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 RESPONDENT SEIU HEALTHCARE ILLINOIS & INDIANA

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QUESTIONS PRESENTED

1. Whether Illinois may require all personal assistants working in the State's Rehabilitation Program to bear their proportionate share of the costs incurred by their bargaining unit's collective bargaining representative for negotiating and enforcing a binding contract with the State that sets wages, benefits, and other employment terms for the bargaining unit.

2. Whether a First Amendment claim by other personal assistants was correctly dismissed on standing and ripeness grounds.[*]

[*] The claim that gives rise to the second question presented involves only respondents other than SEIU Healthcare Illinois & Indiana (SEIU-HCII), and SEIU-HCII does not address that question in this brief

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STATEMENT

1. Background

a. Illinois' Medicaid-funded Home Services Program (Rehabilitation Program) provides care to individuals with disabilities in a home-based setting. 20 ILCS 2405/0.01 *et seq.*; 89 Ill. Admin. Code §676.10 *et seq*. The Program "prevent[s] the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State." 89 Ill. Admin. Code §676.10(a).

The Program delivers home-based care to its "customers" pursuant to individualized "service plans." *Id.* §676.30(b), (u). Illinois' Department of Human Services (Department) develops each customer's

service plan. *Id.* §§676.30(c), 684.10(a). Service plans list "the specific tasks involved, the frequency with which the specific tasks are to be provided, [and] the number of hours each task is to be provided per month." *Id.* §684.50.

The State pays more than 20,000 "personal assistants" to carry out these service plans. *Id.* §676.30(p); J.A. 20. Personal assistants perform "household tasks, shopping or personal care," "incidental health care tasks," and "monitoring to ensure health and safety." 89 Ill. Admin. Code §686.20. The State determines personal assistants' hourly wage and pays them directly, withholding income taxes. *Id.* §686.40(a)-(b). Customers do not pay personal assistants or set their wage rate. *Id.* §677.40(d); 42 C.F.R. §447.15.

Customers select and supervise personal assistants, subject to State restrictions. 89 Ill. Admin. Code §677.200(g). The State requires that personal assistants meet minimum age requirements, provide recommendations, have previous experience or training, and satisfy a Department counselor that they can adequately communicate and follow directions. *Id.* §686.10. The State bars customers from hiring their spouses or minor children. *Id.* §§676.30(m), 684.30. The State requires that each customer and personal assistant sign a State-drafted employment agreement, and that customers annually evaluate personal assistants under the guidance of a Department counselor. *Id.* §§686.10(h), 686.30. The counselor mediates disputes between customers and personal assistants. *Id.* §686.30(c). The State can effectively fire personal assistants by disqualifying them from the Program. J.A. 55-56.

b. Illinois' Public Labor Relations Act (PLRA), 5 ILCS 315/1 *et seq.*, declares it "the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives … for the purpose of negotiating wages, hours, and other conditions of employment." *Id.* 315/2.

Under the PLRA, a majority of public employees in a bargaining unit may choose a labor organization to be the unit's "exclusive representative" for contract negotiations about employment terms. *Id.* 315/3(f), 315/6(c), 315/9. The PLRA representative is "responsible for representing the interests of all public employees in the unit," and any collective bargaining agreement must "contain a grievance resolution procedure which shall apply to all employees in the bargaining unit." *Id.* 315/6(d), 315/8. A collective bargaining agreement may include a "fair share" provision that requires all bargaining unit employees to bear "their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and conditions of employment, but not to exceed the amount of dues uniformly required of [union] members." *Id.* 315/3(g), 315/6(e). The State automatically deducts this amount from non-member employees' wages. *Id.* 315/6(e).

c. In the mid-1980s, personal assistants (then called "housekeepers") organized a union and petitioned for recognition of their representative under the PLRA. Pet. App. 4a. A hearing officer with the Illinois State Labor Board found that the State and the customers functioned as personal assistants' "joint employers" and concluded that, because the Board lacked jurisdiction over customers, the PLRA did not

cover those employees. D.Ct. Doc. 32-7 at 2.[1] On appeal, the Board did not "reach[] the specific conclusions of the Hearing Officer as to the joint employer status," but agreed that, given personal assistants' "unique" employment relationship, the State is not "their 'employer' or, at least, their sole employer" for PLRA purposes. *Id*. at 2-3.

In 2003, the Illinois General Assembly amended the PLRA to cover labor relations between the State and the Rehabilitation Program personal assistants. Public Act 93-204 (D.Ct. Doc. 32-10). By that time, the Program's growth had greatly increased the importance of retaining the workforce needed to provide this less expensive alternative to institutional care.[2] Under the amendments, the personal assistants are "[p]ublic employee[s]" and the State is their "public employer" for purposes of collective bargaining "limited to the terms and conditions of employment under the State's control." 5 ILCS 315/3(n)-(o), 315/7. The amendments provide that personal assistants are not considered public employees for other purposes, including tort liability and state retirement and health benefits. *Id.* 315/3(n).

The same statute amended the Disabled Persons Rehabilitation Act to provide that "[t]he State shall engage in collective bargaining … concerning … terms

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[1] The report stated that customers were then responsible for paying part of personal assistants' wages, and reasoned that customer participation was needed to "effectively negotiate economic … terms … of employment." D.Ct. Doc. 32-7 at 13. Illinois is now solely responsible for all compensation.

[2] By 2003, the Program provided services to 28,926 individuals with disabilities, compared with 1,256 in 1979. Illinois Home Services Program, Annual Report 2009, http://www.dhs.state.il.us/page.aspx?item=52254.

and conditions of employment that are within the State's control," but collective bargaining shall not "limit the right of the persons receiving services … to hire and fire … personal assistants … or to supervise them within the limitations set by the … Program," including those in individualized service plans. 20 ILCS 2405/3(f).

These statutory amendments occurred shortly after the Governor issued Executive Order 2003-8, directing State officials to allow Rehabilitation personal assistants to decide whether to designate a representative for collective bargaining with the State. Pet. App. 45a-47a. The Order explained that "each [customer] employs only one or two personal assistants and does not control the economic terms of their employment … and therefore cannot effectively address concerns common to all personal assistants," and that recognition of a representative would "preserve the State's ability to ensure efficient and effective delivery of personal care services." *Id.* at 45a-46a.

Based on a showing of majority support among Rehabilitation personal assistants, SEIU Healthcare Illinois & Indiana (SEIU-HCII) was designated the bargaining unit's PLRA "exclusive representative." *Id.* at 4a-5a, 22a.

SEIU-HCII and Illinois executive branch officials have since negotiated and entered into three successive collective bargaining agreements (CBAs) covering employment terms for personal assistants. 2003-2007 CBA (D.Ct. Doc. 32-4); 2008-2012 CBA (J.A. 35-60); 2012-2015 CBA.[3] Negotiations occur in

[3] The current CBA is available on the Illinois Department of Central Management Services website at http://www2.illinois.gov/

private sessions exempt from Illinois' Open Meetings and Freedom of Information Acts. 5 ILCS 120/2(c)(2), 140/7(1)(p). The principal subjects covered by the CBAs thus far have included:

Wages: The CBA sets hourly wage rates. Wages are currently $11.65 per hour, and will increase to $13.00 per hour on December 1, 2014. CBA, Art. VII, §1. Before the initial CBA, the wage was $7.00 per hour. 2003-2007 CBA (D.Ct. Doc. 32-4), Art. VII.

Payment Practices: The CBA provides that "the State and the Union shall work together to identify causes of and solutions to problems resulting in late, lost or inaccurate paychecks," CBA, Art. X, §4, a serious problem in this dispersed 20,000-person unit working varied and often irregular hours.

