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Brief of Amicus Curiae Labor Law Professors in Support of Respondents

Fred T. Korematsu Center for Law and Equality

No. 11-681

IN THE
SUPREME COURT OF THE UNITED STATES

PAMELA HARRIS *et al.*,

***Petitioners*,**

v.

PAT QUINN, Governor of Illinois, *et al.*,

***Respondents*.**

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

BRIEF OF AMICUS CURIAE LABOR LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Illinois may require personal assistants working under the auspices of the State's Rehabilitation Program to pay their share of the representation costs incurred by a union selected on a majority basis by the personal assistants themselves to serve as their exclusive bargaining representative?

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are the law professors and scholars listed in Appendix A. *Amici* teach, research, and write about labor relations and labor law, and have expertise in the issues before the Court in this case. The interests of *Amici* are to maintain the integrity of the law regarding the application of the First Amendment to the public sector workforce, and to aid the Court by contextualizing the important role of labor unions in the public sector.

A list of signatories can be found in Appendix A. Institutional affiliations are provided for identification purposes only.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters evidencing the parties' consent to the filing of *amicus* briefs are on file with the clerk.

SUMMARY OF ARGUMENT

Distinct from their roles as sovereigns, state, local, and federal governments act as managers of large public workforces that carry out vital public functions. Governments have adopted a range of strategies for meeting the inevitable management challenges that arise, and this Court has "often recognized that 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." *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008).

Like many other public sector employers, Illinois has reasonably decided to manage its workforce of public assistants in part by allowing workers to select, on a majority basis, a union as their collective bargaining representative. The selected union is then required to fairly represent all members of the bargaining unit as their exclusive representative. In turn, members pay a service fee that covers their share of costs that are germane to the union's representation. These interlocking features—selection of a bargaining representative by a majority, exclusive representation, the duty of fair representation, and the service fee—are important aspects of a time-tested model of public sector workforce management that has been repeatedly upheld by this Court. Here, however, Petitioners challenge both exclusive representation and the service fee (also called an "agency fee" or "fair-share fee") on First Amendment grounds.

I. Unlike in the private sector, state employers choose for themselves whether to permit their employees to bargain collectively, and can also set—within established First Amendment limits—countless other parameters, such as the subjects over which bargaining will occur and the permissibility of strikes. In other words, each state may structure its labor law in the manner that it concludes best promotes sound workforce management. While some states accordingly reject bargaining with their workforces altogether, others reasonably conclude—and indeed, research suggests—that collective bargaining can be an effective way to aggregate, clarify, and channel workers' preferences, and that collective bargaining can promote the state's own efficiency interests by promoting workforce engagement and longevity.

States that permit collective bargaining almost universally adopt the exclusive representation model. Under that model, once a union has been democratically selected by a bargaining unit, the state bargains with only that representative. Further, that union represents all the workers within the unit, including those who do not join the union. The alternative—in which a union represents only those workers within a bargaining unit who choose representation—would allow a potential multitude of unions to demand separate negotiations and separate contracts with an employer. States that adopt collective bargaining almost always reject this system, which threatens to raise bargaining costs and increase intra-workforce conflict.

Likewise, states may reasonably conclude that, within a system of exclusive representation, employees should be required to pay their share of the costs of representation. In particular, states may reasonably conclude that allowing bargaining unit members to choose not to pay their share towards the costs of representation would lead to free riding that would undermine the benefits sought from the exclusive representation system.

Illinois's particular interests in allowing its Medicaid-funded personal assistants to select a union to represent them in bargaining with the state are evident. A union can serve an important quasi-human-resources role in aggregating and communicating information about this geographically dispersed workforce. This information can aid the state in determining how best to attract and retain a qualified and professional workforce, potentially improving service delivery and decreasing program costs. Further, unions can help improve workforce health and safety through cooperative partnerships with public managers, as in this case, where the union has negotiated training and equipment programs.

II. Both exclusive representation and the required agency fee are consistent with the First Amendment. This case is squarely controlled by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and a line of related cases, which there is no reason to revisit. However, even if *Abood* were distinguishable, well-established First Amendment principles demonstrate that Illinois was free to implement its chosen collective bargaining system.

This conclusion does not turn on whether the public assistants are state "employees."

First, public administrators are free to consult selected stakeholders—including elected employee representatives—through non-public channels, and a state's choice to consult some individuals or entities and not others does not even implicate the First Amendment rights of those who are excluded. This larger principle squarely encompasses the exclusive representation system, in which a state determines that it will set workplace policy in consultation with a majority-supported union, and not other unions or individual employees. The only exception to this principle—that states may not selectively exclude individuals from voicing their opinions in *public* fora—is not implicated by this case.

Second, public administrators are free to compel payments to subsidize mandatory economic associations that serve legitimate non-speech purposes. This Court has applied this principle not just in the agency fee context, but also in the contexts of bar dues and mandatory advertising programs. Thus, for the agency fee to be constitutional, Illinois need only show that it serves a larger system of economic association with a legitimate economic purpose. Collective bargaining through an exclusive representative for the purpose of promoting stable labor relations and the effective administration of the personal assistant program easily qualifies under this standard.

Accordingly, Illinois is free to conclude that its interest and those of its citizens in a stable and

professional workforce of public assistants is best served by permitting personal assistants to choose an exclusive bargaining representative, and to require represented personal assistants to pay an agency fee.

