No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS *et al.*,
Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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It is telling that, to save Illinois' provider unionization laws and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), Respondents resort to asserting that compelled association with a union is a mere "commercial association," subject to a deferential balancing test. In so doing, they necessarily seek to have this Court overrule its recent holding in *Knox v. SEIU, Local 1000* that compulsory unionism is "subject to exacting First Amendment scrutiny" and must be justified by compelling state interests. 132 S. Ct. 2277, 2289 (2012).

The Court should decline Respondents' invitation. Illinois is forcing homecare providers to support SEIU-HCII for an inherently expressive purpose—to "petition the Government for a redress of grievanc-

es," U.S. Const. amend. I. This warrants the most exacting constitutional scrutiny, as *Knox* held just two Terms ago.

Respondents ignore *Knox's* test because *Abood* did not apply the proper level of scrutiny when it imported Commerce Clause rationales for compulsory unionism into First Amendment jurisprudence. The time has come to overrule *Abood*. But even if *Abood* is not overruled, it should not be extended beyond the government workplace to private homecare providers reimbursed by a Medicaid program. Illinois' provider-unionization law fails both *Knox* tests.

The mandatory association here fails *Knox's* compelling-interest test because: (1) association cannot be compelled for the purpose of speech itself, *United States v. United Foods, Inc.*, 533 U.S. 405, 415-16 (2001); (2) Illinois lacks a "labor peace" interest in avoiding petitioning from diverse associations of providers; and (3) the State could bargain with one organization over its Medicaid rates without forcing providers to affiliate with that organization.

Even if this were "the rare case where a mandatory association [could] be justified," Respondents' compulsory fees fail *Knox's* necessary-incident test. 132 S. Ct. at 2289. The State could bargain with SEIU-HCII over Medicaid rates without forcing providers to support it financially, as the Union can rely on *voluntary* support for its agenda, like all other advocacy groups.

The Seventh Circuit should be reversed.

ARGUMENT

I. COMPELLED ASSOCIATION FOR PETITIONING GOVERNMENT IS SUBJECT TO EXACTING SCRUTINY.

A. *Knox*'s Exacting Scrutiny Test Controls.

1. *Knox* explained that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." 132 S. Ct. at 2289. First, the mandatory association must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United Foods*, 533 U.S. at 414).

The *Knox* test controls here. But Respondents and the United States ignore that test. They argue that the constitutionality of compulsory union fees should be evaluated under the *Pickering* balancing test, which "balance[s] . . . 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." *Pickering v. Bd. of Educ. of Twp. High Sch.*, 391 U.S. 563, 568 (1968). *See* State Br. 25-26; SEIU-HCII Br. 35-36; S.G. Br. 11. But *Knox* is clear: Exacting scrutiny applies to a case like this one involving "compulsory subsidies for private speech." 132 S. Ct. at 2289.

Knox is the latest in a long line of case law demanding heightened scrutiny of compelled expressive association. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Roberts*, 468 U.S. at 623. This includes compelled-association cases involving government employees and contractors, *e.g., Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996); and, most relevant here, compulsory union fee cases, *e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 & n.11 (1986) (procedure for extraction of such fees must "be carefully tailored to minimize the infringement") (citing strict-scrutiny cases).

This line of precedents is quite separate from "*Pickering* and its progeny," which "involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466-67 (1995). The balancing test applicable to those cases is "a different, though related, inquiry [used] where a government employer takes adverse action on account of an employee or service provider's right of free speech"—in other words, in retaliation cases. *O'Hare*, 518 U.S. at 719.

But in the "'unusual' and 'extraordinary'" circumstance where a State *compels* expression by forcing workers to associate with an entity to petition government through collective bargaining, exacting scrutiny applies. *Knox*, 132 S. Ct. at 2291. *Knox* said so plainly. "*Far from calling for a balancing of rights or interests*," the Court wrote, precedent requires that "any procedure for exacting fees from unwilling contributors . . . must serve a 'compelling interest' and must not be significantly broader than necessary

to serve that interest." *Id.* (emphasis added). That is unequivocal. Respondents' attempt to invoke *Pickering* balancing cannot be squared with *Knox.*

2. The State and Solicitor General nonetheless assert that *Pickering* balancing should apply because collective bargaining is an "internal" proprietary matter that government has broad authority to regulate. State Br. 24-27; S.G. Br. 21. Providers agree that there is a difference "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) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)); *see* Opening Br. 24-25. But that does not help Respondents here.