Health Benefits: The CBA provides for health benefits through a fund designed and administered by the union, subject to State audit. Art. VII, §2. The State's contribution to the fund is $0.75 per hour for 2012-2013, for an annual contribution of $27 million. *Id.*

Training: The CBA establishes a State-funded Personal Assistants Training Program administered jointly by the State and SEIU-HCII "to improve the quality of care." Art. IX, §1, pp. 18-22, Side Letter (Dec. 16, 2013) pp. 1-2 (mandatory training).

Orientation: The CBA provides for personal assistants to complete an orientation to the Program, for the State to pay them for attendance, and for a joint labor-

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cms/Employees/Personnel/Documents/emp_seiupast.pdf. Unless otherwise specified, citations are to the current CBA.

management committee to develop the content and schedule. Art. IX, §1.

Background Checks: The CBA provides for the State's implementation of pre-hire criminal background checks. Side Letter (Dec. 16, 2013) pp. 2-3.

Health and Safety: The CBA establishes a joint committee on health and safety issues. Art. IX, §1. It also requires the State to provide gloves to personal assistants, requires personal assistants to notify the State if injured while performing services, and requires the State to provide paperwork to document injuries. *Id.* §§2, 3.

Grievance Procedures: The CBA establishes a grievance procedure that culminates in binding arbitration to handle payment and other contractual disputes. Art. XI. Pursuant thereto, when the State disqualified a personal assistant from the Program based on allegations lacking credibility, SEIU-HCII obtained an arbitration order reversing the decision. *See* D.Ct. Doc. 32-5.

Registry: The CBA creates a registry for customers to locate bargaining unit members and for bargaining unit members to find work. CBA, Side Letter (Dec. 16, 2013) p. 3; J.A. 57-58.

No Strikes: The CBA prohibits strikes and work stoppages. CBA, Art. XII, §5.

Union Dues/Fair Share: The CBA provides for deduction of union dues from members' wages, with written authorization, and for deduction of fair-share payments from the wages of non-members. Art. X, §§5, 6.

The CBAs are limited to employment terms within the State's control, the legally-authorized scope of

bargaining. The CBAs confirm the State's authority to make policy decisions concerning Program operations. Art. V.

2. Proceedings Below

Three of the petitioners are personal assistants paid to care for individuals with disabilities enrolled in the Rehabilitation Program. These petitioners filed suit against the State and SEIU-HCII alleging that the CBA's fair-share provision violates their First Amendment rights. J.A. 30-31. They sought a judgment rescinding that provision and requiring a refund of fair-share fees. J.A. 32-33.

The district court dismissed the Rehabilitation petitioners' claims, recognizing that "employees can be required to contribute fair share fees to compensate unions for their representational activities." Pet. App. 28a. Since the State controls the key employment terms for personal assistants, pays them for their work, has "a vital interest in establishing peaceful labor relations with" them, and functions as their employer for purposes of collective bargaining, the fair-share provision fell within "longstanding Supreme Court precedent." *Id.* at 33a, 35a. The district court emphasized that "[t]here are no allegations that the fair share fees here are used to support any political or ideological activities." *Id.* at 35a.

The Seventh Circuit panel unanimously affirmed. As to the Rehabilitation petitioners, it began its analysis with the settled law that fair-share fees covering the costs of collective bargaining representation are permissible in the employment context. Pet. App. 7a-9a. The panel considered the Rehabilitation Program's operations and, "because of the significant control the state exercises over all aspects of the

personal assistants' jobs," had "no difficulty concluding that the State employs [the] personal assistants." *Id.* at 11a, 13a. Therefore, "the fair share fees in this case withstand First Amendment scrutiny—at least against a facial challenge to the imposition of the fees." *Id*. at 13a.

SUMMARY OF ARGUMENT

Illinois' requirement that all personal assistants in its Rehabilitation Program bear their proportionate share of the costs of negotiating and administering a collective agreement to establish basic terms for their employment in that State program complies with well-established law. "The First Amendment permits the government to require both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent." *Locke v. Karass*, 555 U.S. 207, 209, 213 (2009); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). The same principle permits mandatory fees in other contexts, including dues for integrated bar associations. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-16 (1990). The claim here, which challenges only this core fair-share fee obligation, presents no reason to reconsider that well-established and long-standing law.

I. This Court has already considered and rejected petitioners' arguments that exclusive collective bargaining representation and fair-share fees violate the First Amendment. This Court has also placed protective limits (barely acknowledged by petitioners) on both the meaning of "exclusive" representation and the scope of fair-share fees to ensure they comply with the First Amendment. Petitioners do not allege here that those limitations were transgressed.

Petitioners criticize the Court's well-settled precedents on this issue for failing to apply strict scrutiny, but the Court's deference to legislative judgments about the importance of systems of exclusive representation and fair-share fees to stabilized labor relations is consistent with settled First Amendment principles. A collective bargaining unit, whether in the private or public sector, is a predominantly economic and commercial association, not a predominantly expressive association, and strict scrutiny does *not* apply to the regulation of commercial or economic associations, including labor regulation. *See, e.g.*, *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). Moreover, strict scrutiny certainly does *not* apply to the government's dealings with its employees and contractors in pursuing efficient workforce management. *See, e.g.*, *Borough of Duryea v. Guarnieri,* 131 S.Ct. 2488, 2500 (2011); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 556, 564-67 (1973). That is the context of this case, where the State seeks to develop and maintain a stable workforce committed to service within a State program.

Abood's holding that neither exclusive representation nor fair-share fees violate the First Amendment is consistent with these precedents. Use of exclusive representation as a tool for determining basic employment terms promotes the government's significant interest in stabilized labor relations through a highly regulated system of *economic* association, and the system's impact on public employees' First Amendment rights is limited. Fair-share fees serve the government's significant interests in ensuring the vitality of that system, preventing unfairness to other employees, and eliminating incentives to "free ride" on

other employees' efforts. The government has an overriding interest in preventing free riding in this context because the government itself creates the free rider problem by mandating that the exclusive representative represent *all* employees in the unit. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring and dissenting). At the same time, the First Amendment burdens of the system are minimized by limits on the permissible scope of fair-share fees, which confine them to costs germane to contract negotiation and administration.

II. *Abood* controls the outcome here. Illinois retains the authority to set employment terms for its personal assistant workforce. As the Seventh Circuit held, the State is the personal assistants' joint employer. Like joint employers in the private sector, the State can and does engage in meaningful collective bargaining with the personal assistants' representative, and the system of exclusive representation serves the State's interest in stabilized labor relations by establishing a process of structured give-and-take with the workforce, through a representative, so as to negotiate a single satisfactory contract for the entire unit.

Even if the Seventh Circuit was wrong about the common-law status of Illinois' relationship with the personal assistants, however, the State's significant and legitimate interests as proprietor are not limited by such formalities, *see NASA v. Nelson*, 131 S.Ct. 746, 758-59 (2011); *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 679-80 (1996), and those interests justify the system of exclusive representation and fair-share fees here. The Illinois Legislature was entitled to conclude that addressing workforce-wide issues through collective bargaining would best ensure

the success of the State's program and thereby save the State the greater expense of providing care to individuals with disabilities in institutionalized settings. Labor disruptions, poor morale, high turnover, or workforce shortages would significantly undermine the State's program, and individual "customers" have neither the interest nor the ability to address workforce-wide issues, such as wage rates, benefits, grievance procedures, trainings, and orientations. The State's substantial interests in building and maintaining the overall workforce are wholly consistent with the State's policy decision to delegate limited authority to customers to select and supervise their own personal assistants.

Petitioners' proposed "limits" on *Abood* should similarly be rejected. They are vague, unadministrable, and neither reflect the important interests at issue nor otherwise flow from this Court's First Amendment decisions.