ARGUMENT

I. The State Has A Well-Established Interest In Managing Its Workforce By Allowing Personal Assistants to Bargain Collectively

A. The Court Allows States Significant Discretion In Managing Their Workforces

Over 20 million people work for local, state, and federal government. *See* Bureau of Labor Statistics, *Table A-8. Employed persons by class of worker and part-time status*, http://www.bls.gov/news.release/empsit.t08.htm (last visited Dec. 29, 2013). This multifaceted workforce keeps homes and families safe and healthy, educates children and adults, and provides the public infrastructure upon which we depend. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting) (describing "fire prevention, police protection, sanitation, and public health" as "activities that epitomize the concerns of local, democratic self-government"). Government employers and administrators must maintain stable and productive relationships with their workforces, especially when they have diverse and even conflicting needs. States have experimented with different approaches to

workforce management. Here, Petitioners challenge Illinois's decision to allow certain publicly funded home-care personal assistants to choose to bargain collectively through an exclusive representative over those working conditions that are set by the state. *Infra* Part I.C.

Recognizing that states require flexibility to manage their workforces effectively, this Court has "often recognized that 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." *Engquist*, 553 U.S. at 599; *see also Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2495 (2011) ("Government must have authority . . . to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("the government as employer indeed has far broader powers than does the government as sovereign"); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947) ("For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."). Accordingly, this Court has permitted public sector managers much of the same discretion enjoyed by the private sector. *See NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011) ("Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties.") (citation omitted); *Garcetti v. Ceballos*, 547 U.S. 410, 418

(2006) ("[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions"); *Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (holding Congress may bar public employees from engaging in certain political activity).

Many public sector employers, like their private sector counterparts, [2] have adopted management policies and practices designed to promote worker voice—that is, to enhance employer-employee cooperation and to productively channel and amplify workers' participation within an organization. Petitioners seek to eliminate one such policy that is available to public employers and administrators—namely, collective bargaining with an exclusive representative chosen by the workers themselves, and supported by a mandatory fair-share fee. *See* Pet. Brief at 18-24. If successful, this dramatic change in state labor policy would both eliminate a time-tested model of workplace

[2] The alignment of employee and employer incentives through workplace participation has been a significant theme in popular and academic management theory. *See, e.g.*, Eileen Applebaum et al., *Manufacturing Advantage: Why High-Performance Work Systems Pay Off* (2000); Joseph M. Juran, *Quality by Design* (1992); David I. Levine, *Reinventing the Workplace: How Business and Employees Can Both Win* (1995); Saul A. Rubenstein & Thomas A. Kochan: *Learning from Saturn: Possibilities for Corporate Governance and Employee Relations* (2001).

management and depart from fundamental legal principles.

B. The State Has Well-Established Interests In A Collective Bargaining System That Includes Exclusive Representation And Agency Fee Contributions

1. Collective Bargaining Is A Traditional System Of Personnel Management With Potential Benefits For Public Sector Employers

Collective bargaining has been part of the public employment landscape for more than five decades. Wisconsin Employment Relations Act, Wis. Stat. Ann. Ch. 509 (West 1959). Since then, it has become a familiar process that most state governments and the federal government have adopted in some form. Joseph Slater, *The Rise & Fall of SB-5: The Rejection of an Anti-Union Law in Historical & Political Context*, 43 U. Tol. L. Rev. 473, 477-79 (2012).

There is tremendous variation in states' approaches to collective bargaining, making the metaphor of states as laboratories particularly apt. Unlike in the private sector, where federal labor law uniformly regulates employers within many sectors of the economy, *see* 29 U.S.C. § 151 *et seq.* (National Labor Relations Act); 45 U.S.C. § 151 *et seq.* (Railway Labor Act), states choose whether to bargain collectively with their employees. Moreover, a state that legislates in favor of collective

bargaining by public employees may then set additional parameters, including the subjects over which unions may bargain, the legality of employee strikes, and the availability of various dispute resolution mechanisms. The extent of states' discretion in this area is illustrated by the varied approaches that they have taken:

> [State public sector labor] laws both vary considerably and are more subject to political shifts at a local level. A minority of states does not permit any public employees to bargain, and another minority only permits a few types of public employees to bargain. . . . Also, where collective bargaining is authorized, the scope of bargaining is generally narrower—sometimes quite a bit narrower—than in the private sector. Further, the majority of states do not allow any public employees to strike.

Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512-13 (2013) (hereinafter Slater, *Unsettled State*). Accordingly, states can structure their labor laws to amplify those aspects of collective bargaining that they view as most helpful, and correspondingly to downplay or eliminate other aspects (such as the strike) that they view as counterproductive.

However, there are also First Amendment limits to states' freedom to innovate in this area,

which protect individuals' rights not to associate with a union. States may not require their employees to become union members or pay the costs of union ideological or political endeavors; at most, they may require represented employees to pay for the costs associated with collective bargaining and other activities that are germane to the representation. *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 301-02 (1986). Further, bargaining unit members are entitled to notice and other protections of these rights, *id.* at 308-09.