The way homecare providers petition Illinois over its Medicaid program is not an "internal" proprietary matter that the State has free rein to manage, any more than is petitioning by doctors or nurses over Medicaid policies. This is petitioning by citizens directed to the State in its capacity as regulator and lawmaker, and not that of a servant speaking to their master.

Nor is union collective bargaining with government a mere internal matter, like the workplace grievance of a lone employee, *see Borough of Duryea v. Guarnieri,* 131 S. Ct. 2488, 2496 (2011). This petitioning concerns government policies of public concern, such as the operation of a Medicaid program here, which can affect thousands of individuals and the public fisc. Given its scope and impact, "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word." *Abood*, 431 U.S. at 257 (Powell, J., concurring in judgment).

Illinois nonetheless argues that it has proprietary authority to manage the petitioning of personal assistants and others as government "employees" if the "State has sufficient control over the employment relationship to make collective bargaining meaningful." State Br. 14, 34; *see* S.G. Br. 28-30. According to the State, "[w]ithout sufficient control over the terms of employment, bargaining may be an empty exercise." State Br. 37. But whether mandatory bargaining is *possible* says little about whether it is *justified*.

A state's exertion of economic or regulatory control over a profession does not grant it proprietary authority to dictate how members of that profession petition the state. *See* Opening Br. 31-32. If it did, the First Amendment rights of millions who work in government-financed or regulated industries (such as medicine, education, utilities, defense, etc.) would be degraded. This Court cannot accept Illinois' conception of an *inverse relationship* between government regulation and First Amendment freedoms—i.e., that the more the government regulates an individual's profession, the fewer rights the individual has to choose with whom he associates to petition the government over those policies.

3. SEIU-HCII offers a second theory why *Knox*'s exacting scrutiny should not apply: it contends that collective bargaining is *commercial* association, not expressive association. That is untenable—and not just because *Knox* already answered the scrutiny question.

This Court has consistently explained that collective bargaining with government is political, and that "compulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment

rights.'" *Knox*, 132 S. Ct. at 2289 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)). The Court recognized in *Knox*, for example, that "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." 132 S. Ct. at 2289. And *Abood* itself stated that collective bargaining by public-employee unions "may be properly termed political," 431 U.S. at 231, and that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Id*. at 222. These rationales have added force where, as here, "bargaining" concerns the operation of a public-aid program.

The Union nonetheless insists that collective bargaining is commercial because it is a regulated process, limited to a particular subject matter, that occurs in non-public fora. SEIU HCII Br. 24-25, 32-34. But none of these attributes changes the relevant fact that a union is petitioning government over policy matters in this bargaining. Most lobbying of government officials occurs behind closed doors and is limited to particular subjects.

Certainly, government cannot transform core expressive activity—like petitioning over Medicaid rates—into a non-expressive, commercial activity merely by creating a regulated process for that petitioning. The proposition is not only illogical, but limitless. If accepted, the very act of subjecting a policy issue to a collective-bargaining process would constitutionally justify itself.

SEIU-HCII offers two authorities in support of its commercial-association theory: Justice Powell's concurrence in *Abood*, and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). SEIU-HCII Br. 21,

29. Neither aids its position. Justice Powell's concurring opinion in fact *refutes* the union's argument. In his view, exacting scrutiny should apply to all compulsory union fees, 431 U.S. at 259-60, because there is no "basis here for distinguishing 'collective-bargaining activities' from 'political activities' so far as the interests protected by the First Amendment are concerned." *Id.* at 257. To be sure, he hypothesized in a footnote that bargaining over salaries or benefits might potentially survive such scrutiny, *id.* at 263 n.16—but he nevertheless maintained that exacting scrutiny was the proper standard.

The union fares no better with *Glickman*. The marketing cooperative in that case was upheld as an economic regulation because it primarily performed regulatory functions unrelated to expressive activity. 521 U.S. at 460-62, 477. In contrast, a public-sector union's primary function is expressive—to petition the government. *Glickman* itself distinguished the situation before it from compelling support for unions, *id.* at 470-73, "which arguably always poses some burden on First Amendment rights," *id.* at 473 n.16; *see United Foods,* 533 U.S. at 411-16.