ARGUMENT

Illinois has a paramount proprietary interest in providing Rehabilitation Program customers with disabilities with high-quality, customer-directed homecare services that prevent unnecessary and more expensive institutionalization. This Program relies upon a workforce of more than 20,000 personal assistants whom the State pays to care for customers. As a policy matter, Illinois delegates to individual customers the authority to select and, within limitations, supervise their own personal assistants. But Illinois retains authority to set all economic terms of employment for this workforce.

After Program workers organized and demanded recognition of their union, the Legislature extended collective bargaining rights under the Illinois PLRA to this workforce. Their basic employment terms have since been established in three successive CBAs. Those CBAs resulted in wage increases, health benefits, training, and a dispute resolution process. The CBAs also created ongoing labor-management committees to explore solutions to other workforce problems. The union enforces the contract for all workers, and plays a role in administering some of its provisions. The CBAs do not go beyond setting basic employment terms or interfere with customer autonomy. Rather, by producing CBAs that develop mutually agreed upon means of making work within the Program more attractive, collective bargaining helps expand the pool of qualified workers available for customers and helps the State retain those workers, improving the Program's efficiency.

Illinois' system complies with well-established law governing collective bargaining and fair-share fees. The Court's unanimous decision in *Locke v. Karass*, 555 U.S. 207, 209, 213 (2009), recognized the long-settled "general First Amendment principle" that "[t]he First Amendment permits the government to require both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent." *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). The same principle permits the government to require attorneys to join and pay dues to integrated bar associations, *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-16 (1990), and growers to pay fees to agricultural cooperatives that collectively set production terms. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457,

473-74 (1997); *see United States v. United Foods*, 533 U.S. 405, 413-15 (2001).

Petitioners challenge the requirement that all Rehabilitation Program personal assistants bear their share of the basic costs of collective bargaining negotiations and contract administration. They do not allege that the scope of the fair-share fee exceeds the constitutional limits identified in this Court's decisions, nor do they challenge any procedures for collecting the fees, nor must non-members here "opt-out" of paying for non-chargeable expenditures. *Cf. Knox v. SEIU, Local 1000*, 132 S.Ct. 2277 (2012). Although petitioners' brief refers in strong language to union "lobbying" and "petitioning" about "matters of public concern," those phrases are merely assertions that they should not be required to fund *any* efforts to establish the terms of a public contract through collective bargaining or *any* contract administration—a proposition this Court has repeatedly rejected. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 524 (1991); *id.* at 552-53, 556-57 (Scalia, J., concurring and dissenting); *Abood*, 431 U.S. at 227-32. The CBAs here encompass only basic employment terms, and contract negotiations are conducted with state agency officials in private sessions that are not subject to Illinois' open-meetings laws. *See* 5 ILCS 120/2(c)(2), 140/7(1)(p).

Petitioners' claim therefore depends upon establishing that the "general First Amendment principle[s]" recognized in *Locke*, 555 U.S. at 213, and prior cases do not apply. Below, petitioners argued that particular aspects of their employment relationship merited that result. Here, petitioners attack decades of well-established First Amendment decisions addressing exclusive collective bargaining representation

and fair-share fees, arguing that they were not carefully considered and should be overturned. But petitioners misrepresent this well-developed body of First Amendment law, ignoring the rationales of the decisions and the limitations they adopt to ensure consistency with the First Amendment.

The Court's prior decisions are part of, not at odds with, the general body of First Amendment law—much less *so at odds* as to justify overruling these long-established precedents. These precedents apply fully here, where the government acts as proprietor of its own program, retains its authority to set all economic terms for the workforce carrying out its program, and engages in collective bargaining to reach a binding contract establishing those basic workforce employment terms.

I. THE GOVERNMENT MAY USE A SYSTEM OF EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATION AND FAIR-SHARE FEES TO SET EMPLOYMENT TERMS FOR ITS WORKFORCE

A. Exclusive Representation Is Consistent With The First Amendment

Petitioners' principal contention is that the use of exclusive collective bargaining representation in the public sector—i.e., including public employees in a bargaining unit subject to uniform employment conditions negotiated by a bargaining agent selected by a majority of that bargaining unit's members—

violates the First Amendment.[4] This Court has fully considered and rejected these arguments before, and has imposed significant limitations (largely ignored by petitioners) on exclusive representation systems to ensure consistency with the First Amendment.

1. Exclusive collective bargaining representation is a system that regulates the economic relationship between an employer and its workforce. Under that system: (1) the majority of employees in a bargaining unit may select a representative to engage in collective bargaining about employment terms; (2) if this occurs, the chosen representative becomes the "exclusive representative" for collective bargaining purposes; (3) the representative has a duty to bargain "in good faith" with the employer regarding employment terms within the legally-authorized scope of bargaining and to reduce any agreement to an enforceable contract; and (4) the representative must represent the interests of *all* unit employees, whether or not union members, in bargaining and enforcement. *See* 5 ILCS

[4] Petitioners' Complaint did not challenge the designation of an exclusive bargaining representative for the Rehabilitation petitioners, only the requirement that they bear their share of the costs of representation. *See* J.A. 30. Petitioners' Complaint sought rescission of the fair-share provision, not the whole CBA or the recognition of an exclusive representative. J.A. 32-33; *see* Pet. App. 5a n.2 ("[T]he constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement."). Thus, the relief petitioners now seek from this Court—that "the case [be] remanded with instructions to find Illinois' exclusive representation laws unconstitutional" (Pet. Br. 56)—goes well beyond that sought in their Complaint, as does petitioners' principal argument that exclusive collective bargaining representation itself violates the First Amendment (Pet. Br. 23-33, 37-48).

315/6(c)-(d), 315/7, 315/10(b)(4), (8); *see also* 29 U.S.C. §§157, 158(b)(3), (d), 159(a); *Ford Motor v. Huffman*, 345 U.S. 330, 337-38 (1953).

By the time *Abood* rejected a First Amendment challenge to the use of such a system in public employment, it was well-accepted that the "principle of exclusive union representation" through majority rule (431 U.S. at 220) best promotes stabilized labor relations. Congress adopted exclusive representation for private-sector employees and employers in the Railway Labor Act (RLA) and National Labor Relations Act (NLRA). *Abood,* 431 U.S. at 220; *Emporium Capwell v. W. Addition Cmty. Org.*, 420 U.S. 50, 62-64 (1975); *Steele v. Louisville & N.R.*, 323 U.S. 192, 199-202 (1944). Even earlier, the exclusive representation principle was "adopted in substantially similar form by every important national board ever created for the continuing regulation of labor relations." Note, *The Decisions of the National Labor Relations Board*, 48 Harv. L. Rev. 630, 637 & n.56 (1935).

The judgment of policymakers, based on experience over many decades and industries, has been that exclusive representation best promotes stabilized labor relations, with all the consequent benefits, because it "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment," "frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 220-21; *see Emporium Capwell*, 420 U.S. at

68-70.[5] Collective bargaining systems involving multiple, competing unions and a single employer are used in some other countries, but U.S. policymakers have not considered those less stable systems good models. *See, e.g.*, Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 50-53, 55-56, 60-61, 65-67 (1998).

2. Long before *Abood*, *Railway Employes v. Hanson*, 351 U.S. 225 (1956), rejected a First Amendment challenge to the RLA's use of exclusive representation and fair-share fees in the private-sector context. The Court reasoned that Congress could determine "that industrial peace and stabilized labor-management relations" are served by the union shop arrangement, that this is "a legitimate objective," and that, while "[m]uch might be said pro and con if the policy issue were before" the Court, "[t]he decision rests with the policy makers, not with the judiciary." *Id*. at 233-34. *Hanson*'s holding that exclusive representation and fair-share fees for "core" activities are consistent with the First Amendment was confirmed in *Machinists v. Street*, 367 U.S. 740, 749 (1961), which, to avoid "constitutional questions," narrowly interpreted the RLA's authorization for fair-

[5] *See also* Sen. Report No. 573, 2 Leg. Hist. of the NLRA 2313 (1935) ("Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees."); House Report No. 1147, 2 Leg. Hist. of the NLRA 3070 ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides.").

share fees to prohibit collection of fees for political activities, while allowing them for collective bargaining purposes.

