petitioners claim robust First Amendment protections that trump the countervailing government interests in a well-managed workforce.

Nor can *Abood* be isolated from decisions upholding compelled payments not only in the employment context (such as *Lehnert* and *Locke*) but also in the context of bar association fees (*Keller*), agricultural cooperatives (*Glickman*), and student activity fees (*Southworth*). These cases establish that the government may compel financial support for cooperative activity, so long as the support serves a legitimate government purpose and is limited to a proportionate share of the costs germane to that purpose. And because Illinois deducts union dues only with express authorization from the personal assistants, this case presents no question regarding the propriety of employees being required to opt out.

II. Petitioners' new argument that exclusive representation alone violates the First Amendment is foreclosed by *Knight*. Petitioners are not required to join a union, and the designation of an exclusive

representative does not interfere with their right to speak or to petition government.

III. The proper test for determining whether *Abood* applies asks whether the State has sufficient control over the employment relationship to make collective bargaining meaningful, which in turn promotes the government's interest in peaceful and productive labor relations. Petitioners' alternative test would ignore this important government interest.

IV. Illinois' relationship with the personal assistants satisfies the control test. The State sets the hiring criteria and evaluates each customer's choice of assistant, provides an orientation and annual training, controls the assistants' hours and job responsibilities, attends annual reviews and effectively may fire any assistant who does not meet state standards, and sets and pays the assistants' salary and benefits. That the customers have discretion in choosing their assistant and supervise that assistant's performance of State-designated tasks reflects the State's efforts to preserve customer autonomy whenever possible, but it does not diminish the State's interests in the effective provision of services.

V. Lastly, as to the personal assistants who voted against unionization and are neither represented by a union nor pay fair-share fees, their claim is not ripe for judicial review.

ARGUMENT

I. *Abood* Was Properly Decided, And Its Holding Is Compelled By Several Lines Of Authority.

Petitioners challenge a "general First Amendment principle"—that government may require "both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative * * * to pay that union a service fee" so long as the union does not "charge the nonmember for certain activities, such as political or ideological activities." *Locke v. Karass*, 555 U.S. 207, 213 (2009). Specifically, petitioners claim that the inclusion of "public sector" employees in the foregoing rule is the fault of one decision, *Abood*, which the Court should now abandon.

As an initial matter, petitioners' request to overturn *Abood* is not properly before the Court. Petitioners failed to preserve this claim in either the district court or the Seventh Circuit. Nor did they raise it in their certiorari petition or reply, even after the Governor flagged the fact in his brief in opposition. Rather, petitioners argued that the lower courts had *misapplied Abood*. See, *e.g.*, Pet. 19; Pet. App. 13a, 29a; Pet. Reply 1-3, 5, 7. Indeed, petitioners did not signal any interest in overturning *Abood* even when, after *Knox v. SIEU, Local 1000*, 132 S. Ct. 2277 (2013), was decided, they responded to the United States' certiorari-stage brief. See, *e.g.*, Supp. Br. 1, 7. Waiting until their merits brief in this Court was too late. See S. Ct. R. 14.1(a); *Thornton v. United States*, 541 U.S. 615, 624 n.4 (2004) (plurality op.); see also *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997).

In any event, *Abood* is not the outlier petitioners describe, for it follows inexorably from other First Amendment decisions, this Court has applied its constitutional analysis in a variety of non-labor contexts, and it is in step with *Engquist*, *Garcetti*, and other cases recognizing limits on the constitutional rights of public employees. Even if petitioners could establish some exception to *stare decisis* applicable to *Abood* alone (and they cannot), they fail to acknowledge the many lines of this Court's precedent they seek to unsettle, much less attempt to reconcile such a profound reordering with *stare decisis* principles.

A. *Abood* Followed From *Hanson* And *Street*.

In *Hanson*, this Court upheld Congress' power to authorize a private railroad company to enter into a "union-shop" agreement, which required employees to join the union as a condition of employment. 351 U.S. at 238. The Court determined that "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," and Congress sufficiently protected these rights by limiting the conditions of compulsory union membership to the payment of dues. *Id.* at 236, 238. The Court concluded, therefore, that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work"—nonmembers who might otherwise free ride on this work—"does not violate" the Constitution. *Id.* at 238.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court again acknowledged that unions have a "clearly defined and delineated role to

play in effectuating the basic congressional policy of stabilizing labor relations in the industry." *Id*. at 760. Performance of a union's statutory duties "entails the expenditure of considerable funds," and the union's position as exclusive bargaining representative "carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." *Id*. at 760-761. The Court thus upheld union shop agreements, notwithstanding their intrusion on employees' "freedom of choice," "for the limited purpose of eliminating problems created by the 'free rider.'" *Id*. at 767.

Abood elaborated on the government interests advanced by negotiating with an exclusive representative of its employees: avoiding the confusion and demands of negotiating and enforcing two or more agreements; preventing inter-union and union-nonunion rivalries; and ensuring that employees benefit from collectivization. See 431 U.S. at 220-221. The Court also described the duties of the exclusive representative: "negotiating and administering a collective-bargaining agreement"; representing "'union and nonunion'" "employees in settling disputes and processing grievances"; and other "great responsibilities" requiring "the services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Id*. at 221. These burdens are exacerbated by the fact that unions must fairly represent the interests of *all* bargaining unit members, union and non-union alike. See *ibid*. Fair-share fees "distribute fairly the cost of these activities among those who benefit" and counteract "the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union

while obtaining benefits of union representation." *Id.* at 222.

Once again, the Court recognized that compulsory financial support for a union impacts employees' First Amendment interests. See *ibid*. But as the Court held in *Hanson* and *Street*, that impact is justified "by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Ibid*. *Abood* thus balanced the employees' First Amendment interests with the need to compel financial support for the bargaining representative, who by law must work for all employees, and held that the required fair-share fees cannot be used to support political candidates and express political views unrelated to the performance of collective bargaining. See *id*. at 234.

This balance of public and individual interests is the same, the Court recognized, whether the employer is the government or a private entity, for the "desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." *Id.* at 224. The government interests that support "the impingement upon associational freedom created by the" union shop in the private sector are equally "important" in the public sector. *Id.* at 225. And the individual interests in avoiding fair-share fees are no "weightier" in the private sector. *Id.* at 229. In this sense, "[p]ublic employees are not basically different from private employees." *Ibid.* Both "may find that a variety of union activities conflict with their beliefs." *Id.* at 231. That the employer is the government, whose activities "may be properly termed political," "does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees." *Ibid.*

B. *Hanson* And *Street* Are First Amendment Decisions.

In their effort to convince the Court that it can overturn *Abood* surgically, without any impact on other precedent, petitioners begin with the claim that *Hanson* and *Street* did not, in fact, address First Amendment claims. See Pet. Br. 19-20. But this is false, as the decisions themselves and subsequent cases make clear.