There are good reasons that some states adopt a system of public sector bargaining. One reason is to enhance employer-employee communication. The benefits of providing workers with a collective voice are evident in the reasons that workers themselves give for wanting better communication with managers: not just to improve the quality of their own lives, but also to make their employers more successful. Richard B. Freeman and Joel Rogers, *What Workers Want* 4-5 (1999).

Unions are a traditional avenue for amplifying, clarifying, and channeling worker voice, allowing management to better account for worker views and priorities. This role in aggregating and funneling employees' perspectives not only helps those employees to feel more useful and engaged, but it also has been linked to certain productivity gains, including lower turnover, search, and retraining costs. *See* Kenneth G. Dau-Schmidt and Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in *Labor and Employment Law and Economics* 96, 109 (Kenneth G. Dau-Schmidt *et al.*

eds., 2009). Empirical studies have found that where mature collective bargaining relationships develop, "unions can increase firm productivity in certain industries, particularly if management constructively embraces, rather than fights, union contributions." *Id.* at 109-10; *see also* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 19 (1985) (arguing that their empirical analysis showed that "unions are associated with greater efficiency in most settings"). The potential benefits of this arrangement are obvious, in that it helps public employers to improve morale and satisfaction as efficiently as possible. Samuel Estreicher, "*Easy In, Easy Out": A Future for U.S. Workplace Representation*, 6 (Nov. 30, 2013 draft), at: http://lawprofessors.typepad.com/files/labor-law----easy-in-easy-out----december-12-2013.pdf ("[c]ollective bargaining provides a means for workers to collectively express their preference for [a particular workplace policy] and for parties to determine whether the collective benefits outweigh the collective costs of its provision"). Not only would it be logistically difficult for a public administrator to replicate the union's function in this regard (particularly when the relevant workforce is dispersed), but a unilaterally determined outcome could lack legitimacy in the eyes of the workforce.

In sum, governments may reasonably decide to allow their workers to bargain collectively for a host of reasons, including their judgment that unions can streamline workforce management. Although Petitioners do not directly attack collective bargaining itself, they seek to prevent governments

from structuring public sector bargaining to require or allow either exclusive representation or the agency shop. The next two subsections explain why public employers often conclude that these features are crucial to an effective system of public-sector bargaining.

2. Exclusive Representation Is A Fair And Efficient Structure For Public Sector Collective Bargaining

The American system of collective bargaining is built upon the premise of exclusive representation as chosen by a majority of workers. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975) ("Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule."); Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into A "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 47 (1998) ("[t]he fundamental ordering principle which shapes American labor law and collective bargaining is the principle of exclusive representation"). Petitioners challenge Illinois's decision to implement the exclusive representation system for home health care personal assistants. Pet. Br. at 35. They suggest that, to the extent Illinois wishes to allow personal assistants to choose union representation, that representation should take place on a members-only basis. However, members-only representation presents significant complications, potentially undermining or eliminating the advantages of collective bargaining

that lead states to permit bargaining in the first place.

In a "members-only" or "minority-union" regime, unions negotiate only on behalf of those who want representation. Non-members are not bound to union representation; conversely, the union owes non-members no duty. *Cf. Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). From an employer's perspective, however, exclusive representation is a significantly more straightforward system. There are only two tracks for each unit of employees: no representation or complete representation by one bargaining agent. Either the state will determine working conditions unilaterally, or it will meet with a single union, which is in turn obligated to fairly represent all bargaining unit members during the negotiation. The importance of this aspect of the exclusive representation system should not be understated; indeed, some states structure their public sector labor law with an eye towards minimizing the number of different contracts that must be negotiated and administered even among different bargaining units. *E.g.*, Wash. Rev. Code § 41.80.020(3) (2013) (requiring public sector unions representing separate bargaining units to bargain in coalition over health care benefits, with the resulting agreement to be common to all CBAs).

In contrast, members-only bargaining would allow a potential multitude of unions within a single bargaining unit to each demand a right to separately negotiate with the employer over employment terms and conditions for their own members, resulting in different contracts for similarly situated employees.

Such a system would multiply the employer's negotiation costs and greatly complicate the ramifications of such bargaining. It would tend to generate instability and discourage compromise, as each union could compete with others on a continuing basis to demonstrate its ability to gain "more" for its members (and attack any others for accepting "less"). Multiple-union units also have a much greater potential for discord between unions, leading to a greater chance of strikes or other disruption. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) (observing that the "exclusion of the rival union may reasonably be considered a means of insuring labor-peace" by preventing the employer from "becoming a battlefield for inter-union squabbles"); *Abood*, 431 U.S. at 224 (discussing the "confusion and conflict that could arise if rival . . . unions, holding quite different views as to [terms and conditions of employment], each sought to obtain the employer's agreement"). Such workplace disruption poses special concerns for public employers and administrators:

> Disputes during labor negotiations are especially costly in the public sector. In the private sector, competitors can provide goods or services that are not supplied by the striking workers. In the public sector, however, the government is often the sole supplier of a service. In many cases this service is essential, and disruption of its supply could be life threatening.

Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 519 (1994).[3]

Further, exclusive representation removes employees' incentives to undercut or derogate their colleagues who are on the "outside," as could occur in a system of members-only bargaining. In a members-only system, union-represented employees could try to cut a sweeter deal for themselves at the expense of the nonmembers, or employers could reward nonmembers exorbitantly in order to dissuade union membership. In either situation, however, the members-only system results in conflict and disequilibrium.