Petitioners are wrong that *Hanson* was just a Commerce Clause case. *Hanson* presented a First Amendment claim because the RLA preempted state laws that otherwise prohibited union shop agreements, such that the fees were effectively imposed by force of federal law. 351 U.S. at 232. This Court expressly held that the union shop "does not violate … the First … Amendment[]," *id.* at 238, and has described its holding as such ever since. *See Lehnert*, 500 U.S. at 515; *id.* at 552 (Scalia, J., concurring and dissenting); *Keller*, 496 U.S. at 7-9; *Abood*, 431 U.S. at 226 n.23. *Street*'s construction of the RLA was likewise premised on the Court's understanding that the First Amendment places limits on government-required fair-share fees, but allows them within those limits. *See* 367 U.S. at 746-50.

Abood held that the government could use the same system of exclusive collective bargaining representation to regulate its proprietary economic relationship with its own employees, because: (1) "the governmental interests advanced … are much the same as those promoted by similar provisions in federal labor law," (2) "there can be no principled basis for according [the Michigan Legislature's] decision less weight … than was given in *Hanson* to the congressional judgment," and (3) "a public employee" does not have "a weightier First Amendment interest than a private employee." 431 U.S. at 224, 229.

Petitioners criticize *Abood*'s reliance on *Hanson*, *see* Pet. Br. 21, in effect arguing that government employers have less ability to utilize collective

bargaining systems to structure their own proprietary labor relations than government regulators possess when structuring private-sector labor relations. But in holding that government employers could adapt the private-sector labor relations arrangements upheld in *Hanson* for public-sector personnel administration, *Abood* applied the well-established principle that governments have *greater* latitude in dealings with their own workforces than they do in regulating citizens, including with respect to First Amendment interests. *See Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 556, 564-67 (1973) (upholding broad restrictions on federal employees' political activities); *United Public Workers v. Mitchell*, 330 U.S. 75, 99-103 (1947) (same); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."); *see also Allen v. Wright*, 468 U.S. 737, 761 (1984) (recognizing "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'") (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

3. The Court has repeatedly considered and rejected all of the First Amendment arguments raised by petitioners.

Abood squarely rejected petitioners' contention that public-sector collective bargaining "is inherently 'political' and thus requires a different result under the First … Amendment[]," concluding that, while there are "differences in the nature of collective bargaining in the public and private sectors," those differences "simply do not translate into differences in

First Amendment rights." 431 U.S. at 227, 232. Petitioners repeatedly cite Justice Powell's *Abood* concurrence (Pet Br. 21-23) in contending that *Abood* erred in reaching this conclusion, but they ignore that Justice Powell was concerned with instances where public-sector bargaining extended well beyond "narrowly defined economic issues." 431 U.S. at 263 n.16 (Powell, J., concurring). He accepted the validity of exclusive representation and fair-share fees in the context of collective bargaining over basic economic issues—which is all that is at issue here:

> I should think that on some narrowly defined economic issues—teachers' salaries and pension benefits, for example—the case for requiring the teachers to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant. On such issues the case for requiring all teachers to contribute to the clearly identified costs of collective bargaining also would be strong, while the interest of the minority teacher, who is benefited directly, in withholding support would be comparatively weak.

Id.

In *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984), this Court rejected petitioners' argument that the government violates public employees' First Amendment rights if it establishes a process for exclusive dealings in a private forum with an exclusive representative. As *Knight* recognized, petitioners "have no constitutional right to force [Illinois] to listen to their views. They have no such right as members of the public [or] as government employees …." *Id.* at

283; *see Smith v. Ark. State Hwy. Emps.,* 441 U.S. 463, 465 (1979). *Knight* rejected petitioners' contention that an exclusive bargaining representative's meetings with the employer violate the "negative" associational rights of the bargaining unit members who do not support the union. *See* 465 U.S. at 288 ("The state has in no way restrained appellees' … freedom to associate *or not to associate* with whom they please ….") (emphasis added). Even the dissenting justices in *Knight* considered it "*settled law* that a public employer may *negotiate* only with the elected representative of its employees." *Id.* at 315-16 (Stevens, J., dissenting) (emphases added). Indeed, the Court summarily affirmed the lower court's rejection of the *Knight* petitioners' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.* at 278-79 (majority opinion).

Similarly, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Court rejected the contention that a public employer engages in unconstitutional viewpoint discrimination by according the exclusive representative certain privileges (in that case, access to internal employee mailboxes) denied to rival organizations. The Court reasoned that the union, as the majority-designated representative, had "official responsibility" within the school's internal operations as "exclusive representative of *all* Perry Township teachers," justifying the differential treatment. *Id*. at 51 (emphasis in original).

Thus, this Court has repeatedly upheld public-sector exclusive representation systems. In doing so, the Court has not relied upon any contention that employees may be "assigned" a representative for

public "petitioning" activities, but has recognized that the First Amendment permits a public employer, in its personnel administration, to establish an official and limited internal process reserved for dealings with the organization designated by a majority of relevant employees.

4. In contending that this Court's longstanding precedents fail to acknowledge relevant First Amendment interests, petitioners ignore the significant limitations placed on systems of exclusive representation, which ensure they comport with First Amendment values.

First, the designation of an exclusive representative cannot limit an individual's right to engage in any expressive or associational activity. Public employees in a bargaining unit are not required to become union members, participate in union affairs, subject themselves to union rules, or "associate" with the union in any concrete way. Illinois' PLRA protects bargaining unit members against discrimination based on their decision regarding union membership. 5 ILCS 315/6(a), 315/10(a)(2). Members of a bargaining unit also are not required to "personally speak [any] message" or "host or accommodate [any] message," nor does the designation of an exclusive representative "suggest[] that [individual bargaining unit members] agree with any speech by [the representative]" or interfere with their ability to form their own expressive associations, nor are unit members "restrict[ed in] what [they] may say about the [union's] policies." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 63, 65, 69 (2006). The designation of an exclusive bargaining representative also cannot prevent public employees from participating *as citizens* "in public discussion of

public business." *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976); *see Abood*, 431 U.S. at 230. "Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521 (plurality opinion).

Second, the exclusive representative—when acting in that capacity—cannot freely pursue its own members' goals and interests at the expense of non-members within the bargaining unit. The representative has an "official responsibility" within the personnel administration system (*Perry,* 460 U.S. at 51) to serve the interests of the *entire* unit. *See, e.g.*, 5 ILCS 315/6(d) (duty of fair representation). An exclusive representative thus serves a public statutory function distinct from its role as advocate for its members. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting) ("[T]he state imposes upon the union a duty to deliver services …. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members ….") (emphasis in original); *see also Steele,* 323 U.S. at 201-02. Far from "speak[ing] … as the proxy" for non-members (or even for its own members), Pet. Br. 37, the representative has a statutory duty to represent the bargaining unit *as a whole*, so that the State can negotiate a single agreement governing the entire bargaining unit. *Cf. Huffman*, 345 U.S. at 338 ("A bargaining representative … often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization … but it is not essential that they be such. The bargaining representative, whoever it may

be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.").