In *Hanson,* the Nebraska Supreme Court had held that the Railway Labor Act was unenforceable because it violated the First (and Fifth) Amendments. See 351 U.S. at 230; see also *Hanson v. Union Pac. Ry. Co.*, 71 N.W.2d 526, 546-547 (Neb. 1955). This Court agreed that "questions under the First and Fifth Amendments were presented." 351 U.S. at 231. And, after considering and rejecting a Commerce Clause challenge, the Court addressed the allegations of "[w]ide-ranged [First Amendment] problems." *Id.* at 236. Rejecting these arguments, the Court held that compulsory union membership, like membership in an integrated bar, "does not violate * * * the First * * * Amendment[]." *Id.* at 236, 238. Indeed, when the Court stated that questions of "freedom of expression" were "not presented by this record," *id.* at 238 (quoted at Pet. Br. 19), it was merely acknowledging the lack of evidence that the plaintiff employees were required to do anything other than pay dues toward the union's collective-bargaining activities.

Likewise, *Street* characterized *Hanson* as having held that compulsory union membership "d[oes] not violate the First Amendment." 367 U.S. at 746. Then, to avoid the First Amendment problem the Georgia Supreme Court had identified in the case, this Court in

Street interpreted federal law to prohibit unions from using fair-share fees for "political causes." *Id.* at 749 (contrary interpretation would raise "serious doubt of their constitutionality").

Petitioners not only mischaracterize *Hanson* and *Street*, but they also seek to rewrite the many decisions that rely on these cases for their First Amendment analysis. See *Lathrop v. Donohue*, 367 U.S. 820, 842 (1961) (compulsory union membership does not "abridge protected rights of association," citing *Hanson*); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Allen*, 373 U.S. 113, 117-118 (1963) (compulsory union membership does "not violate the First Amendment," citing *Hanson* and *Street*); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers & Station Emps.*, 466 U.S. 435, 455-456 (1984) ("[i]t has long been settled that such interference with First Amendment rights [from being required to finance a collective bargaining agent] is justified by the governmental interest in industrial peace," citing *Hanson*, *Street*, and *Abood*); *Chic. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302 n.8 (1986) ("[e]arlier cases had construed the Railway Labor Act to permit a similar arrangement [for fair-share fees toward collective-bargaining costs] without violating the Constitution," citing *Hanson*, *Street*, and *Abood*).

Consistent with these decisions, every Member of the Court in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), agreed that *Hanson* addressed and rejected a First Amendment challenge. See *id.* at 515 ("[T]he Court [in *Hanson*] determined that the challenged arrangement did not offend First * * * Amendment values."); *id.* at 552 (Scalia, *J.*,

concurring in the judgment in part and dissenting in part) ("In * * * *Hanson* * * *, we upheld the federal union shop provision * * * against a First Amendment challenge."). And just four years ago, a unanimous Court in *Locke* reiterated in no uncertain terms that in "*Hanson*, *Street*, and *Abood*, the Court set forth a general First Amendment principle" when these decisions upheld the constitutionality of fair-share fees as a condition of private and public employment. 555 U.S. at 213.

C. The Court Has Relied On *Abood*'s First Amendment Analysis In Non-Labor Settings As Well.

Not only does *Abood* follow directly from this Court's prior First Amendment holdings, but the Court has applied *Abood*'s constitutional analysis in other contexts as well. The Court has held more generally, for example, that the First Amendment does not preclude the government from compelling financial support for "cooperative activity," so long as that support serves a "legitimate" government purpose and is limited to a proportionate share of the costs germane to the "overriding associational purpose which allow[ed the] compelled subsidy for speech in the first place." *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 414 (2001). In these circumstances, the compelled support is a "logical concomitant of a valid scheme of economic regulation" and therefore is permissible. *Id.* at 412.

Keller v. State Bar of California, 496 U.S. 1 (1990), thus upheld the requirement that all attorneys pay membership dues to the State Bar for use on activities "germane" to "the State's interest in regulating the legal profession and improving the quality of legal

services." *Id.* at 13-14. It was "entirely appropriate," the Court explained, "that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id.* at 12. Because all lawyers benefitted from the State Bar's activities, there was "a substantial analogy between the relationship of the State Bar and its members * * * and the relationship of employee unions and their members," even though State Bar members "do not benefit as directly from its activities as do employees from union negotiations with management." *Ibid.*

Similarly, *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), upheld "marketing orders" requiring California tree-fruit producers to contribute to the cost of advertising as part of a comprehensive regulatory program. See *id.* at 460, 461, 469. As the Court explained, there is no "broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities." *Id.* at 471. Rather, "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group." *Id.* at 472-473. Thus, as in *Abood* and *Keller*, the assessments were lawful because "the generic advertising * * * [was] unquestionably germane to the purposes of the marketing orders." *Id.* at 473.[3]

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[3] In *United Foods*, this Court reaffirmed *Abood*, *Keller*, and *Glickman* but held that their rationale did not extend to the program there because it did "not require group action, save to generate the very speech to which some handlers object." 533 U.S. at 415. Because the State here instituted a system

And *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), upheld a public university's assessment of student activity fees even though it was "all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable and offensive to their personal beliefs." *Id.* at 232. The university had "important" and "significant interests" in "facilitat[ing] a wide range of speech," and a refund system could "be so disruptive and expensive" as to render "ineffective" "the program to support extracurricular speech." *Id.* at 231, 232, 234.

D. Petitioners Would Abolish The Long-Held Distinction Between Government As Regulator And Government As Employer.

Petitioners implicitly challenge yet another line of this Court's jurisprudence. Underlying their effort to overrule *Abood* is the premise that employees speaking to their public employers are "lobbyists" engaged in core political speech, even when these employees are negotiating over the basic terms of their employment; therefore, the argument runs, public employees enjoy robust First Amendment protections that trump the employer's interest in promoting efficiency and professionalism in the workforce. See Pet. Br. 23, 38,

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of collective bargaining not merely to obtain "'feedback'" from the personal assistants—and thus not, contrary to petitioners' argument, solely to generate speech, see Pet. Br. 43, but to "effectively and efficiently deliver home services" through structured negotiations and a binding contract, Pet. App. 46a—petitioners' argument (at Pet. Br. 43) that the Court should reach the same result here as in *United Foods* is misplaced.

40, 42 n.12, 49; Amicus Br. of Ctr. for Const. Jurisprudence 2, 11-15; Amicus Br. of Cal. Pub.-Sch. Teachers 7-13.

But as petitioners themselves acknowledge elsewhere in their brief (at pp. 24-25), this Court has "long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (internal quotations omitted; alteration in original); see also *NASA v. Nelson*, 131 S. Ct. 746, 757-758 (2011). And this difference "has been particularly clear in [the Court's] review of state action in the context of public employment." *Engquist*, 553 U.S. at 598. "'[G]overnment offices could not function if every employment decision became a constitutional matter,'" and therefore "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.* at 599 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)); see also *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, *J.*, concurring) ("[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."). In this respect, a public employer more closely resembles its private-sector counterpart, for "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

The Court's "public employee speech cases are particularly instructive" in this regard. *Engquist*, 553 U.S. at 599. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). And given "the nature of the government's mission as employer," "constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality op.). There must be "a balance between the interests" of the employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," including its need to promote "harmony among coworkers." *Pickering*, 391 U.S. at 568, 570.

The result is that, in the First Amendment context, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418; see also *Waters*, 511 U.S. at 672 (plurality op.) ("the practical realities of government employment" give rise to "many situations in which * * * most observers would agree that the government must be able to restrict its employees' speech") (emphasis omitted). Specifically, "[w]hen a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011). And even then, courts still

"balance the First Amendment interest of the employee against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* (internal quotations omitted).