States that have opted for a system of collective bargaining almost universally require exclusive representation of employee bargaining units. Their interests in stable representation equilibria, ongoing constructive dialogue, and reduced probabilities for strikes and other conflict all justify this decision.

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[3] States have responded to this concern in part by prohibiting public-sector strikes in many circumstances. Slater, *Unsettled State*, 513 (noting that "the majority of states do not allow any public employees to strike"). However, states may also reasonably conclude that exclusive bargaining is more likely to reduce the risk of damaging public-sector shutdowns. *Cf.* Currie & McConnell, 520 ("Strike costs, as measured by the incidence and length of strikes, are greatest in the absence of legislation requiring employers to bargain.").

3. The Fair Share Fee Is An Important Component Of An Effective System Of Exclusive Representation

Petitioners contend that even if exclusive representation is constitutionally permissible, represented public sector workers should nonetheless be permitted to opt out of paying their share of the costs incurred by their elected representatives. Pet. Brief at 34-36. But just as exclusive representation supports employer interests including "labor peace," *Abood*, 431 U.S. at 224, the agency shop is critical to solving the free-rider problem that could otherwise unravel or seriously weaken collective representation arrangements.

Agency fee agreements require represented employees to pay their "fair share" of the costs of union representation.[4] The reason for the agency shop is straightforward as a matter of economics. Under a system of exclusive representation, the elected union has a duty to represent all employees within the bargaining unit, and the benefits of collective bargaining flow to all as well. *Steele,* 323 U.S. at 202 ("It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be

[4] Petitioners make no allegation that their funds are going to anything other than the costs of negotiating and administering a collective bargaining agreement. *Harris v. Quinn*, 656 F.3d 692, 696 (7th Cir. 2011) (noting that Petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining").

deemed to dispense with all duty toward those for whom it is exercised unless so expressed."). The economic consequences of eliminating the agency fee—the free rider problem—are easy to model. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88 (1971 ed.) ("A rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union."); Richard A. Posner, *Economic Analysis of Law* 430 (8th ed., 2011) ("The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that would otherwise plague the union . . . ."). The empirical evidence supports the model's predictions. *See* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. Rev. 319, 354 & n.187 (2012) ("[s]everal studies show that the level of free riding is higher in right-to-work states") (citing studies).

This court has previously acknowledged this economic reality. *See Abood*, 431 U.S. at 221-22 (the "union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become free-riders") (internal quotation marks, citations, and footnote omitted)). Likewise, Justice Scalia explained in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) that:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule . . . 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.

Id. at 556 (Scalia, J., concurring in part and dissenting in part).

Petitioners' arguments against agency fees demonstrate the interconnectedness of such fees with the American system of collective bargaining and exclusive representation. They argue that agency fees cannot be justified by the exclusive representation responsibility because unions choose such responsibility. Pet. Brief at 35. But this ignores that Illinois law requires unions to undertake this responsibility if they wish to represent any employees at all, *infra* Part I.C. And as discussed earlier, states have good reason for mandating exclusive representation as part of their collective bargaining systems, *supra* Part I.B.2.

Eliminating agency fees would disrupt the intricate collective bargaining machinery

constructed by Illinois and other states to serve their employment needs. Exclusive representation and the agency shop are closely linked, and a state that chooses the former has strong economic reasons to adopt the latter as well. As a matter of policy, economics, and constitutional law, states should be free to provide for collective-bargaining relationships like the one at issue here.

C. Illinois Has Reasonably Chosen Collective Bargaining By Personal Assistants As Its System Of Personnel Management for Its Home-Care Program

Petitioners argue that, even if states generally have interests sufficient to support their systems of collective bargaining, Illinois has no such interest here. Pet. Br. at 24-31, 39-46. However, Illinois has perhaps a greater interest in establishing a system of collective representation in the home health care arena, given the challenges it faces in managing service provision in this context. Whereas the previous two subsections have shown why states generally may choose to allow their workforces to bargain collectively, this subsection focuses on the role of collective bargaining in Illinois's administration of the home-care personal assistant program.

Like many other states, Illinois allows its workforce to select bargaining representatives. *See* Public Labor Relations Act (PLRA), 5 Ill. Comp. Stat. 315/1 *et seq*. Under the PLRA, a union chosen on a majority basis by the members of a bargaining unit becomes that unit's exclusive representative for

purposes of contract negotiations about employment terms, and must represent all bargaining unit members fairly. 5 Ill. Comp. Stat. 315/3(f), 315/9(a-5), 315/6(d). Further, Illinois law permits the state to agree to an agency shop. 5 Ill. Comp. Stat. 315/6(e).