Petitioners complain of the duty of fair representation, arguing that they are forced "into an involuntary fiduciary relationship with a union." Pet. Br. 30. But petitioners have no First Amendment right to negotiate their own employment contract, and a public employer's decision to choose what economic terms to offer, whether unilaterally for all employees or through negotiations with a majority-designated representative, does not interfere with employees' First Amendment rights. *See Knight*, 465 U.S. at 282-83, 286; *Smith*, 441 U.S. at 465. The duty of fair representation *protects* all bargaining unit members and ensures that the designated organization serves its statutory role. *Steele*, 323 U.S. at 201-02; *Huffman*, 345 U.S. at 337. The duty is no more a burden on benefitted employees than the fiduciary duty owed by outside pension fund managers to the beneficiaries of pension accounts, which may be similarly "imposed" on public employees through government-mandated benefit plans.

Finally, when engaged in negotiations, the exclusive representative may not engage in unfettered speech or "petitioning" activities. Rather, it has a good faith bargaining duty, which requires that it bargain about those subjects that the government has opened for negotiation and refrain from insisting on positions or concessions outside such mandatory subjects. *See* 5 ILCS 315/7, 315/10(b)(4); *cf.* 29 U.S.C. §158(b)(3), (d).

In short, public-sector collective bargaining is not a system through which a union freely engages in "petitioning" on behalf of unwilling citizens. Rather, it is a non-public, specialized, and regulated process designed by the government employer as part of its

internal system of personnel administration, within which the exclusive representative plays an official and assigned role.

B. Fair-Share Fees Are Consistent With The First Amendment

As with exclusive representation, this Court has repeatedly rejected petitioners' arguments regarding fair-share fees. Decades of settled First Amendment precedents on this issue are part of a more general line of decisions that apply to, among other things, mandatory bar association dues. This Court has considered the First Amendment issues and held that fair-share fees may be assessed to support the collective bargaining representative's or bar association's "core" legally-prescribed functions. The Court has also adopted substantive and procedural limitations to ensure that such fees remain so confined, and otherwise fully comport with the First Amendment.

1. The Court's relevant jurisprudence, beginning with *Hanson* and running through *Keller*, *Glickman*, and *United Foods,* stands for the settled proposition that, when the government creates a valid cooperative association for economic, commercial, or other predominantly non-speech purposes, the government may fund that association's core activities through compulsory payments by those within the relevant group. Such payments are justified by the government's "overriding associational purpose," and to the extent this entails subsidizing some expressive activity, those payments are "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 413-14.

Thus, *Hanson* held that a government-imposed "requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work … does not violate … the First … Amendment[]." 351 U.S. at 238. The Court reaffirmed that holding in *Street* by distinguishing between fees to pay for contract negotiation and administration and fees to support "political activities." 367 U.S. at 779-70. The Court likewise relied on *Hanson* to hold that the government may require attorneys to join and pay dues to a bar association. *See Lathrop v. Donohue,* 367 U.S. 820, 842-43 (1961) (plurality opinion); *id*. at 849 (Harlan, J., concurring).

Abood followed those settled precedents, holding that the government can require its own employees to bear their proportionate share of the costs of negotiating and administering a contract establishing their bargaining unit's employment terms. 431 U.S. at 232. The Court acknowledged that a requirement "financially to support their collective-bargaining representative has an impact upon their First Amendment interests," but concluded that "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations." *Id.* at 222.

The same general principle applies to state-mandated, integrated bar associations. "Lawyers [can] be required to pay moneys in support of activities that [are] germane to the reason justifying the compelled association in the first place, for example, expenditures … that relate[] to 'activities connected with disciplining members of the Bar or proposing ethical codes for the profession.'" *United Foods*, 533

U.S. at 414 (quoting *Keller*, 496 U.S. at 16); *see Lathrop*, 367 U.S. at 842-43. That requirement is consistent with the First Amendment, even if some dues pay for expressive activities germane to the bar's core mission, because "[t]hose who [are] required to pay a subsidy for the speech of the association already [are] required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." *United Foods*, 533 U.S. at 414; *see also Keller*, 496 U.S. at 12-14.[6] The same principle allows the government to require agricultural growers to pay fair-share fees to an agricultural cooperative, where "mandated cooperation was judged by Congress to be necessary to maintain a stable market" and "marketing orders … to a large extent deprive[] producers of their ability to compete and replace[] competition with a regime of cooperation." *United Foods*, 533 U.S. at 414 (discussing *Glickman*).

Conversely, this Court held in *United Foods* that compelled subsidies for advertising violate the First Amendment when that First Amendment expressive activity stands alone and is not a "concomitant of a valid scheme of economic regulation." *Id*. at 412. But no Justice questioned the government's ability to require compulsory payments for "core" activities that,

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[6] This Court has repeatedly recognized *Abood* and *Keller* as companion cases establishing a single First Amendment principle. *See United Foods*, 533 U.S. at 413, 415; *Johanns v. Livestock Mkt'g Ass'n*, 544 U.S. 550, 557-58 (2005); *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 230-31 (2000); *Glickman*, 521 U.S. at 473. By asking this Court to overrule *Abood*, petitioners necessarily ask this Court to overrule *Keller*.

"as in *Abood* and *Keller*, [are] in furtherance of an otherwise legitimate program." *Id.* at 415.

Petitioners get matters entirely wrong in analogizing fair-share fees that fund core collective bargaining activities to the mandatory advertising payments struck down in *United Foods*. "Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and parcel of … economic transactions between employees and employer …." *Glickman*, 521 U.S. at 484 (Souter, J., dissenting). Like other transactions in which the government procures goods or services, these transactions occur in structured, proprietary, and non-public settings, such as closed bargaining sessions and arbitrations. In the context of such economic transactions, any compelled association predominantly involves *commercial* association for the non-speech purpose of arriving at a mutually satisfactory and binding agreement, and the State, as proprietor, may structure its process for contracting with employees and contractors through reasonable regulations, including by compelling payments to fund the required association's core activities. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 638 (1984) (O'Connor, J., concurring) ("[*Abood*] ruled that 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.").[7]

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[7] *See also Glickman*, 521 U.S. at 485 (Souter, J., dissenting) ("[I]n contrast to [the] right of expressive association, 'there is only minimal constitutional protection of the freedom of *commercial* association,' because 'the State is free to impose any rational regulation on the commercial transaction itself[.]'") (quoting

2. Petitioners also ignore this Court's extensive body of law crafting significant fair-share fee limitations to protect First Amendment interests. Beginning with *Street* and continuing in *Abood*, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Lehnert*, and *Locke*, "the Court has considered the constitutionality of charging for various elements of such a fee, upholding the charging of some elements (*e.g.*, those related to administering a collective-bargaining contract) while forbidding the charging of other elements (*e.g.*, those related to political expenditures)." *Locke*, 555 U.S. at 210. These decisions place significant limitations on the activities for which fair-share fees may be charged, but reject petitioners' contention that *any* collection of fair-share fees violates the First Amendment. *See, e.g.*, *id.* at 218; *Lehnert*, 500 U.S. at 524. The Court's cases also impose procedural limits on fair-share fees collection to protect First Amendment rights. *See, e.g.*, *Teachers v. Hudson*, 475 U.S. 292, 310 (1986); *Knox*, 132 S.Ct. at 2296. Petitioners allege no violation of any of these protections.

Roberts, 468 U.S. at 634 (O'Connor, J., concurring)) (emphasis in original); *cf. Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2496-97 (2011) (to the extent that public employees' contractual grievances might be characterized as "petitioning," employees' First Amendment interests may have to yield to government's proprietary interests in efficiently operating its internal personnel administration system); *id.* at 2506 (Scalia, J., concurring and dissenting) (demands "addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign" are not First Amendment "petitions").