In practice, this means that public employees frequently lack First Amendment protection for speech related to the terms of their employment. See *id.* at 2496 (acknowledging need to avoid constitutionalizing employee "grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations"); *id.* at 2506 ("When an employee files a petition with the government in its capacity as his employer, he is not acting as [a] citize[n] for First Amendment purposes, because there is no relevant analogue to [petitions] by citizens who are not government employees.") (Scalia, *J.*, concurring in judgment in part and dissenting in part) (internal quotations omitted; alterations in original); *Connick*, 461 U.S. at 148, 155 (holding that there was no protection for speech regarding office policies that included "need for a grievance committee" and fairness of "office procedure regarding transfers").

Petitioners and their amici seek to upset this "delicate balance." *Engquist*, 553 U.S. at 607. Under their proposed rule, employee speech directed to a public employer—including communications that merely "implicate employment conditions," Amicus Br. of Cal. Pub.-Sch. Teachers 11—enjoys First Amendment protection that supercedes the interest in a well-managed public workforce. Far from treating the government employer more like its private-sector counterparts, petitioners and their amici thus invite the Court to draw a sharp distinction between the two. See

Pet. Br. 23, 29; Amicus Br. of Cal. Pub.-Sch. Teachers 11; Amicus Br. of Ctr. for Const. Jurisprudence 13-14. Indeed, it is impossible to reconcile petitioners' claim that all collective employee speech with a government employer is political and worthy of heightened First Amendment protection with *Connick*, *Garcetti*, *Engquist*, and the other cases in this line.

Relatedly, petitioners err in claiming that there is no principled distinction between "lobbying" a public sector employer, on the one hand, and "bargaining" with that employer, on the other. See Pet. Br. 21-23. Since *Abood*, this Court has reaffirmed that distinction repeatedly. Thus, in *Lehnert*, every member of the Court agreed that there is a sound basis for differentiating between the two. See 500 U.S. at 519 (setting forth test); *id.* at 553 (offering alternative test, whereby "the state interest that can justify mandatory dues arises solely from the union's statutory duties") (Scalia, *J.*, joined by O'Connor, Souter, and Kennedy, *JJ.*, dissenting). And in *Knox*, the Court reaffirmed "the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmember's money to support candidates for public office or to support political causes which [they] oppos[e]." 132 S. Ct. at 2294 (internal quotations omitted; alterations in original). No Member of the Court suggested that this "important difference" is actually illusory, and petitioners' claim that there is no real distinction cannot be squared with these decisions.

It also ignores the courts' proven ability to draw an analogous line between public employee communication that "touch[es] upon a matter of public concern," and

other employee speech. *Connick*, 461 U.S. at 147. "To be sure, conducting these inquiries sometimes has proved difficult." *Garcetti*, 547 U.S. at 418. But an alternative that treats all communication by public employees as political speech or First Amendment "petitioning"—as petitioners invite the Court to do here—would elevate "'the interests of the [employee], as a citizen, in commenting upon matters of public concern,'" to the exclusion of the government's interest, "'as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering*, 391 U.S. at 568) (brackets in original). The line courts successfully draw in applying *Connick* and *Garcetti* is no less principled, and no more essential, than the one courts have drawn for decades under *Abood*.

E. *Abood* And Related Lines Of Decision Are Entitled To *Stare Decisis* Effect.

Adherence to principles of *stare decisis* accomplishes several goals—it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (quotation marks and citations omitted). And respecting precedent, even on constitutional questions, is particularly important if, as here, a decision "has become settled through iteration and reiteration over a long period of time." *Id.* at 244; see also *Dickerson v. United States*, 530 U.S. 428, 443-444 (2000); *Quill Corp. v. N.D. By & Through Heitkamp*, 504 U.S. 298, 316-317 (1992).

Abood was decided more than three decades ago, and this Court has reaffirmed its holding repeatedly, including recently in *Locke*. See 555 U.S. at 210, 213-214; see also *supra* pp. 20-21. And as the foregoing sections make clear, overturning *Abood* would implicate a whole host of the Court's First Amendment decisions as well as decades of jurisprudence distinguishing between the government as regulator and the government as employer. See *Welch v. Tx. Dep't of Highways*, 483 U.S. 468, 494 (1987) (if "Court were to overrule these precedents, a number of other major decisions also would have to be reconsidered").

Such a monumental reordering would not satisfy any of the criteria that sometimes favor a departure from *stare decisis*. The rule at issue has not become unworkable in practice. And far from identifying any changed circumstances, petitioners and their amici press arguments almost identical to those presented and rejected in *Abood* itself. Finally, in the thirty-plus years since *Abood*, public-sector unions and government employers have relied on the decision to order their affairs and engage in collective bargaining, just as government employers have relied on *Connick*, *Garcetti*, and *Engquist* to promote efficiency and professionalism in the public workplace. See Brief Amicus Curiae of the States of New York, *et al.*; Brief Amicus Curiae of the States of Washington, *et al.*

II. Exclusive Representation Alone Does Not Violate The First Amendment.

In their rush to overrule *Abood*, petitioners raise yet another new argument—that the State's decision to negotiate exclusively with the union chosen by a majority of personal assistants *alone* violates the First

Amendment. See, *e.g.*, Pet. Br. 23, 30, 37. In fact, petitioners now insist that merely "put[ting] to a vote" the question of exclusive representation violates their First Amendment rights. Pet. Br. 58. This argument was not raised in the complaint or the courts below, or in the certiorari petition, and it therefore is not properly before the Court. See *supra* p. 15. In any event, holding that the First Amendment prohibits government from authorizing systems of exclusive representation in the public sector would require the Court to overrule far more than *Abood*.

Most obviously, the Court would have to overturn its decision in *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984), which petitioners acknowledge, see Pet. Br. 46-47 & n.15, but whose holding they ignore. By summary affirmance, *Knight* sustained a state law granting public employees the right to negotiate through their exclusive representative over issues subject to collective bargaining. See 465 U.S. at 279. The Court then held that the grant of exclusive authority to the union to "meet and confer" with the State about "questions of policy" not subject to mandatory bargaining did not violate the First Amendment, either. *Id.* at 274, 280. The case thus presented the precise question petitioners ask the Court to decide here (as if for the first time)—whether the First Amendment prohibits a system allowing public employees to elect an exclusive bargaining representative. Declining to work a "massive intrusion into state and federal policymaking," *id.* at 285, the Court held that the system did not even "infringe[] * * * any First Amendment right," *id.* at 291.

This was true for several reasons. The government's decision to negotiate with an exclusive

representative did not interfere with nonmembers' rights to speak or petition government on their own. See *id.* at 280-282; accord *Lehnert*, 500 U.S. at 521 (plurality op.) ("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. Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976) (nonunion members may use public forums to "communicate [their] views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands").

And because the government "in no way restrained [the plaintiffs'] freedom to speak," their First Amendment challenge to exclusive representation reduced to a claim that "government is constitutionally obligated to listen to [them]." *Knight*, 465 U.S. at 282, 288. But *Knight* properly rejected this argument as well: "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288; see also *Smith v. Ark. State Highway Emps. Local 1315*, 441 U.S. 463, 464-465 (1979) (*per curiam*). The Court likewise rejected the plaintiffs' claims that their "associational freedom ha[d] been impaired" by the recognition of an exclusive representative. *Knight*, 465 U.S. at 289. Employees were not required to become union members, and they remained "free to form whatever advocacy groups they" wished. *Ibid*.