Finally, even if some subjects of collective bargaining might be deemed economic, that makes no difference. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"; no matter the topic, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *United Foods* itself involved economic speech—commercial advertising for mushrooms. 533 U.S. at 411. Yet compelling association to generate that commercial speech was held

unconstitutional. *Id.* at 416-17. Petitioning the government over Medicaid rates and policies lies on a higher plane of First Amendment activity than advocating for greater mushroom consumption.

B. Respondents' Other Threshold Arguments Fail.

1. Perhaps recognizing the weakness of their merits argument given *Knox*, Respondents maintain that the propriety of exclusive representation is not before the Court because the Complaint challenges only forced fees. State Br. 30; SEIU-HCII Br. 16. But the two are intertwined, as *Abood* itself recognized.[1] *Knox's* first test asks whether the "mandatory association" subsidized by a compulsory fee is justified by a compelling state interest. 132 S. Ct. at 2289. Thus, to determine if the compulsory fee here is constitutional, the Court must determine if SEIU-HCII's mandatory representation is narrowly tailored to advance a compelling state interest. One issue necessarily leads to the next; both are fairly presented.

2. The propriety of *Abood* is also before the Court. Supreme Court Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The first question presented is whether a state may "compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the State[.]" Pet. i. The Seventh Circuit held, and Respondents argue, that *Abood* justifies this compulsion. Provid-

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[1] In *Abood,* to determine the constitutionality of exacting compulsory union fees from employees, 431 U.S. at 211, the Court first looked to whether "governmental interests" justified "exclusive union representation." *See id.* at 220-22, 224.

ers' response that *Abood* does not, because it should be overruled under the principles delineated in *Knox* (which was decided after the Providers' certiorari petition was filed), is a legal argument well within the scope of the question presented. "'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. City of Escondido,* 503 U.S. 519, 534 (1992)). Indeed, the Court cannot apply *Abood's* labor-peace and free-rider rationales without passing on the validity of those rationales.

3. As a last-ditch effort to evade *Knox*, Respondents contend that Petitioners' mandatory-association argument should be rejected because this Court already decided the issue in *Minnesota State Board v. Knight*, 465 U.S. 271 (1984). Not so. *Knight* does not hold that it is constitutional to compel individuals to associate with an exclusive representative; indeed, the "case involve[d] no claim that anyone is being compelled to support [union] activities." *Id.* at 291 n.13; *see also id.* at 289 n.11. Rather, *Knight* holds that *excluding* individuals from union bargaining sessions is constitutional because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.

Of course, that Illinois can choose to whom it *listens* under *Knight* does not mean that the State can dictate who shall *speak* for the Providers. An example proves the point. If Governor Quinn decided only to confer with SEIU-HCII over his Medicaid policies, this would not offend the First Amendment; he can confer with whomever he wants under *Knight*. But

the State's law is not so limited. It dictates not only to whom the Governor must listen, but also who shall speak for every provider by designating an exclusive representative to petition for them. This designation thrusts providers into a fiduciary relationship with SEIU-HCII, akin to "that between attorney and client," *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991), and inextricably affiliates them with the union's petitioning and policy positions. That is compelled association for an expressive purpose, subject to exacting First Amendment scrutiny.

II. ILLINOIS' PROVIDER UNIONIZATION LAW IS UNCONSTITUTIONAL.

A. Illinois' Scheme Fails the First *Knox* Test Because Mandatory Representation Is Not the Least Restrictive Means to Satisfy a Compelling State Interest.

1. *Knox's* first test requires that a mandatory association be the least restrictive means to satisfy a compelling state interest. 132 S. Ct. at 2289. Mandatory union representation cannot satisfy this requirement because its purpose is expressive, namely to "petition the Government for a redress of grievances," U.S. Const. amend. I. That is all that collective bargaining in the public sector entails: a union speaking to government to obtain benefits for itself and those it represents. Or, as the Solicitor General puts it, collective bargaining is "a mechanism for employees to speak with one voice at the bargaining table." S.G. Br. 23. But that will not do, because association cannot be compelled for the purpose of generating "speech itself." *United Foods*, 533 U.S. at 415-16. *Abood* should be overruled for this reason. *See* Opening Br. 22-23; Amicus Br. of Cal. Pub. Sch. Teachers *et al.* 18-22 ("Teachers' Amicus Br.").