C. *Abood* Is Consistent With Other First Amendment Precedents

This Court has consistently deferred to legislative judgments regarding both the importance of the government interests served by systems of compelled commercial association and fair-share fees, and the manner in which such systems serve those interests. *See Hanson*, 351 U.S. at 234 ("The decision [whether to permit union shop agreements] rests with the policy makers, not with the judiciary."); *Abood*, 431 U.S. at 222-25 (deferring to "the *legislative assessment* of the important contribution of the union shop to the system of labor relations") (emphasis added); *Hudson*, 475 U.S. at 301 n.8 ("accord[ing] great weight to the congressional judgment" that permitting fair-share fees "would promote peaceful labor relations"); *Lathrop*, 367 U.S. at 843 ("State Bar activities serve the function, *or at least so Wisconsin might reasonably believe*, of elevating the educational and ethical standards of the Bar ...."') (emphasis added); *Keller*, 496 U.S. at 12-13 (declining to weigh relative interests in agency shop and integrated bar).

Petitioners ask this Court to disregard these precedents because they did not apply strict scrutiny. *See, e.g.*, Pet. Br. 18. But they are entirely consistent with settled First Amendment principles. Strict scrutiny does *not* apply to the regulation of commercial or economic association, including labor regulation. *See, e.g.*, *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (in role as representative of "general *business* needs of employees," regulation of union's "right of selection to membership" is constitutionally permissible) (emphasis added). And of particular relevance to public-sector collective bargaining, strict scrutiny does *not* apply to the government's actions as

proprietor (not sovereign) in dealing with employees and contractors. *See, e.g.*, *Guarnieri,* 131 S.Ct. at 2500; *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675-76 (1996); *Letter Carriers*, 413 U.S. at 556, 564-67; *Mitchell*, 330 U.S. at 99-103.

1. *Abood* applied the correct analysis

a. In *Abood*, *Keller*, and the other decisions cited above, the Court properly deferred to legislative judgments because of the predominantly economic and commercial nature of the compelled "association" at issue. The government possesses broad authority to regulate association for *economic* or *commercial* purposes—even when that regulation has some impact on First Amendment interests. *See Roberts*, 468 U.S. at 634 (O'Connor, J., concurring) ("[T]here is only minimal constitutional protection of the freedom of *commercial* association.") (emphasis in original); *see also NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982); *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972) (Stevens, J.) ("[T]he economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment."). The government may, for example, prohibit horizontal boycotts by competitors, including economic boycotts of the government to induce government action, even though such prohibitions also limit First Amendment speech and associational rights. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428, 431 (1990).

Petitioners rely entirely on the erroneous premise that a system of exclusive collective bargaining representation must be understood as "compel[led] association for the inherently expressive purpose of

petitioning the government." Pet. Br. 23. To the contrary, in creating a collective bargaining system, a state employer creates an *economic* and *commercial* association, based on pre-existing employment relationships, in order to better negotiate and enforce a single binding contract establishing terms and conditions for its workforce's employment. *Cf. United Foods*, 533 U.S. at 414 ("To attain the desired benefit of collective bargaining, union members and nonmembers [are] required to associate with one another, and the legitimate purposes of the group [are] furthered by the mandated association."). The negotiation of that contract occurs through a regulated and specialized process that is not required by the First Amendment, *Smith,* 441 U.S. at 465, and from which the government may exclude individuals at its discretion. *Knight*, 465 U.S. at 273; *see Perry*, 460 U.S. at 48-49. The government's decision to establish a bargaining unit and to require its employees to pay for contract negotiation and administration on the unit's behalf involves not "compelled petitioning" but regulation of the government's internal economic affairs as an employer, and such decisions "rest[] with [personnel] policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234; *cf. Abood*, 431 U.S. at 229 (finding "no principled basis" for according State's decision "less weight in the constitutional balance" than *Hanson* gave to the "congressional judgment" reflected in the RLA).

Indeed, the significant government-imposed limitations on exclusive representatives are entirely inconsistent with petitioners' theory that they are compelled to support an association predominantly engaged in First Amendment expression. Exclusive representatives must by law represent the unit, not their own members' interests. *See supra* at 24-25.

They must bargain in good faith about only those subjects that the government has opened for negotiation. *See* 5 ILCS 315/7, 315/10(b)(4); *cf.* 29 U.S.C. §158(b)(3), (d). And the government extensively regulates labor unions' internal activities, including the manner in which they may define membership, elect leadership, conduct meetings, and set dues. *See, e.g.*, 29 U.S.C. §401 *et seq*. All these regulations could not survive constitutional scrutiny if collective bargaining constituted "inherently expressive" association. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 914. Such regulation is permissible, however, when *economic* association is at issue. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 226-27 (1982) (rejecting First Amendment challenge to NLRA's secondary picketing prohibitions); *NLRB v. Retail Store Emps.*, 447 U.S. 607, 616-19 (1980); *Roberts*, 468 U.S. at 637-38 (O'Connor, J., concurring).

Thus, far from disregarding this Court's precedents, the distinctions drawn in *Abood*—between the core collective bargaining activities that employees may be compelled to fund; germane activities not involving political or ideological expression, which may also be so funded; and "non-chargeable" activities, which can be funded only through voluntary contributions, *see Lehnert*, 500 U.S. at 517-19—track the well-established distinctions between a union's *commercial* activities as exclusive representative, which are subject to reasonable regulation; expressive activities incident to its commercial activities, which must be regulated with greater precision; and its political and ideological activities, which receive full First Amendment protection. *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("[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."); *see also Retail Store Emps.*, 447 U.S. at 616; *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010).

b. Petitioners' theory ultimately rests on challenging *Abood*'s deference to the state legislature's decision to adopt for its own workforce the private-sector fair-share arrangements approved in *Hanson*. In the public sector, petitioners argue, such arrangements must satisfy strict scrutiny, which was purportedly unnecessary in *Hanson*'s purely regulatory context. Pet. Br. 18, 21-22. But petitioners' challenge turns upside down this Court's long-standing view that "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion of O'Connor, J.); *see Letter Carriers*, 413 U.S. at 556, 564-67 (upholding broad restrictions on public employee political activity); *Mitchell*, 330 U.S. at 99-103 (same); *Pickering*, 391 U.S. at 568 (public employer cases require special deference to government's interests "as an employer, in promoting the efficiency of the public services it performs through its employees"); *cf. Engquist v. Or. Dep't of Ag.*, 553 U.S. 591, 598 (2008) ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'") (quoting *McElroy*, 367 U.S. at 896).

Given the importance of the government's interests in being an effective economic actor and structuring its internal proprietary affairs, where a public employer

regulates its employees' personal speech on matters of public concern, the Court balances the "'interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Letter Carriers*, 413 U.S. at 564 (quoting *Pickering*, 391 U.S. at 568). The balance is conducted with significant deference to the government's legitimate workforce management interests, and has resulted in this Court upholding far greater and more direct impingements on speech interests than are even arguably presented here. *See, e.g.*, *id.* at 567 (upholding broad ban on partisan activities and associations); *Mitchell*, 330 U.S. at 99-103 (same). The same deferential balancing test applies to government workforce management choices whether the affected party is an employee or a contractor, *Umbehr*, 518 U.S. at 677-78; *cf. NASA v. Nelson*, 131 S.Ct. 746, 758-59 (2011), and to the impact of such choices on both speech and petition rights. *See Guarnieri*, 131 S.Ct. at 2495, 2497.[8]

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[8] Rather than acknowledge the deference accorded government proprietors in structuring their internal economic affairs or the distinction between compelled association in the economic sphere and compelled association relating to predominantly expressive activities, petitioners attack all uses of exclusive representation in public-sector collective bargaining as unconstitutional on the theory that such bargaining implicates "public concerns." But acceptance of petitioners' theory would also cast into doubt the constitutionality of exclusive representation in the *private* sector. Private-sector labor relations rest on the foundation of exclusive representation compelled by law, from the NLRA and RLA to various state agricultural labor relations acts. Private-sector economic bargaining in industries like defense, auto, steel, transportation, energy, health care, and privatized public services quite often implicates "public concerns." *See, e.g.*,

By ignoring the deference that this Court shows in public workforce management cases, petitioners would have this Court evaluate public-sector exclusive representation and fair-share fees in a manner wholly inconsistent with the larger body of relevant First Amendment law.[9]

c. This Court's First Amendment decisions do not support petitioners' invocation of strict scrutiny. Their argument instead rests entirely upon language in *Knox*, but *Knox* did not involve "core" collective bargaining activities. *Knox* instead involved a public-sector union's use of fair-share fees to fund its political activities outside of collective bargaining—a "special

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Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 582-83 (1952). *Abood* properly recognized that the First Amendment interests of dissenting public employees are not constitutionally greater than the interests that might be asserted in private-sector contexts. *See* 431 U.S. at 231.