Illinois's Medicaid-funded Home Services Program (Rehabilitation Program) provides care to disabled individuals in their homes. *See* 20 Ill. Comp. Stat. 2405/1 *et seq*.; 89 Ill. Admin. Code 676.10 *et seq*. The advantages of home care include lower costs for housing, greater comfort for customers, and easier access for family and loved ones. *See* 89 Ill. Admin. Code 676.10(a). However, managing the provision of care across thousands of homes requires innovative and flexible approaches in order to balance customers' privacy and control with the interests of the state in ensuring proper care for its entire eligible population. Illinois has chosen to permit its over 20,000 personal assistants who serve customers through this program to choose whether to bargain collectively. 5 Ill. Comp. Stat. 315/3(n)-(o); Public Act 93-204 (Dist. Ct. Doc. 32-10).[5]

The State has a set of diverse interests in managing the long-term and ongoing relationships between itself, customers, and personal assistants. Further, it has reasonably concluded these interests are best served by offering the personal assistants an opportunity to bargain collectively. Three of

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[5] The Disabled Persons Rehabilitation Act was similarly amended. 20 Ill. Comp. Stat. 2405/3(f); Public Act 93-204 (Dist. Ct. Doc. 32-10).

these interests—managing employee productivity, protecting customer health and safety, and protecting personal assistants' health and safety—are discussed further below.

1. As the entity responsible for paying personal assistants to provide home care services within a state program, Illinois has an employer's interest in managing workforce productivity to ensure services are readily available, effective, and efficient.

A union's role in aggregating employee voice, *supra* Part I.B.1, is especially important in the home care context. Unions can collect information about the issues faced by geographically dispersed personal assistants, including employment problems they are encountering and suggestions they have for improvements, and communicate that information to the state in an organized fashion. Essentially, the union can serve as a quasi-human-resources department for a set of workers whose dispersion would otherwise present a serious management challenge. Further, qualitative studies of the health care industry have demonstrated that unions help build teams, foster the growth of human capital, and improve patient outcomes. Thomas Kochan, *Will the Supreme Court Support or Block Development of a Modern Collective Bargaining System for Homecare Workers?*, at 8, Dec. 10, 2013, at: http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/field-content-file/pdf/Michael%20Lillich/Kochan%20Commentary%20on%20Harris%20v%20Quinn%20Case%2012%2010%2013%2013.pdf (hereinafter Kochan, *Homecare*)

("The Kaiser Permanente study . . . documents the significant investments in resources, time, and personnel required of unions to develop the capacity and mobilize and serve the workforce in partnership, team, and network building activities.").

2. Moreover, the State has an interest in protecting customer health and safety by ensuring a stable and well-qualified workforce available to all qualified customers who could benefit from the program. The State pursues this interest—balanced against its interest in ensuring that customers are empowered to decide among individual workers—in part through its hiring qualifications and review process for personal assistants. 89 Ill. Admin. Code 686.10. However, the interest is a continuing one that goes beyond any individual customer's choice of a particular personal assistant. In particular, the state has an interest in attracting qualified workers into the program and lowering the turnover rate among personal assistants, because longevity contributes to a competent and professional workforce. This interest is particularly acute in the home health care field, which is plagued with high turnover based in part on low wages and worker dispersion and isolation. *See* Kochan, *Homecare*, 2.

Unions can serve the State's interests in customer health and safety by helping to lower employee turnover, cut search and retraining costs, and boost productivity in the context of a cooperative partnership with an employer. *See supra* Part I.B.1; *see also* Kochan, *Homecare*, 9 (recent research "demonstrates that productivity, quality, customer satisfaction, and employee satisfaction are enhanced

when union and management leaders work together and apply state-of-the-art concepts and tools to foster a cooperative, low conflict, high employee involvement, *transformed* workplace" (emphasis in original)). Perhaps most obviously, union-negotiated benefits can reduce personal assistants' incentives to leave the field. For example, the current collective bargaining agreement in this case established significantly improved (yet still modest) wages, CBA, Art. VII, Sec. 1, a health benefits fund, Art. VII, Sec. 2; a Personal Assistants Training Program administered jointly by the State and the union, Art IX, Sec. 1 & CBA at 18-22 (Side Letter); an orientation program, Article IX; a grievance procedure with binding arbitration for wage, hour, and other contractual disputes, Article XI; and a no-strike clause that prohibits work stoppages, Art. XII, Sec. 5.[6] These improvements stabilize the workforce and lead to better care for customers.

3. Further, the State has a particular interest in its own workforce's health and safety. While this is true of all public employees, entering another person's home to provide personal, intimate care can entail unique safety concerns. *See* Gurumurthy Ramachandran *et al.*, *Handling Worker and Third Party Exposures to Nanotherapeutics During Clinical Trials*, 40 J.L. Med. & Ethics 856, 862 (2012) ("While the employer of the workers may be responsible for the health and safety of the workers, they may not

[6] The current CBA is available on the Illinois Department of Central Management Services website at: http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf.

have complete control over exposures in the home."). Unions and employers have developed a variety of programs for protecting health and safety. Some are as straightforward as encouraging employees to report health and safety problems so they can be addressed quickly (and creating a mechanism for them to do so), or calling for the provision of gloves to address an existing health and safety concern, CBA, Art. IX, Sec. 2. Others are more complex, such as the creation of a joint committee to study health and safety issues, Art. IX, Sec. 1; or the provision of employee home health care training—something that is underprovided in the home health care field, and that may require creative approaches to effectuate. *See* Ramachandran, 40 J.L. Med. & Ethics at 862. ("[t]he training of home care workers is variable and often inadequate.").