Even if *Abood* is not overruled, Illinois' scheme violates this Court's *existing* prohibition on compelling support for union "lobbying" activities that relate to "financial support of the employee's profession." *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 520-22 (1991) (plurality opinion); *accord id.* at 559 (Scalia, J., concurring in relevant part). An organization petitioning a state for more monies from a Medicaid program is quintessentially lobbying. *See* Opening Br. 40-42. That SEIU-HCII's petitioning on this topic occurs within a regulated bargaining process does not, as the Union claims, alter its expressive and ideological nature. *See* p. 7, *infra.*

2. Respondents argue that Illinois' mandatory-association law nonetheless is justified by the State's interest in "labor peace." That contention fails for several reasons.

First, *Abood* erroneously elevated "industrial peace" from a Commerce Clause interest for allowing mandatory union representation into an interest that justifies infringing on First Amendment rights. This interest is not cognizable, much less compelling, when government is involved because "'conflict' in ideas about the way in which government should operate [i]s among the most fundamental values protected by the First Amendment." 431 U.S. at 261 (Powell, J., concurring in judgment).

The Union argues that providers remain free to associate with other organizations to petition the State over its Medicaid rates. SEIU-HCII Br. 23-24; *see* S.G. Br. 12, 25. This is not exculpatory. Government cannot compel association merely because citizens may have other First Amendment rights remaining. *Cf. Miami Herald v. Tornillo*, 418 U.S. 241, 256-57 (1974). If anything, that homecare providers can still

petition the State other than through SEIU-HCII proves that Illinois has not suppressed competing demands from them, and thus has not achieved labor peace, as *Abood* defines it. *See Lehnert,* 500 U.S. at 521 (labor-peace rationale does not apply to lobbying activities because "our national and state legislatures, the media, and the platform of public discourse are public fora open to all").

Second, even if labor peace were a cognizable interest in other circumstances, it is not here. Diverse provider petitioning about Medicaid policies cannot disrupt internal State operations because the State does not manage providers in its workplaces.[2] Moreover, Medicaid policies—the topic of bargaining here—are matters of public concern, and the State has no more legitimate interest in suppressing diverse provider petitioning on this subject than it does in suppressing the ability of doctors or nurses to lobby the State over its Medicaid rates through diverse associations. *See* Opening Br. 24-31, 39-42.

The State argues that it has a labor-peace interest because it is the providers' joint employer at common law. Br. 36-40, 48-53. SEIU-HCII, however, rejects a common law analysis. Br. 54-55. More importantly, this Court rejects the proposition that constitutional rights turn on such common-law labels, because they do not reflect the interests at stake. *See O'Hare*, 518 U.S. at 719-22. Here, irrespective of what other par-

[2] Respondents assert that Illinois exerts some managerial control over providers because a "service plan" establishes what services the Rehabilitation Program will subsidize. To the contrary, the purpose of this physician-approved plan is not managerial, but to determine what care is medically necessary. *See* Opening Br. 45. Moreover, the service plan's contents are not subject to bargaining.

allels may exist between providers and public employees, they differ in that Illinois lacks a managerial interest in avoiding petitioning from diverse provider groups over its Medicaid policies.

Homecare providers are not the State's common-law employees in any event. They are not even State contractors. They are individuals whose services to other citizens are paid for by a Medicaid program. *See* Opening Br. 44-45. Their relationship with government is little different from that of other private healthcare workers who serve Medicaid or Medicare patients. *Id*. at 51-53. It is for good reason that even Illinois law recognizes that providers are not State employees, except, of course, for the sole purpose of unionization. 20 Ill. Comp. Stat. 2405/3(f).

Third, even if Illinois did have a "labor peace" interest in not bargaining with diverse associations of providers, forcing providers to associate with SEIU-HCII is not the least restrictive means to advance that interest. Illinois could simply choose not to bargain with any organization over its administration of the Rehabilitation Program. This would be consistent with how government agencies administer the vast majority of public programs.

Illinois could also choose to bargain with a single organization, such as SEIU-HCII, *without* forcing providers to affiliate with and support it. *See* Teachers' Amicus Br. 29-30. Given that Illinois has discretion under *Knight* to choose with whom it deals, it is impossible to accept that the State needs to force providers to support SEIU-HCII to avoid dealing with other organizations.