[9] The *only* context in which this Court has suggested strict scrutiny *might* apply to decisions by a public employer implicating its employees' First Amendment rights is the political patronage context. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion of Brennan, J.). The "patronage" decisions are inapposite because, unlike fair-share fees funding "core" collective bargaining activities, political patronage involves political behavior unrelated to workforce management interests. *See id.* at 366; *cf. O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714 (1996) (public employee may be discharged on political grounds if "political affiliation is a reasonably appropriate requirement for the job in question"); *Lehnert*, 500 U.S. at 517 (consistent with *Elrod*, *Abood* prohibits compelled support for ideological activities outside collective bargaining context); *Abood,* 431 U.S at 233-36 (citing *Elrod* in discussing union ideological activities). This Court has never extended *Elrod* beyond pure political patronage. *See O'Hare*, 518 U.S. at 719 (*Elrod* rule applies "where political affiliation alone" is basis for employer's decision).

assessment billed for use in electoral campaigns" of which "nonmembers … were nevertheless required to pay more than half." 132 S.Ct. at 2291. In that campaign, the union did not act within the scope of its statutory role as exclusive representative, but solely as a First Amendment expressive political association. Compelling workers to pay fees for that purpose involved mandatory association for expressive political purposes, and *Knox*'s language reflects that different context.

2. *Abood* reached the correct conclusion as to both exclusive representation and fair-share fees

In addition to applying the right analysis, *Abood* also reached the correct conclusion that, within the limits the Court has established, the important government interests served by exclusive representation and fair-share fees justify their limited impact on First Amendment rights.

a. As explained above, exclusive collective bargaining representation serves important government interests by promoting stabilized labor relations. *See supra* at 16-18. Moreover, the *negotiation* and *enforcement* of public employees' terms and conditions of employment by a union is primarily an *economic* interaction fully subject to regulation. *See supra* at 29, 32-35. The role of the exclusive representative within that context is not that of a private entity exercising unfettered expression rights, but a regulated entity exercising "official responsibilit[ies]" imposed by law. *Perry,* 460 U.S. at 51. Adoption of the requirement that negotiations and contract enforcement within the officially established channels be conducted by the entity designated by a majority of the workforce (if any) is thus within the discretion of an economic

policymaker (and well within the discretion of a public personnel policymaker).

Accordingly, *Abood* correctly concluded that a public employer can require employee cooperation to achieve its workforce management goals and pursue its significant interests in improving effectiveness, efficiency, and morale, including by creating formal cooperative structures to involve employees in resolving workforce issues. *See Guarnieri*, 131 S.Ct. at 2495-97 (acknowledging "substantial government interests" in "efficient and effective operation," employee "morale," and management of internal affairs through specialized employee dispute resolution systems).

b. *Abood* was also correct in recognizing the significant government interests served by fair-share fees within an exclusive representation system and their limited impact on employees' First Amendment interests.

Fair-share fees prevent unfairness to union members, incentives to "free ride" on member-employees' efforts, and resulting conflicts. Without them, dues-paying members bear the burden of paying for *all* costs of representing the unit, subsidizing the services provided to non-members. *See, e.g.*, *Street*, 367 U.S. at 760-64. Fair-share payments thus prevent members' voluntary contributions from being "depleted to cover the costs incurred in the representation of [those] free riders." *Robinson v. New Jersey*, 741 F.2d 598, 610 (3d Cir. 1984) (Adams, J.); *cf. Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980) ("common-fund" attorneys' fees awards "rest[] on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense").

Exclusive representation presents a classic "free rider" situation because the "public good" of representation will not be adequately funded absent compulsory fees, even if all members of the unit view a fully funded representative as in their interest. *See* Mancur Olson, Jr., *The Logic of Collective Action* 11, 14-16, 67, 75-76, 85-87 (1965) (discussing collective action problems unions face without fair-share fees, including that even union supporters then have rational economic incentives to avoid paying because they can receive the same benefits for nothing, know that their payments will be used to benefit non-payers, and risk bearing an increasingly disproportionate share of overall costs); Eric A. Posner, *The Regulation of Groups*, 63 U. Chi. L. Rev. 133, 137-38 (1996) (in such a system, "each [individual] actor finds it rational to cheat"); *cf. Consolidated Edison v. Bodman*, 445 F.3d 438, 442-43 (D.C. Cir. 2006) (Williams, J.) (comparable problems justify "common fund" attorneys' fees awards).

Moreover, the government interest here is far greater than in most "free rider" situations because fair-share fees in this context overcome obstacles to beneficial cooperative action *that the government itself creates*. Exclusive collective bargaining representation imposes an obligation on the union and its members to produce "public goods" whose benefits *by law* must be provided to all bargaining unit members. As Justice Scalia explained in *Lehnert*:

> In the context of bargaining, a union *must* seek to further the interests of its non-members; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership

> (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

500 U.S. at 556 (Scalia, J., concurring and dissenting) (emphasis in original). Thus, the role played by the statutory duty of fair representation, including its impact on the activities of the union and its members, distinguishes this situation from that of a purely private activity that merely happens to further the interests of others:

> 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 …. [T]he "free riders" who are nonunion members of the union's own bargaining unit … 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. (Scalia, J.) (emphases in original). The State has a significant interest in correcting the resulting state-created collective action problem and establishing conditions likely to generate an optimal amount of the "public good" benefits of exclusive representation, so that the system is not seriously weakened by lack of participation. *See* James D. Gwartney et al., *Economics: Private and Public Choice* 102 (14th ed. 2013) (free riders lead to inefficient "undersupply [of] public goods, even when the [group] in aggregate values them highly relative to their cost").

Accordingly, even if a desire to prevent "free riding" is not normally sufficient to justify compulsory payments to a group like the PTA, *cf. Knox*, 132 S.Ct. at 2289, fair-share fees in this context reflect the exclusive representative's legally-mandated, official role within a government-established system. They also reflect the State's significant interest in supporting its exclusive representation system by ensuring an adequately funded representative that can represent the unit in a manner that promotes an effective and credible system, e.g., by hiring staff, drawing on expertise, and creating arrangements to involve the unit in formulating its goals. By spreading the costs of representation among all workers in the bargaining unit, the government also provides an incentive for all bargaining unit workers to hold their representative accountable to the entire unit.

This Court's decisions from *Hanson* through *United Foods* have recognized that, once the government has adopted a valid economic system of required cooperation, the significant government interests that justify that cooperative system also justify the use of fair-share fees. All bargaining unit members potentially benefit from the union's actions as exclusive representative. *See United Foods*, 533 U.S. at 414-15 (fair-share fees upheld in *Abood*, *Keller*, and *Glickman* funded mandatory associations generating benefits for all members).[10] To the extent fair-share

[10] Indeed, in the public employer context, this Court has upheld far greater impingements on employees' First Amendment interests than are at issue here because they provided countervailing overall benefits to employees. *Compare Letter Carriers*, 413 U.S. at 566-67 (upholding prohibition on employees' partisan political activity that protected public employees from political coercion), *with United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 471, 477 (1995) (distinguishing *Letter*

fees for costs germane to collective bargaining representation may implicate First Amendment interests, the "compelled contribution of moneys" is "a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity," *id.* at 414, and its impact on First Amendment interests is not greater than the impact inherent in the system of exclusive representation itself. The *form* of that impact may differ, but the First Amendment interest in both is the identical desire to distance oneself from the union's activities as bargaining agent. *See Abood*, 431 U.S. at 222, 235.