Petitioners' only response to *Knight* is to insist that "claims of compelled association were not at issue there." Pet. Br. 47 n.15. But the compelled association claim that was "not at issue" related to the fair-share fees, which the plaintiffs had not challenged. *Knight*,

465 U.S. at 289 n.11; see also *id.* at 291 n.13. In contrast, the Court squarely held that exclusive representation alone does not implicate the First Amendment, even where (unlike here) the representation covered "questions of policy" not subject to collective bargaining, *id.* at 276, and in a case (unlike this one) where the First Amendment rights asserted arose in an academic setting and thus were "especially worthy of respect," *id.* at 297 (Brennan, *J.*, dissenting).

Beyond *Knight*, this case is in line with the many decisions that begin from the premise that exclusive representation is constitutional. These include, for example, the Court's decision upholding the constitutionality of a school district rule limiting access to faculty mailboxes to the teachers' exclusive representative. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 50-52 (1983). Likewise, the Court's many decisions fine-tuning the circumstances under which a union may recover expenses "incurred for the purpose of performing [its] duties [as] an exclusive representative," *Ellis*, 466 U.S. at 448, would not exist if exclusive representation violated the First Amendment outright, see also *Locke*, 555 U.S. at 217-218; *Lehnert*, 500 U.S. at 519; *Hudson*, 475 U.S. at 301-302.

Like the public employees in these cases, petitioners need not become members of a union. See 5 ILCS 315/6(a) (2012). And state law protects them from discrimination for declining to join. See 5 ILCS 315/10(a)(2) (2012). They remain free "to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media," as well as to the government in public

forums. *Madison*, 429 U.S. at 176 n.10. Accordingly, petitioners' reliance on cases addressing claims of compelled association is misplaced. See Pet. Br. 17 (citing, *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

Moreover, *Knight* rejects the very arguments petitioners advance in support of their theory. Petitioners argue that exclusive representation impermissibly interferes with the "'open marketplace'" of ideas by giving the union "a monopoly in expressing its views.'" Pet. Br. 26. But the Court in *Knight* saw no constitutional problem with the fact that exclusivity gave the union an "amplifie[d] * * * voice in the policymaking process." 465 U.S. at 288. As the Court explained, "[a]mplification of the sort claimed is inherent in government's freedom to choose its advisors." *Ibid.* Similarly, petitioners complain about being denied "'a meaningful dialogue with [their] employer,'" Pet. Br. 30, yet in *Knight* this Court held that there is "no constitutional right to be heard on policy questions," 465 U.S. at 290 n.12. Likewise, *Knight* rejected petitioners' claim that exclusive representation has "conscript[ed]" them "into the Union's ranks." Pet. Br. 47. Petitioners need not join the union, and, as *Knight* explained, any pressure they might feel to do so is no different from "the pressure to join a majority party that persons in the minority always feel" and "does not create an unconstitutional inhibition on associational freedom." 465 U.S. at 290.

III. Petitioners' Proposal To Limit *Abood* Ignores Vital Government Interests.

As an alternative to overruling *Abood*, petitioners ask to limit that decision "to its facts." Pet. Br. 24. But this is a thinly veiled second effort at overturning *Abood*, one that requires the Court to adopt a First Amendment test with no basis in law or common sense. The proper test (which the Seventh Circuit applied below) ensures that the State has sufficient control over the employment relationship to make collective bargaining meaningful, thereby promoting the government's interest in peaceful and productive labor relations.

A. Collective Bargaining Serves Critical Government Interests.

Federal and state laws authorizing employees to organize and bargain collectively are a "legitimate" means to facilitate "industrial peace and stabilized labor-management relations." *Hanson*, 351 U.S. at 233-234. Insufficient training, poor morale, excessive absenteeism, lack of productivity, high turnover rates, worker shortages, or any combination thereof undercut the State's ability to provide needed services effectively and efficiently. Collective bargaining creates a structure for employers and employees to negotiate the terms and conditions of employment, determine a mix of benefits that will attract and retain workers, and resolve disputes quickly and equitably. "The theory of [collective bargaining] is that [a] free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the [law] in itself does not attempt to compel." *NLRB v.*

Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); see also *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981). This Court has "accorded great weight to the [legislative] judgment" regarding when collective bargaining is appropriate. *Hudson*, 475 U.S. at 301 n.8; see also *Abood*, 431 U.S. at 229.

The government thus has a legitimate interest in encouraging meaningful collective bargaining as a means of facilitating coordination and cooperation in employment relationships, and the "designation of a single representative" to negotiate with an employer over the terms and conditions of employment advances this interest. *Abood*, 431 U.S. at 220, 221, 224; see also *Hudson*, 475 U.S. at 301 n.8 (recognizing "important 'principle of exclusive union representation'"); *Ellis*, 466 U.S. at 455-456 ("by allowing the union shop," government furthers its "interest in industrial peace"). Exclusive representation "avoids the confusion that would result from attempting to enforce two or more agreements," "prevents inter-union rivalries from creating dissension within the workforce," "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 220-221; see also *Knight*, 465 U.S. at 291 ("The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.'").

And the government's interest in bargaining with an exclusive representative in turn creates the need to avoid free riders—those who would "refuse to contribute to the union while obtaining the benefits of

union representation that necessarily accrue to all employees." *Abood*, 431 U.S. at 222. The "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Id.* at 221. Requiring all employees to contribute "distribute[s] fairly the cost of these activities among those who benefit, and * * * counteracts the incentive that employees might otherwise have to become 'free riders.'" *Id.* at 222. The two interests are inseparable—having adopted a system of collective bargaining through an exclusive representative, with all the benefits of that system, government may "'constitutionally require that the costs of improving the [program] in this fashion should be shared by the subjects and beneficiaries.'" *Keller*, 496 U.S. at 8 (quoting *Lathrop*, 367 U.S. at 842-843).

B. Where The State Is The Employer, It Exercises Sufficient Control To Make Collective Bargaining Meaningful.

"[N]either *Hanson* nor *Abood* discusses the definition of employer"—that is, neither defines the nature of the relationship between the government and its workers needed to trigger the foregoing, constitutionally sufficient interest in bargaining with an exclusive representative. Pet. App. 10a. The Seventh Circuit thus "assume[d] the Court meant to give the word [employer] its ordinary meaning: 'A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.'" *Ibid.* (quoting BLACK'S LAW DICTIONARY). And this reliance on the extent of

employer control is the essence of the common-law definition of an employment relationship, which exists where the hiring party has the "right to control the manner and means by which" a worker performs the job. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); see also Restatement (Second) of Agency § 220, cmt. d (1958).