That two unions—SEIU Local 73 and AFSCME Council 31—seek to represent personal assistants in the Disabilities Program proves the Providers'

points. If personal assistants petitioned the State for changes to this Medicaid program through both organizations, would this disrupt the internal functions of any State workplace? Would the State have any legitimate interest in quashing this diverse petitioning? Would the State have to force the personal assistants into one organization to avoid bargaining with the other? The obvious answer to these questions is "no"; which shows why the labor peace rationale has no purchase here.

3. Unable to demonstrate a labor-peace problem, Respondents attempt to redefine labor peace as "shorthand for the myriad benefits resulting from the negotiation and enforcement of a collectively bargained agreement covering an entire unit," whose "benefits extend far beyond preventing fights among employees and their supervisors." SEIU-HCII Br. 53. Thus, the argument goes, collective bargaining improves working conditions, which then improves worker productivity and retention, which in turn improves services funded by government. *See id*. at 13, 39, 51-54; State Br. 34-35, 54; S.G. Br. 23.

There are three major problems with this attenuated theory. *First*, it has no basis in case law. The labor-peace interest stated in *Abood* referred only to problems ostensibly caused by rival unions. 431 U.S. at 220-21, 224. This Court has never held compulsory unionism constitutional because it helps workers extract more money and benefits from government, thereby improving their services to the public.

Second, Respondents never identify *how* collective bargaining supposedly improves working conditions and government services. They and their amici refer to collective bargaining as if it were a magical ritual whose very performance causes benefits to material-

ize. But collective bargaining involves little more than government officials talking to union officials about government policies. So how, exactly, does Illinois speaking with SEIU-HCII about how it should administer aspects of the Rehabilitation Program improve provider benefits or this Medicaid program? Respondents never say.

Their reticence is understandable. The only way to link their means to their end is the untenable notion that the State needs SEIU-HCII's input to decide *what* changes to make to this Medicaid program. But this is the "feedback" rationale stated in Executive Orders 2003-08 and 2009-15 (Pet. App. 46a, 49a), which Respondents themselves now disavow. *See* State Br. 22 n.3; SEIU-HCII Br. 49 n.13. And for good reason. Government cannot compel association just to generate speech about public affairs. *See* p.11, *supra*. Even if it could, Illinois does not have a "compelling" need for SEIU-HCII's advice on how to operate a Medicaid program. And forcing all providers to support SEIU-HCII is not the least restrictive means to obtain its ostensible expertise in any event, as the State could confer with the Union without this compulsion. *See* Opening Br. 42-44, 46-48.

Third, collective bargaining is not necessary, much less the least restrictive means, for Illinois to improve provider benefits or the Rehabilitation Program. If the State wants to increase provider reimbursement levels, subsidize health benefits, create a provider registry, or make any other changes to the program, *it can simply do so*. Illinois does not need SEIU-HCII's approval.

Illinois' contract with SEIU-HCII illustrates the point. Illinois could set reimbursement rates stated in Article VII (J.A. 44), or contribute directly to a

health-insurance carrier (J.A. 44-45), without this contract. And the contract acknowledges the State's right to "manage, direct, and control all of the State's activities to deliver programs and services," and to "determine the methods and means by which operations are to be carried out." Art. V (J.A. 41).

Most of the contract is devoted not to provider benefits in any event, but to assistance the State will give to SEIU-HCII itself. This includes lists of personal information about providers, a gag-clause on State speech about the union, and a State commitment to mail union membership materials to new providers. Art. IV (J.A. 38-40). And, of course, the State agreed to seize compulsory union fees from all providers. Art. X, § 6 (J.A. 50-51). These exactions were estimated to annually exceed $3.6 million (J.A. 25), and actually averaged $10.4 million annually between 2009 and 2013. *See* Amicus Br. of Ill. Policy Inst. 15-16. These exactions inure to SEIU-HCII's benefit. They do not improve the Providers' lot, much less benefit persons with disabilities enrolled in the Rehabilitation Program.

4. Respondents also vaguely claim that exclusive representation will "stabilize" the personal assistant workforce. State Br. 41; SEIU-HCII Br. 49. But, again, they never explain exactly what that means. How, exactly, are personal assistants "unstable" unless forced to associate with SEIU-HCII?