All but one of the Petitioners in this case provide home care as an assistant to a family member. J.A. 17-18. The State's interest in the provision of care by these assistants is not diminished by Petitioners' familial relations. In fact, for many personal assistants who are related to their customers, their relative isolation and inexperience in this labor force make the union's experience and the union-negotiated training opportunities even more important. However, the state has an even greater interest in ensuring quality services for the many customers who cannot (or who prefer not to) rely on family members for personal assistant services.

II. Public Employers And Administrators May Agree To Exclusive Representation And The Agency Shop In Order To Effectively And Efficiently Deliver Home Health Care

The previous section discussed why states like Illinois have reasonably decided to allow personal assistants the opportunity to elect a union to represent them in bargaining. Permitting union representation—including exclusive representation and the agency shop—helps achieve government interests including stabilized labor relations and the development of a qualified, professional workforce. This section shows why this policy choice does not violate the First Amendment, and why exclusive representation and the agency shop are instead consistent with a long line of settled case law from a variety of contexts.

As an initial matter, *amici* maintain that this case is squarely controlled by *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and that there is no reason to revisit *Abood* or any of the other cases upholding the constitutionality of the agency shop. [7]

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[7] Petitioners imply that *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) is the only case that this Court would need to overturn should petitioners prevail in their position that public sector exclusive representation and the agency shop arrangements are unconstitutional. Pet. Br. at 16-36. As this Part demonstrates, that is incorrect; in fact, petitioners' position is inconsistent with a series of cases concerning the constitutionality of cooperative economic programs involving compelled payments, such as bar associations and agricultural advertising schemes, *infra* Part II.B, as well as with First Amendment cases concerning governmental policymaking,

Nonetheless, this section shows that even if this Court were to conclude that *Abood* is not on all fours with the facts of this case, there is no First Amendment barrier to Illinois's chosen collective bargaining system.

This Court generally defers to government managerial decision-making, protecting government's ability to act freely in its role as "manager of its 'internal operation,'" as distinct from its role as sovereign. *Nelson*, 131 S.Ct. at 757 (quoting *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 896 (1961)); *see also Engquist*, 553 U.S. at 598. Accordingly, this Court

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including (though not limited to) cases arising in the public employment context, cited in this Part.

Further, Petitioners mischaracterize *Abood* as an anomaly in which the Court imported the "labor peace" rationale from the Commerce Clause context, Pet. Br. at 19-21. To the contrary, *Abood* rested on a series of previous First Amendment cases arising in the context of the Railway Labor Act, and it has been repeatedly reaffirmed in the public sector context. *E.g.*, *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (union shop agreement under Railway Labor Act did not violate First Amendment); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 746-48 & 768-69 (1961) (characterizing *Hanson* as First Amendment decision and construing Railway Labor Act to avoid constitutional problems); *Hudson*, 475 U.S. at 301; *Lehnert*, 500 U.S. at 555-56 (Scalia, J., concurring in the judgment in part and dissenting in part) (construing the "constitutional rule suggested in *Hanson* and later confirmed in *Abood*" and describing "compelling state interest" that supports constitutionality of agency shop); *Locke v. Karass*, 555 U.S. 207, 213-14 (2009) (characterizing constitutionality of agency shop in public sector as "general First Amendment principle"). These cases would also be vulnerable in the event that this Court overruled *Abood*.

has often held that the First Amendment rights of individuals who perform work for the government can be overcome by government proprietors' exercise of their managerial prerogatives to effectively and efficiently provide services. *E.g.*, *Guarnieri*, 131 S.Ct. at 2494 (government's "substantial interest in ensuring that all of its operations are efficient and effective" justify "[r]estraints" on workforce); *Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom"). Further, the government's status a "proprietor" or "manager" of internal operations is not limited to situations in which it is also a common-law "employer." *Nelson*, 131 S.Ct. at 758-59 (rejecting argument that diminished First Amendment protections applicable to public employees did not apply to independent contractors); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996) (First Amendment protections do not turn on common-law distinction between contractor and public employee); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678-80 (1996) (same). Accordingly, these principles control even if this Court concludes that Illinois is not the technical employer of the personal assistants.

For the reasons that follow, Illinois's decision to permit personal assistants to choose an exclusive representative was a valid exercise of the state's managerial prerogative.

A. Exclusive Representation Is Consistent With The First Amendment Because Governments May Decide With Whom To Consult Before Setting Working Conditions

Petitioners argue that Illinois's adoption of the exclusive representation system violates the First Amendment because "homecare providers are not managed or supervised by the State." Pet. Br. at 39. Putting aside the factual accuracy of that statement,[8] it is irrelevant to the First Amendment analysis. Petitioners' argument regarding exclusive representation assumes that governments may not consult some stakeholders through a non-public channel that is not available to all stakeholders. But government entities are generally free to privately consult anyone, including a union designated by a majority of the workforce, in making its decisions; conversely, governments are generally free to ignore anyone, including individual workers. The exception to this general principle—that government may not exclude individuals, including union-represented public employees, from being heard in public fora—is not applicable here.