When "asked to construe the meaning of 'employee,'" this Court frequently "adopt[s] [this] common-law test." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); see, *e.g.*, *id.* at 323; *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448 (2003); *Reid*, 490 U.S. at 739-751. Indeed, following this Court's lead, both the National Labor Relations Board and lower courts apply "general agency principles" to define the universe of workers to whom the National Labor Relations Act extends the right to organize and bargain collectively. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

Moreover, the common-law test has special purchase here. Because it turns on the degree of employer control over the terms and conditions of employment, it finds an employment relationship only where collective bargaining would be meaningful. Without sufficient control over the terms of employment, bargaining may be an empty exercise. But where, as here, the employer exerts control over salary and benefits (including health insurance), qualifications, training, and other core elements of the relationship, see *supra* pp. 1-3, 7-8, collective bargaining is most able to promote the government's interest in maintaining a stable and professional workforce. And because the State's relationship with the personal assistants so readily satisfies the common-law test, the Court need

not decide whether a collective bargaining regime would be valid in some cases without a common-law employment relationship. See *Keller*, 496 U.S. at 12, 15-16 (compelled payments to mandatory association permissible outside of employment context); see also *NASA*, 131 S. Ct. at 758-759.

Petitioners argue that the common-law test is "ill-suited for First Amendment line drawing," seemingly because it considers multiple factors, "none of which is determinative." Pet. Br. 32 n.8. But "totality of the circumstances" tests are not unusual in constitutional adjudication, see, *e.g.*, *Florida v. Harris*, 133 S. Ct. 1050, 1055-1056 (2013), including in the First Amendment context, see *Garcetti*, 547 U.S. at 424 (determining whether public employee spoke pursuant to official duties, and thus within scope of First Amendment protections, requires "practical" inquiry); *id.* at 436 (Souter, *J.*, dissenting) (describing majority's "totality of the circumstances" test).

Relying on *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), petitioners also suggest that a common-law employment relationship is irrelevant to the scope of First Amendment protections. See Pet. Br. 31-32. But see *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996) (interest balancing that determines scope of First Amendment must be "adjusted to weigh the government's interest as contractor rather than as employer"). Again, however, the existence of such a relationship indicates the presence of sufficient control for meaningful collective bargaining, thus facilitating the government's interest in maintaining a productive workforce through peaceful labor relations. Moreover, *O'Hare* was an application of the prohibition against political patronage—recognized

by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), see 518 U.S. at 725-726—and *Abood* specifically rejected the argument that "fair-share" provisions are "governed by * * * decisions" (including *Elrod*) "holding that public employment cannot be conditioned upon the surrender of First Amendment rights," 431 U.S. at 226. The Court held that so long as objectors are not required to contribute "toward the advancement of * * * ideological causes not germane to [the union's] duties as collective-bargaining representative," fair-share fees do not present the same First Amendment questions at issue in cases like *Elrod*. *Id.* at 235.

Finally, petitioners fault the Seventh Circuit's reliance on the "joint employment concept." Pet. Br. 32. But joint employment is a familiar feature of the common law, *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (describing "hornbook rule" that "a 'person *may* be the servant of two masters . . . *at one time as to one act*'") (quoting Restatement (Second) of Agency § 226 (1958)) (ellipses and emphasis in original); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (under common law, worker "could be deemed to be acting for two masters simultaneously"), as well as labor relations law, see *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (employer may "possess[] sufficient control over the work of the employees to qualify as a joint employer" under National Labor Relations Act); *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982) (where two employers "share or co-determine those matters governing essential terms and conditions of employment," "they constitute 'joint employers' within the meaning of the NLRA"). And the Seventh Circuit, consistent with the common-law test, held that the State and the customers would qualify as

joint employers only if "*each* exercise[s] significant control over the personal assistants." Pet. App. 10a (emphasis added). Whether the State is an employer or a joint employer, the dispositive question is whether the State exercises sufficient control over its workers to make collective bargaining a meaningful way to promote a stable and professional workforce.

C. Petitioners' Test Relies On An Artificially Narrow Interpretation Of The Government's Labor Peace Interest.

Rather than asking whether the government exercises sufficient control over the employment relationship to engage in meaningful collective bargaining, petitioners would limit *Abood* to circumstances where (1) "the government is actively managing and supervising the affected individuals in its workplaces," and (2) "the representation does not extend to matters of public concern." Pet. Br. 24. But petitioners' novel test fails to account for the government's interests in facilitating peaceful labor relations and, relatedly, avoiding free riders.

As an initial matter, there is no reasonable definition of "actively manag[e]" that the State does not satisfy here: it sets the hiring criteria and evaluates each customer's choice of assistant, designs and implements the assistants' orientation and training, attends annual reviews and effectively may fire any assistant who does not meet the State's standards, controls the assistants' hours and job responsibilities, and sets and pays their salaries and benefits.

Nor can it be that the State's interest turns on whether it supervises its employees in government-owned buildings, a claim that precedes

from petitioners' absurdly cramped view of the labor peace rationale. See, *e.g.*, Pet. Br. 25. As the Seventh Circuit recognized in rejecting this same argument, this Court held long before *Abood* that "'[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex' and a question of policy outside of the judiciary's concern." Pet. App. 12a (quoting *Hanson*, 351 U.S. at 234). Relying on *Hanson*, the court below saw that *Abood* used the shorthand "labor peace" "to include 'stabilized labor management relations,' which are at issue in any employer-employee relationship." *Ibid.*

In fact, the State's interest in promoting labor stability is particularly acute here, for the Illinois General Assembly established the Home Services Program to provide critical services to the State's most vulnerable citizens in a cost-effective manner. "Without a reliable workforce to deliver quality care, homecare services fail and the burden falls on expensive residential care facilities and on families." C. Howes, *Living Wages & Retention of Homecare Workers in San Francisco*, INDUS. RELATIONS, Vol. 44, No. 1, at 142 (2005). High turnover, low morale, excessive absenteeism, poor training, or lack of productivity would impede the State's efforts to keep customers in their own homes. See *id.* at 143 ("The average duration of matches between a consumer and provider is * * * an important measure of stability and quality of care[.]"). Collective bargaining provides an effective means for the State to coordinate with the personal assistants to determine the combination of benefits that will attract and retain qualified workers, and to quickly resolve any disputes that may arise.

The first element of petitioners' proposed test is therefore nonsensical, for the government's interest in the efficient and effective delivery of services does not diminish merely because the State has decided to respect customers' personal autonomy by allowing them to supervise personal assistants directly and at home. In fact, the government's labor peace interest is *greater* in these circumstances. Because each customer employs only one or two personal assistants, and has no control over the economic terms of their employment, the customer "cannot effectively address concerns common to all personal assistants." Pet. App. 46a. And because the personal assistants are not in a centralized workplace, they have no opportunity to "effectively voice their concerns" to the State about the terms and conditions of their employment. *Ibid.* Collective bargaining facilitates cooperation and coordination between the personal assistants and their public employer.

Moreover, many common topics of collective bargaining that are critical to worker satisfaction and productivity—including wages, health and retirement benefits, training and safety, and discipline and grievance procedures—are the same regardless of whether the government directly supervises the affected employees or whether they work in government-owned workplaces. Indeed, petitioners' argument would eliminate collective bargaining for huge classes of public employees who necessarily work outside a centralized government workplace, including bus drivers, police officers, and sanitation workers.