Perhaps "stabilize" means reducing turnover rates. But forcing providers to pay union fees is an odd way to induce them not to change jobs. After all, any provider could *voluntarily* choose to join SEIU-HCII if he or she desires. Government-compelled association

cannot be justified as means for "improving workforce morale," S.G. Br. 23.[3]

Or, perhaps "stabilize" is another catchword for "labor peace," replacing the ostensible instability of providers' petitioning the State through diverse associations with the "stability" of one mandatory advocate. If that is Respondents' meaning, it violates the pluralistic principles upon which our system of government is predicated. *See* Opening Br. 26-27, 39-40. The democratic process is predicated on citizens choosing their representatives in government, not on government choosing a representative for citizens.

* * *

In the end, Respondents' case hinges on the empty phrases "labor peace" and "stability." But the State cannot infringe on First Amendment freedoms by invoking vacuous platitudes. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *see Knox*, 132 S. Ct. at 2291 & n.3. This Court has repeatedly held mandatory associations unconstitutional when the asserted state interest, even if compelling in other contexts, did not justify the mandatory association. *See, e.g.*, *Dale*, 530 U.S. at 656-59; *Hurley v. Irish-Am. Gay, Lesbian &*

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[3] It also makes no sense under Illinois' scheme: Homecare providers are selected, hired, and fired by persons with disabilities—not the State. *See* Opening Br. 6-7. Many are family members of the person they serve. *See* J.A. 16-18. Whether a person with disabilities wants to retain a particular individual to assist her with basic living functions in her home is an issue between them, not the State.

Bisexual Grp., 515 U.S. 557, 572-73 (1995); *Elrod*, 427 U.S. at 364-66; *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). So too here. If the labor-peace rationale is valid at all, it does not justify collectivizing homecare providers.

Illinois' scheme thus fails the first *Knox* test. And even if *Knox* were overruled in favor of *Pickering* balancing, Illinois' provider-unionization law fails that test for the same reasons. The fundamental right of homecare providers to choose with whom they associate to petition government far outweighs Illinois' non-existent labor-peace interest in avoiding petitioning from diverse groups of providers.

B. Illinois' Compulsory-Fee Requirement Fails the Second *Knox* Test Because It Is Not a "Necessary Incident" of the Mandatory Association.

Even if this were "the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414).[4]

1. Illinois' extraction of compulsory fees from providers cannot satisfy this test because the purpose of SEIU-HCII's representation is expressive—to petition the State over the Rehabilitation Program. This Court has never "upheld compelled subsidies for speech in the context of a program where the princi-

[4] Respondents' assertions that the state interests that justify a mandatory association automatically justify compelled funding of it, *see* State Br. 21-23; SEIU-HCII Br. 42-43, would nullify *Knox's* second test, and thus cannot be reconciled with *Knox*.

pal object is speech itself." *United Foods*, 533 U.S. at 415.

Respondents' rejoinder is that union representation is part of a larger regulatory scheme of administering the Rehabilitation Program. But the question is whether the mandatory association *itself* has non-expressive regulatory functions. *See id.* at 414-16. For example, compelled funding for the tree-fruit cooperative in *Glickman* was upheld because it mostly performed regulatory functions unrelated to speech. *See United Foods*, 533 U.S. at 415-16. In contrast, compelled funding of the Mushroom Council in *United Foods* was unconstitutional because its primary purpose was to generate speech. *Id.* This case is like *United Foods*, as SEIU-HCII's statutory function is to speak with (i.e., petition) the State.

2. The "free-rider" rationale for compulsory fees is unavailing for the reasons stated in *Knox*, 132 S. Ct. at 2289-90, and pages 34-36 of the Opening Brief. *See* Teachers' Amicus Br. 24-29. The possibility that homecare providers could benefit from SEIU-HCII's petitioning does not justify forcing providers to pay for this unsolicited advocacy.

Respondents contend that SEIU-HCII's statutory authority to represent all providers distinguishes it from the examples cited in *Knox,* which involved organizations that voluntarily engage in advocacy efforts that benefit others. *See* State Br. 45-48; SEIU-HCII Br. 40-42. But the Union demanded and voluntarily assumed the power to represent providers vis-à-vis the State. Indeed, Respondents' contention turns reality on its head; it is not SEIU-HCII that is being forced to represent nonmember providers against its will, but nonmember providers who are

being forced to accept SEIU-HCII's representation against their will.