This Court's decision in *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984) is largely dispositive of this issue. *Knight* concerned the constitutionality of Minnesota's exclusive

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[8] As Respondents Quinn and SEIU HII describe, Illinois has considerable oversight over the personal assistants as their joint employer. Quinn Br. at 48-50; SEIU HII Br. at 1-3 & 46-47.

representation rule under which the state would either bargain or "meet and confer" over terms and conditions of employment only with elected exclusive representatives of professional employees. *Id*. at 274-75. A group of community college faculty brought a First Amendment challenge, claiming, in this Court's words, "an entitlement to a government audience for their views." *Id*. at 282. Rejecting that claim, the Court reasoned that "Minnesota has simply restricted the class of persons to whom it will listen in its making of policy," which it was free to do 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 282, 283.

In other words, Petitioners' First Amendment rights are not even *implicated* by Illinois's decision to adopt the exclusive representation system for negotiations over certain employment terms, because states are generally free to set workplace policy in a non-public process in consultation with some constituent groups—here, an organization selected by the affected workforce itself—and not others. Moreover, this principle does not depend on whether the state is acting as an employer. *Id*. at 286 ("[a]ppellees thus have no constitutional right as *members of the public* to a government audience for their policy views") (emphasis added); *see also Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979) ("the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or . . . to recognize the association and bargain with it").

Conversely, Petitioners remain free to advance any position, including positions that are adverse to the state or the union, either individually or in concert, through any channels that are open to the public. *City of Madison v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) (union-represented employees have First Amendment right to speak "[w]here the State has opened a forum for direct citizen involvement"); *Lehnert*, 500 U.S. at 521 (employees are "free to petition their neighbors and government in opposition to the union which represents them"). However, this principle bears no relevance to this case, because Petitioners do not allege that Illinois has opened the bargaining process to the public, yet excluded Petitioners. *Cf. City of Madison*, 429 U.S. at 178-79 ("the First Amendment plays a crucially different role when . . . a government body has . . . determined to open its decisionmaking processes to public view and participation") (Brennan, J., concurring). Nor does bargaining with an exclusive representative itself create a public forum. *Perry Education Ass'n*, 460 U.S. at 48-49 (opening school mail system to union with exclusive representative status did not trigger obligation to allow rival union mail system access).

Accordingly, this Court's settled precedent is entirely consistent with Illinois's decision to adopt the exclusive representation system.

B. The Agency Shop Is Constitutional Because It Is Germane To A Larger Program Of Economic Association With Legitimate Economic Ends

Governments may compel payments to subsidize mandatory economic associations that in turn serve legitimate economic ends. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997) (mandatory payment permissible "as a part of a broader collective enterprise in which [participants'] freedom to act independently is already constrained by the regulatory scheme"); *see also United States v. United Foods*, 533 U.S. 405, 413 (2001) (compelled payments to private organization permissible as part of required economic cooperation where there is "some state imposed obligation which makes group membership less than voluntary"). This principle underlies not just *Abood* and other cases concerning the agency shop, *supra* n.6, but also cases concerning mandatory bar dues and generic agricultural advertising schemes. These cases reveal that governments may solve collective economic problems through mandatory associations, including by requiring participants to make payments to support these associations.[9] Thus, Illinois need only show that it adopted the agency shop within its workforce of personal assistants as part of a larger regulatory system of economic cooperation with a predominantly non-speech-

[9] This principle should apply *a fortiori* in the context of the public sector workforce, itself a form of economic association in which states' heightened managerial interests can often overcome workers' First Amendment interests. *Supra* Part II.

related purpose. Here, that system is collective bargaining through an exclusive representative, and its purpose is the promotion of stable labor relations in order to achieve the goals described in Part I.C.

This Court has generally permitted governments to address collective economic problems by requiring a regulated community to associate. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (describing "minimal constitutional protection of the freedom of commercial association"). Further, members of the regulated community may be required to financially contribute to the association's work that is germane to the legitimate economic purpose. Accordingly, *Abood* began by identifying the larger collective enterprise of which the agency fee was a part: allowing bargaining units of public sector workers to select an exclusive representative, to achieve labor peace. 431 U.S. at 224. The Court relied on Michigan's judgment that the agency shop was an important component of effective union representation of public sector workers, for many of the reasons discussed in Part I.B, before ultimately holding that bargaining unit members could be required to fund only those expenses that are "germane to [a union's] duties as collective-bargaining representative." *Id.* at 223, 232, & 235. This case falls squarely within that holding.

The Court has applied this approach in other cases concerning compelled subsidization of mandatory associations. For example, in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), the Court

applied *Abood* in permitting mandatory bar dues to the extent they are germane to "the State's interest in regulating the legal profession and improving the quality of legal services." *Id*. at 13. Like in *Abood*, the Court did not apply strict scrutiny, which would have demanded that California show that there were no alternatives—either to its regulation of lawyers through a non-governmental bar association, or to the bar association's decision to levy mandatory (rather than optional) dues—that did not require the mandatory payment. *Compare id*. at 12 (concluding that it was "appropriate" to require attorneys to contribute to bar associations) *with Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (strict scrutiny requires government to show interest of compelling importance that cannot be achieved through alternative method).[10] Further, this was so even though the Court acknowledged that at least some germane bar association activities were likely to be ideologically objectionable to some bar members. *Keller*, 496 U.S. at 15-16 (bar association activities not germane if they both had "political or ideological coloration" and were "not reasonably related to the advancement" of regulation of the legal profession).

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[10] For example, the Court did not require California to show that it could not have achieved the attorney regulation it desired by making the bar association an arm of public government, in which case the objectors would have had no tenable challenge to mandatory assessments. *See Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech"); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting First Amendment challenge to social security tax).