And even if—contrary to this Court's past decisions—the definition of "labor peace" could be limited merely to avoiding "multiple representatives,"

Pet. Br. 25, petitioners' proposed test still ignores reality. The government's interest in preventing "inter-union rivalries" and reaching a binding agreement with a single union, see *supra* Sec. III.A, does not depend on the employees' location or whether they are directly supervised. Although "proof" of "past disturbances" is unnecessary to invoke the labor peace rationale, *Perry*, 460 U.S. at 52 n.12, the contest between the two unions to represent assistants in Illinois' Support Services Program is evidence that "inter-union rivalries" may arise even when employees are widely dispersed. See *Waters*, 511 U.S. at 673 (plurality op.) ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is a matter of public concern.").

Nor, finally, are this Court's decisions affording substantial deference to the government as employer irrelevant here because—as petitioners contend—"virtually all" involve "a workplace setting where the government directly and actively supervised the employee." Pet. Br. 28. This Court has specifically rejected the argument "that the government interests in maintaining harmonious working environments and relationships" are too "attenuated" to warrant consideration "where the contractor does not work at the government's workplace and does not interact daily with government officers and employees." *Umbehr,* 518 U.S. at 677. The government's "interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated" when it acts as contractor just as when it acts as employer. *Id.* at 678. "Deference is therefore due to the government's

reasonable assessments of its interests *as contractor*." *Ibid.* (emphasis in original); see also *NASA*, 131 S. Ct. at 759 (whether employment relationship exists "says very little about the interests at stake in this case"). Indeed, while overturning *Abood* would throw decisions like *Engquist*, *Connick*, and *Garcetti* into doubt, limiting *Abood* as petitioners propose would vastly curtail the effect of these decisions, to the peril of public employers.

The second prong of petitioners' proposed test—that exclusive representation "not extend to matters of public concern"—is equally misguided. As petitioners use the term, "matters of public concern" encompasses every element of public-sector collective bargaining. See Pet. Br. 30, 38, 40-42. But this explodes the settled distinction between the government as regulator and the government as employer. See *supra* Sec. I.D. The government's interest as employer "in promoting the efficiency of the government services it performs through its employees" has long enjoyed substantial deference even with regard to employee speech and petitioning on matters of public concern. *Borough of Duryea*, 131 S. Ct. at 2493 (internal quotations omitted). The second prong of petitioners' proposed test also is impossible to reconcile with *Abood*, *Lehnert*, and *Knox*, each of which confirmed that there is a constitutional "line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities." *Lehnert*, 500 U.S. at 517; see also *supra* p. 27. Petitioners' test thus reduces to a request to overrule these cases *sub silentio* and hold that a public-sector union's use of fair-share fees, even for collective bargaining activities, is prohibited.

D. Avoiding Free-Riding Is A Vital Government Interest.

Not only do petitioners understate the importance of the government labor peace interest at stake, but they also wrongly urge the Court to "disavow the free-rider argument entirely." Pet. Br. 34. The Court's recognition of that legitimate government interest in *Abood* was not the historical accident petitioners depict, however. Rather, for over half a century, both Congress and this Court have recognized the important social interest in curbing free riding, and they have balanced the harms it causes with employees' constitutional rights. See *supra* Secs. I.A-C; see, *e.g.*, *Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB*, 347 U.S. 17, 41 (1954).

Nor has the Court limited its reliance on the free-rider rationale to the context of collective bargaining. Just as *Hanson* predicted, see 351 U.S. at 238, this Court has found "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Keller*, 496 U.S. at 12. "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Ibid.* And the Court subsequently relied on *Abood* and *Keller* to uphold a law requiring growers, handlers, and processors of California tree fruit to finance a generic advertising campaign. *Glickman*, 521 U.S. at 471-473.

Petitioners place significant weight on dicta in *Knox* that acceptance of the free-rider justification in the

union-shop context is "'something of an anomaly.'" Pet. Br. 34 (quoting 132 S. Ct. at 2289). Yet they ignore this Court's longstanding acknowledgment of the special importance of free-riding concerns in the context of collective bargaining, starting with *Hanson*. *Knox* itself recognized the Court's settled rule that "compelling nonmembers to pay a portion of union dues" is "justified by the interest in furthering 'labor peace.'" 132 S. Ct. at 2290 (quoting *Hudson*, 475 U.S. at 303). And *Knox* was clear that it left intact that bedrock principle of American labor law. See *id.* at 2289.

In any event, the compelled association with political advocacy challenged in *Knox* is a far cry from the anti-free-riding measure here. To be sure, both implicate First Amendment rights. See *Ellis*, 466 U.S. at 455. The former treads on core First Amendment protections, however, while the latter does not, and the dissenters' First Amendment interest was therefore greater in *Knox*. At the same time, the government's interest is far more powerful here, where free riders would threaten the State's ability to bargain with a single, exclusive representative of its employees.

As Justice Scalia explained in *Lehnert*, "What is distinctive * * * about the 'free riders' who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." 500 U.S. at 556 (Scalia, *J.*, concurring in part and dissenting in part) (emphasis in original); see also *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 750 (1988) (in absence of union-shop agreements, unions "were legally obligated to represent the interests of all workers, including those who did not

become members[;] thus nonunion workers were able, at no expense to themselves, to share in all the benefits the unions obtained through collective bargaining"); *Street*, 367 U.S. at 762 ("Benefits resulting from collective bargaining may not be withheld from employees because they are not "members of the union.") (internal quotations omitted). "Thus, the free ridership (if it were left to be that) would not be incidental but calculated, not imposed by circumstances but mandated by government decree." *Lehnert*, 500 U.S. at 556 (Scalia, *J.*, concurring in part and dissenting in part).

Because exclusive bargaining representatives are forced to carry nonmembers and expend significant resources on activities (including contract negotiation and grievance processing) that benefit nonmembers, the union-shop context is different from the examples in *Knox* where the free-rider argument does not prevail. See 132 S. Ct. at 2289-2290. Accordingly, in the union context, the result of permitting free riders would not only be to force union members to subsidize bargaining and dispute resolution on behalf of non-paying employees, but to do so using the part of union dues that exceed the members' own fair-share portion—the part that union members *intended* the union to use for core political speech.

Finally, it bears noting that the book review on which the *Knox* dicta relies, see 132 S. Ct. at 2289-2290 (quoting Clyde W. Summers, Book Review, SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW & POLITICAL THEORY, 16 COMPARATIVE LABOR L.J. 262, 268 (1995)), did not indict the free rider argument. Rather, the passage *Knox* quoted was illustrating the weakness of the book's defense of that argument. See

Summers, *supra*, at 268. In fact, Professor Summers' ultimate conclusion supports respondents: "The free rider argument has a special force when unions are involved because unions have a special role in a democratic free market society. Such a society relies on collective bargaining to help regulate the labor market, protect rights of employees, and provide a measure of industrial democracy." *Id*. at 272.

IV. The Seventh Circuit Correctly Held That Petitioners Are State Employees For Purposes Of *Abood*.

The personal assistants are employees of the State within the common-law definition. The State exercises significant control over the terms of their employment, and—even if narrow tailoring were required—the Illinois law that petitioners challenge would satisfy this standard. Finally, given the extensive control the State exerts over the personal assistants, petitioners' claim that affirming the decision below will give rise to the unionization of vast groups of non-similarly situated workers is misplaced.