If SEIU-HCII truly finds the crown of exclusive representation to be a heavy one, it can simply disclaim this power and free itself of the ostensible burden of speaking for dissenters. The least restrictive solution to any free-rider problem here is not compulsory fees, but for the union not to take nonmembers for an involuntary ride.

3. Finally, compulsory union fees are not "necessary" to achieve the "*regulatory purpose* which justified the required association," *United Foods*, 533 U.S. at 414 (emphasis added), which here is a state's ostensible labor-peace interest in not dealing with rival unions. States can achieve this interest by dealing with only one union, funded by its voluntary members. *See* p. 14, *supra*. States do not need to extract compulsory fees for that union just to deal exclusively with it.

SEIU-HCII, however, claims that "[exclusive] representation will not be adequately funded absent compulsory fees." Br. 40. This claim cannot be reconciled with the fact that exclusive representation functions without compulsory fees in the federal government, postal service, and two dozen Right to Work states. *See* Opening Br. 36. There is no reason to believe unions cannot fund their activities through *voluntary* support, like all other advocacy groups.

Exclusive-representative status is not an impediment to obtaining such support, as the Union implausibly asserts. Br. 40-42. The status grants unions control or influence over individuals' jobs, benefits, and relations with their employer (or here, the State), and thus significant leverage to induce those individuals to join and support the organization.

In the end, unions seek the mantle of exclusive representation, even without compulsory fees, because it is an extraordinary *power*. It grants a union a monopoly on dealing with government over certain policies, and the authority to speak and contract for all individuals in a group, whether they approve or not. Compulsory fees are not necessary to induce unions to seek exclusive-representative status, and thus are not "necessary" for a state to achieve any labor-peace interest it may have in bargaining with one union.

C. Respondents' Approach Lacks a Limiting Principle.

1. The Providers explained in their opening brief that upholding Illinois' scheme will open the door to the collectivization of many who receive government money for a service. Opening Br. 49-56. This includes the medical profession, childcare businesses, government contractors, *id.* at 50-55, and even foster parents. Amicus Br. of Albert Contreras *et al.* 21-22; *see* Amicus Br. of Mackinac Ctr. 3-16.

Respondents ask this Court not to consider these implications, because they are not (yet) before the Court. *See* SEIU-HCII Br. 59; State Br. 55-56. But Illinois wants this Court to broadly hold that "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." State Br. 13 (emphasis added). SEIU-HCII, for its part, wants this Court to deem mandatory representation for bargaining with government a mere "economic association" not subject to exacting First Amendment scrutiny, Br. 10, and to hold that *Abood* is *not* limited to the employment context. *Id.* at 54-55. Either holding would reach much farther than

the specific facts of this case—and would include the examples Providers offered in their Opening Brief.

The Court should not countenance such broad authority to compel association for petitioning government. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . " *United Foods*, 533 U.S. at 411. Given that Respondents' legal theories lack acceptable limiting principles, their theories should be rejected.

2. SEIU-HCII attempts to turn the tables by asserting that overruling or narrowly construing *Abood* will endanger mandatory bar associations and private-sector labor laws like the National Labor Relations Act. Br. 44. This does not follow.

Mandatory bar associations are justified by a compelling interest not at issue here—a "State's interest in regulating the legal profession and improving the quality of legal services." *Keller v. State Bar*, 496 U.S. 1, 14 (1990). The outcome of this case will not impact that holding one way or the other.

The NLRA will not be affected by holding it unconstitutional to unionize independent homecare providers because they are not covered by the law. *See* Amicus Br. of Mackinac Ctr. 5. Even overruling *Abood* will not necessarily affect the NLRA because *Abood's* primary infirmity is that public-sector bargaining is "petition[ing] the Government for a redress of grievances" under the First Amendment. That obviously cannot be said of union bargaining with private employers.

III. THE DISABILITIES PROGRAM PROVIDERS' CLAIMS ARE RIPE.

Respondents prove too much in arguing that the constitutional claims of Pamela Harris and other Disabilities Program providers are not ripe because they might not be unionized. This possibility will exist right up until the very moment they *are* unionized, causing irreparable harm to their fundamental First Amendment rights. *See Elrod*, 427 U.S. at 373. The Disability Providers should not be forced to "'await the consummation of threatened injury to obtain preventive relief.'" *Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979) *(*quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)). Their claims are ripe for adjudication now.

CONCLUSION

The Seventh Circuit's judgment should be reversed.

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