Finally, in *Glickman*, the Court upheld a requirement that fruit producers contribute to a generic advertising program as part of a larger agricultural marketing program intended to maintain steady food supplies and prices. 521 U.S. at 461-62. Again, the Court emphasized that the government was free to achieve its goal through a comprehensive cooperative program of which compelled payments were one part, relying on both *Keller* and *Abood*. *Id.* at 473; *see also United Foods,* 533 U.S. at 412 (emphasizing that *Glickman* "proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules"). As in those cases, the Court did not require the government to prove that the required association and payment was the least restrictive way to support agricultural prices. Further, once the government identified the legitimate interest served by the system of economic cooperation, the Court upheld the compelled payment by determining that it was germane to that interest.[11] *Glickman*, 521 U.S. at 473.

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[11] The *Glickman* dissenters argued that the majority applied *Abood* too broadly—arguing that the mandatory subsidization in *Glickman* was not justified by the underlying cooperative economic interest—but they did not question the continued validity of *Abood* itself. *Glickman*, 521 U.S. at 485 (Souter, J., dissenting). Rather, they characterized *Abood* as "a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions," *id.* at 484-485.

These cases demonstrate this Court's approach in cases like this one, in which economic regulatory policy involves both required economic association and mandatory payments to support the association. Under this approach, Illinois need only identify the legitimate economic purpose of the required economic association of which the agency shop is a part, and then show that the agency fee covers costs that are germane to that purpose. Moreover, *Keller* and *Glickman* illustrate that this approach does not turn on employment status, as both involved regulation of non-employees.

United Foods is fully consistent. There, the Court rejected a generic advertising program that did not involve a cooperative economic program of which required payments to a private entity were only one component; instead, the "only program the Government contends the compelled contributions serve is the very advertising scheme in question." 533 U.S. at 415. Here, however, the payments are integral to the mandatory economic association, which is in turn designed to achieve a legitimate economic goal: a collective bargaining system based on exclusive representation, in service of labor stability and the generation of a more professional workforce of personal assistants. This is none other than the "labor peace" rationale articulated in *Abood*.

Put another way, the state's chosen method of achieving labor peace is not limited to compelled payments that support speech. The agency fee undergirds the exclusive representation system, which, as described above, does not implicate First

Amendment rights. Further, both the agency fee and the exclusive representation system are cornerstones of the comprehensive collective bargaining structure that Illinois has erected. Collective bargaining is itself a form of economic association, as this Court's cases treating both collective bargaining and labor unions themselves as economic, rather than expressive, institutions, illustrate. *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring in part and concurring in the judgment) ("a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990) (strike by non-employee attorneys not protected by First Amendment because government has greater power to regulate "economic" than "political" activity); *Int'l Longshoremen's Ass'n v. Allied Intern., Inc.*, 456 U.S. 212, 225-26 (1982) (describing "political objective" as "far removed from what has traditionally been thought to be the realm of legitimate union activity") (internal quotation marks and citation omitted); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) ("[t]he interests of the contestants in a labor dispute are primarily economic"). Accordingly, the *Abood-Keller-Glickman* line of cases, rather than *United Foods*, controls this case.

In addition to the foregoing, regulatory schemes governed by the Court's economic association cases must "impose no restraint on" freedom of expression; must not "compel any person to engage in any actual or symbolic speech," and must not compel covered individuals to "endorse or to finance any political or ideological views." *Glickman*, 521 U.S. at 469-70. Petitioners argue that collective bargaining in the public sector is often inherently political. Pet. Br. at 41-42 & n.12. Putting aside *Abood*'s own resolution of this issue, this Court has rejected the argument that public sector working conditions are inherently matters of public concern. *Guarnieri*, 131 S.Ct. at 2497 ("The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances."); *Connick*, 461 U.S. at 148 (public employee's concerns about confidence and trust in supervisors, office morale, and felt need for a grievance committee not matters of public concern). But more significantly, even if these matters do in some sense involve "public concerns," this Court's decisions make clear that the First Amendment associational interests of individuals working in government service, even when relating to public concerns, must be balanced against governments' legitimate managerial interests. *See, e.g.*, *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564-65 (upholding legislative ban on certain political activity by federal executive employees that serves government interests in efficient operations); *Mitchell*, 330 U.S. at 99 ("If . . . efficiency may be best obtained by prohibiting active participation by

classified employees in politics as party officers or workers, we see no constitutional objection."). Here, Petitioners are free to express their views on any issues they like. They only claim a right to prevent the state from structuring its internal personnel relations in the manner it has determined most efficiently serves its managerial interests.

Accordingly, Illinois is free to conclude that its interests and those of its citizens—particularly the customers who are served by personal assistants—are best served when working conditions are set during bargaining with an elected exclusive representative. The state is further free to require that personal assistants make agency fee payments in support of that larger program of economic cooperation, adopted to ensure a stable and professional workforce of personal assistants.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be *affirmed*.

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APPENDIX

Appendix A

The *Amici* professors have substantial experience in labor law. Their expertise thus bears directly on the issues before the Court in this case. *Amici* are listed in alphabetical order below. Institutional affiliations are provided only for identification purposes.

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