A. The State Controls Many Of The Terms And Conditions Of Employment.

The State exercises substantial "control" over the personal assistants. *Reid*, 490 U.S. at 751-752 (setting forth factors of common-law employment relationship). The State decides which services a personal assistant may provide. 89 Ill. Admin. Code § 686.20. A State-employed counselor develops a Service Plan for each customer that lists "the specific tasks" each personal assistant will perform, "the frequency" with which the assistant must perform them, and "the number of hours" per month the personal assistant may

spend on each task. *Id.* §§ 676.30(u), 684.10(a), 684.50. All personal assistants must participate in an annual State-designed training program and submit to background checks. 2012 CBA (Side Letter 2). And the State-employed counselor helps the customer undertake an annual performance review of each personal assistant and "mediate[s]" "unresolved issues" between the customer and the assistant, including (if needed) by replacing the assistant. 89 Ill. Admin. Code § 686.30.

Because the State-created Service Plan dictates the tasks a personal assistant will perform and the time allowed for each task, the State also exercises "discretion over when and how long" each assistant works. *Reid*, 490 U.S. at 751. And because the State only pays for services listed in the Service Plan unless the counselor approves additional services, 89 Ill. Admin. Code §§ 676.200, 684.10(a), 686.10(h)(2), the State alone has the "right to assign additional projects" to the personal assistant, *Reid*, 490 U.S. at 751. The State also provides safety gloves, which can be critical to the personal assistants' well being, 2012 CBA Art. IX § 2, and is therefore "the source" of at least some of "the instrumentalities and tools" of the job, *Reid*, 490 U.S. at 751.

Moreover, the State exercises sole control over "paying" personal assistants, the "method" by which they are paid, their "tax treatment," and the "provision of employee benefits." *Id.* at 751-752. The State alone determines the personal assistants' wages and pays them directly. 89 Ill. Admin. Code §§ 676.200, 686.40(a)-(b); 42 C.F.R. § 447.15. The State withholds Social Security tax and all state and federal income taxes. 89 Ill. Admin. Code § 686.10(h)(10). And the

State pays to train the assistants and funds their health insurance. 2012 CBA Arts. VII § 2, IX § 1.

In addition, the State exercises significant control over the "hiring" of each personal assistant. *Reid*, 490 U.S. at 751-752. A customer cannot decide to hire an assistant without the State-employed counselor's approval, 89 Ill. Admin. Code § 684.20(a) ("[t]he counselor has the responsibility to identify the appropriate level of service provider"), and, on the customer's request, the counselor must identify qualified candidates, *id.* § 684.20(b). Prior to hiring, moreover, any applicant must meet State-imposed standards, including age and work-hour limits, pre-hire recommendations, and documented comparable experience and/or training, and also must demonstrate communication skills and the ability to follow directions to the counselor's satisfaction. *Id.* § 686.10(b)-(f). All new hires must complete a "comprehensive orientation" program designed by the State. 2012 CBA (Art. IX § 1 & Side Letter 2). And the State may fire personal assistants by refusing to pay for their services if they do not meet state standards. 89 Ill. Admin. Code § 677.40(d). Moreover, the State may refuse to pay for (or disqualify from the Program) personal assistants if there are credible allegations of customer neglect, abuse, or financial exploitation. See 2012 CBA (Art. XII § 6).

It is no surprise, therefore, that the Illinois Workers' Compensation Commission has consistently held, applying the common-law test, that personal assistants are state employees for purposes of the state Worker's Compensation Act. See *Marketoe Day v. Illinois*, No. 07 W.C. 6544, No. 09 I.W.C.C. 0708, 2009 WL 2488458, at *5 (Ill. Indus. Comm'n July 10, 2009);

see also *Bauer v. Indus. Comm'n*, 282 N.E.2d 448, 450 (Ill. 1972) (common-law test determines coverage under Illinois Worker's Compensation Act). The Commission relied on the fact that the State "determined the extent of [the customer's] needs"; "controlled [the personal assistant's] salary [and] number of hours he was permitted to work each week"; "provided training"; "required [the personal assistant] to provide background information and references"; "informed [the personal assistant] he would not be entitled to pay for [certain activities]," even if requested by the customer; and "reserved the right to terminate [the personal assistant's] pay in the event of evidence of fraud, abuse or neglect or in the event of a determination that [the customer] no longer required home care." *Martin v. Illinois*, No. 04 W.C. 31542, No. 05 I.W.C.C. 0580, 2005 WL 2267733, at *5 (Ill. W.C.C. July 26, 2005).

Finally, as the court below recognized, see Pet. App. 10a-11a, a customer enjoys discretion to choose any personal assistant meeting state standards, 89 Ill. Admin. Code § 684.20(b). And the customer is responsible for supervising the personal assistant's performance of State-designated tasks within the time the State sets for performance, and may discipline and even terminate the assistant. *Id.* § 676.30(b). Moreover, because the Program exists as an alternative to institutionalization, "the location of the work," *Reid*, 490 U.S. at 751, is the customer's home, 89 Ill. Admin. Code § 676.10(a), and the customer may supply additional "instrumentalities and tools," *Reid*, 490 U.S. at 751. But these are only a few of the factors relevant to deciding whether a common-law employment relationship exists. "'[A]ll of the incidents of the

relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324 (quoting *United Ins.*, 390 U.S. at 258).

Nor was the Seventh Circuit's application of the common-law test "flawed on its own terms." Pet. Br. 44-45. Here, petitioners quote Illinois regulations providing, *inter alia*, that the "'customer shall serve as the [personal assistant's] employer'" and the Department has no "'control'" over "'the employment relationship between the customer and the personal assistants.'" *Ibid.* (emphasis omitted). But the Seventh Circuit correctly recognized that the label affixed by the State is insufficient to establish (or disestablish) an employment relationship. See Pet. App. 9a. Instead, the court below properly "consider[ed] the relationship itself" when deciding that the State has sufficient control over the personal assistants to qualify as their employer. *Ibid.*

Petitioners also nit-pick the Seventh Circuit's phrasing of the regulations, noting that the customer's physician (not the Department-employed counselor) must provide final approval for any Service Plan, and that the counselor does not conduct the annual performance review alone. See Pet. Br. 45. But these misstatements—if they can be called that—are inconsequential: the counselor *develops* the Service Plan before submitting it to the customer's physician for approval, and the counselor *assists* the customer with each performance review and mediates any unresolved issues, including by replacing the assistant. See *supra* pp. 1-3. Notably, petitioners do not contest the other ways in which the State exerts control over the personal assistants' job.

Nor, finally, does the Illinois Labor Relations Board's 1985 decision indicate that customers employ the personal assistants to the exclusion of the State, as petitioners contend (at p. 45). "Without reaching" the hearing officer's finding that the State and the customers are "joint employers" of the personal assistants, the State Board merely held that it lacked statutory authority in joint employment situations (unless both employers were subject to Board jurisdiction), see *supra* pp. 4-5—an interpretation of state law the Board since has rejected, see, *e.g.*, *AFSCME, Council 31*, No. S-RC-05-126, 23 PERI ¶ 71, 2007 WL 7562292, at *1 (Apr. 23, 2007).

B. The State Need Not Show Narrow Tailoring, And No Less Restrictive Means Are Available In Any Event.

Petitioners also contend (at pp. 46-48) that the State's system of collective bargaining flunks constitutional scrutiny because there are more narrowly tailored means (meet-and-confer arrangements, administrative rulemaking, and polls) to serve the State's interest in facilitating a stable and productive workforce. Because the State's system is subject to a balancing analysis in lieu of strict scrutiny, however, see *supra* Secs. I.A-D, the State need not show that collective bargaining is the least restrictive means of facilitating the Program's goals. And regardless of the applicable level of scrutiny, this Court already "determined that the First Amendment burdens accompanying [fair-share] payment requirement[s] are justified by the government's interest in preventing freeriding * * * and in maintaining peaceful labor relations," *Locke*, 555 U.S. at 213, in cases where the alternatives petitioners propose here were equally

available. Even Justice Powell, in the concurring opinion in *Abood* on which petitioners place such weight (at pp. 21-23), indicated that fair-share fees in the public sector may well survive strict scrutiny if, as here, they are used for bargaining over "narrowly defined legal issues" (such as salaries and benefits) and certain non-bargaining activities (such as "[t]he processing of individual grievances"). 431 U.S. at 263 n.16.

Moreover, empirical evidence shows that collective bargaining is more effective than its alternatives. Collective bargaining does not rely on individual, dispersed workers without the wherewithal to collaborate effectively. Thus, studies indicate that unionized caregivers in Illinois, specifically, are likely to obtain more training and worker's compensation than their non-unionized counterparts. See E.T. Powers & N.J. Powers, *Should Government Subsidize Caregiver Wages? Some Evidence on Worker Turnover & the Cost of Long-Term Care in Group Homes for Persons with Developmental Disabilities*, JOURNAL OF DISABILITY POLICY STUDIES, Vol. 21, No. 4, Tables 4-5 & p. 204 (2011). "These findings [are] consistent with unions playing important information-provision and policing roles." *Id.* at 206-207. And studies show that unionization of homecare workers is associated with increased compensation and retention, and retention is one of the most important indicia of quality of care. See Howes, *supra*, at 139-140, 143; see also E.T. Powers & N.J. Powers, *Causes of Caregiver Turnover & the Potential Effectiveness of Wage Subsidies for Solving the Long-Term Care Workforce 'Crisis'*, B.E. JOURNAL OF ECONOMIC ANALYSIS & POLICY (CONTRIBUTIONS), Vol.

10, No. 1, at 23 (2010).[4] As a result, collective bargaining uniquely facilitates the cooperation between the public employer and the personal assistants necessary to determine workforce preferences and provide quality home care as a cost-effective alternative to institutionalization.

Finally, only by misleadingly describing the State's argument and the opinion below can petitioners claim that "[i]f upheld," the Seventh Circuit's decision "will open the door to the collectivization" of "almost anyone receiving government money for a service." Pet. Br. 49, 51. Consistent with the State's argument and the opinion below, "individuals who provide services to public-aid recipients," Pet. Br. 49, may be required to pay fair-share fees in exchange for reaping the benefits of collective bargaining only if they *also* are subject to "significant [government] control" over the terms and conditions of their employment, Pet. App. 10a. For this reason, the Seventh Circuit did not address whether its "narrow[]" decision extended to Support Services Program providers (whose "exact relationship" with the State was not "developed"), Pet. App. 3a & n.1, 17a, or to "contractors, health care providers, or citizens," Pet. App. 13a. Accordingly, the First Amendment implications of requiring workers other than the Home Services Program personal assistants to pay fair-share

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[4] Powers & Powers studied direct service providers in Illinois group homes for the developmentally disabled. These workers and their counterparts in the Program share similar job responsibilities. See Powers & Powers, *Causes of Caregiver Turnover*, *supra*, at 1. Thus, workers attracted to both positions are likely similar in their characteristics and expected responses.

fees—including all workers described by petitioners, see Pet. Br. 51-55, and those covered by amendments to Illinois law that post-date petitioners' complaint, see 5 ILCS 315/3(n), (o); 20 ILCS 2405/3(f) (eff. Jan. 29, 2013)—are not presented by this case.

V. A Constitutional Challenge To A Hypothetical, Future Fair-Share Agreement Is Not Ripe For Judicial Review.

The Support Services Program personal assistants "have opted not to have union representation." Pet. App. 14a. The question whether their unionization would violate the Constitution therefore is not ripe for judicial review.

A mere "hypothetical threat" is not an injury ripe for adjudication. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 90 (1947). Here, it is merely "hypothetical" that the Support Services Program personal assistants will select a bargaining representative. Shortly after the executive order, these personal assistants voted *against* union representation. J.A. 26-27 (¶¶ 32-36). In the intervening four years, there have been no new votes. Nor have there been any indications that the assistants wish to revisit their initial vote, let alone reverse it. Under analogous circumstances, this Court has repeatedly recognized that a constitutional challenge is not ripe. See, *e.g.*, *Texas v. United States*, 523 U.S. 296, 300-301 (1998); *Renne v. Geary*, 501 U.S. 312, 321 (1991).

In effect, petitioners seek an advisory opinion declaring that *if* the personal assistants choose a collective bargaining representative at some point, the First Amendment will preclude that representative from either negotiating on their behalf or collecting fair-share

fees from them. But "[p]laintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (quotations omitted).

The great weight petitioners place on this Court's observation that "'one does not have to await the consummation of threatened injury to obtain preventative relief'" is misplaced. Pet. Br. 56 (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). This principle applies only where the purported harm is imminent or inevitable, see, *e.g., Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 144 (1974), whereas petitioners' claim "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," *Texas*, 523 U.S. at 300 (internal quotations and citation omitted).

A showing of imminent harm is unnecessary only where a collateral injury, distinct from the harm that formed the basis of the suit, is either present or inevitable. See, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754-2755 (2010). Petitioners' allegation that if there were a future vote, "they must expend resources to encourage other providers to vote any union down," Pet. Br. 56, does not qualify as such a collateral harm. Regardless, as the Seventh Circuit explained below, a party's expenditure of resources to sway the results of an election is not an injury by itself. Pet. App. 16a. Otherwise, the mere proposal of every new piece of legislation would establish a justiciable injury for those who oppose it. *Ibid.*

Prudential considerations also favor leaving petitioners' constitutional arguments unaddressed, for

there is no "hardship to the parties" in "withholding court consideration," and the issues are not "fit[] * * * for judicial decision." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Petitioners will suffer no hardship if judicial resolution of their constitutional claim is postponed. The executive order has no immediate impact on them or their interests. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (speculative whether regulations would deny legalized status to any plaintiff); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999). If the Support Services Program personal assistants select a collective bargaining representative, these petitioners would be free to request a preliminary injunction or declaratory judgment from a federal district court. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998).

Nor is the question petitioners seek to adjudicate appropriate for resolution at this time, for it does not turn entirely on a question of law. To prevail, they must persuade the Court that the specific relationships these personal assistants have with customers are such that the State no longer has a sufficient interest in labor peace among these workers to justify even the modest First Amendment impingement permitted by *Abood*. The potential First Amendment question, therefore, turns on factual considerations regarding the amount of control Illinois exercises over the Support Services Program personal assistants. These issues are better considered in the context of a particular collective bargaining agreement, not a theoretical one.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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