In sum, the legal principles in *Abood* were not novel, were correct, and have not since been undermined.[11]

D. *Stare Decisis* Precludes Overruling *Abood*

Even if this Court would not reach the same conclusion today that it did in *Abood*, departure from precedent "always require[s] … 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation omitted). Reluctance to overturn precedent should be especially strong where, as here, a "long and unbroken series of precedents reaffirm[] th[e] [settled] principle." *Welch v. Tex. Dep't of Hwys. & Pub.*

Carriers on that basis and invalidating broad prohibition on compensation for speech activities unrelated to employment).

[11] Although this Court's decisions provide no basis for applying strict scrutiny to public-sector exclusive representation or fair-share fees, both would survive such scrutiny because they are necessary to the compelling government interests discussed above. Indeed, in his *Abood* concurrence, Justice Powell concluded that, as to core bargaining over economic terms, the system would survive strict scrutiny. 431 U.S. at 255, 263-64 & n.16 (Powell, J. concurring).

Transp., 483 U.S. 468, 494 (1987) (plurality opinion of Powell, J.). A decision overruling *Abood* would effectively overrule *Keller* and call into question numerous other precedents, as well as the logic underlying important aspects of the NLRA and the RLA. *See Locke*, 555 U.S. at 210; *United Foods*, 535 U.S. at 413-15; *Glickman*, 521 U.S. at 472-74; *Lehnert*, 500 U.S. at 516-19; *Keller*, 496 U.S. at 12-17; *Hudson*, 475 U.S. at 294, 301-02; *Ellis*, 466 U.S. at 447-48, 455-57; *see also Knight*, 465 U.S. at 279; *Perry*, 460 U.S. at 50-53; *CWA v. Beck*, 487 U.S. 735, 762-63 (1988).

The burden of justifying a departure from precedent is higher still where, as here, there has been substantial institutional reliance on well-settled law. State and local governments have for decades structured their basic public employment systems around exclusive representation supported by fair-share fees, and countless workers have made career choices based on the vitality of those systems and the validity of the resulting contracts. *See Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J, concurring) ("demands" of *stare decisis* are "at their acme ... where reliance interests are involved").

Petitioners do not even attempt to meet their high burden. Petitioners suggest *no special justifications* for overruling *Abood* and the long line of cases that have followed it, and no such justifications exist.

II. THE REQUIREMENT THAT ALL PERSONAL ASSISTANTS BEAR THEIR FAIR SHARE OF COLLECTIVE BARGAINING COSTS IS CONSISTENT WITH THE FIRST AMENDMENT

Abood and *Hanson* are good law, should not be overruled, and directly control the outcome here. The Rehabilitation petitioners do not contend Illinois' PLRA differs in any relevant respect from the statutes in those cases. Nor do petitioners contend that the regulatory regime here has any greater impact on their First Amendment interests. Rather, petitioners argue that the State is not their "employer," and therefore has no interest in stabilized labor-management relations to be served by exclusive representation. Pet. 24-26, 39-49. They are wrong as to the first point, as the court below held. But even if the State is not a "joint employer," its interest in promoting productive collective bargaining to stabilize and develop this State program's workforce wholly legitimates the exclusive representation and fair-share fee arrangement here.

A. *Abood* Controls This Case

1. The State retains authority to set employment terms for its personal assistant workforce

Illinois pays personal assistants an hourly wage to provide care to "customers." Given the intimate nature of those services, the Legislature delegated to customers the limited authority to select and supervise their personal assistants (within the Program's rules). But the Legislature *retained* for the State all traditional "employer" authority to set the economic terms of employment, to approve service

plans detailing the tasks personal assistants can perform and the time permitted for each task, and to exercise all other "employer" authority not expressly delegated to customers. The State and the customers are therefore joint employers.

a. The joint employment doctrine, pursuant to which two entities that "exercise[] common control" over a group of employees are deemed joint employers, is well-established for labor relations purposes. *Boire v. Greyhound Corp.*, 376 U.S. 473, 475-76 (1964).[12]

Here, the State's retention of substantial employer authority establishes it as the personal assistants' "joint employer." The State pays the personal assistants' wages, and State officials have sole authority to establish the wage rate and all other compensation terms. The State processes personal assistants' time sheets, pays personal assistants directly, deducts income taxes, and pays for health benefits. State officials exercise control over the work itself by approving service plans establishing the specific tasks to be performed and the amount of time allotted thereto. The State provides protective gloves to personal assistants when necessary for their work, and pays for and is jointly developing a mandatory personal assistant training program. The State requires personal assistants to attend an orientation paid for by the State. Although the State permits customers to select their personal assistants, the State restricts that choice and participates in the process by

[12] The concept of joint employment is also recognized under the common law, *Vizcaino v. U.S. Dist. Court*, 173 F.3d 713, 723-24 (9th Cir. 1999), and other labor statutes, *Antenor v. D & S Farms*, 88 F.3d 925, 929-30, 932 (11th Cir. 1996); *see* Restatement (Third) of Employment Law §1.04 & cmt. c (Tent. Draft No. 2 (revised) 2009).

setting minimum qualifications, conducting criminal background checks, and requiring that a State official confirm that any prospective personal assistant can communicate and follow directions adequately. State officials attend required annual evaluations of personal assistants. The State requires the customer and personal assistant to sign an employment agreement created by the State. The State can effectively fire personal assistants by disqualifying them from the Program.

Given these factors, the providers here qualify as public "employees" under many statutes' tests of employee status. Prior to the amendment of the PLRA, for example, the Illinois Workers' Compensation Commission consistently concluded that Rehabilitation personal assistants are State "employees" for workers' compensation purposes. *See, e.g.*, *Martin v. State of Ill., Dep't of Human Servs.*, 04 IL.W.C. 31542 (Ill.W.C.C), 2005 WL 2267733, at *5-7 (Jul. 26, 2005); *see also* D.Ct. Doc. 32-9. Courts in other jurisdictions have ruled that the government is an "employer" of workers similarly situated to the personal assistants here despite the authority delegated to the service recipient. *See, e.g.*, *Bonnette v. Cal. Health & Welf. Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Rivera v. Puerto Rican Home Attendants Servs.*, 922 F. Supp. 943, 949-50 (S.D.N.Y. 1996); *In-Home Supportive Servs. v. Workers' Compensation Appeals Bd.*, 152 Cal.App.3d 720, 729-33 (1984).

The Seventh Circuit therefore correctly concluded that personal assistants have an employment relationship with the State beyond the Legislature's decision to classify them as "public employees" in the PLRA. *See* J.A. 9a-11a.

b. *Abood* recognized that the First Amendment generally permits the government to regulate its economic relationship with a workforce through labor relations structures comparable to those used in the private sector, because the relevant interests are substantially similar. 431 U.S. at 232. Illinois' decision to use the PLRA to structure its proprietary relationship with the personal assistant workforce in this joint employer situation has a similarly sound basis in analogous private-sector labor experience.

The National Labor Relations Board (NLRB) will recognize an exclusive collective bargaining representative in the private sector, even if the employer does not control the entire range of employment conditions. *Management Training Corp.*, 317 NLRB 1355, 1357-58 (1995). In an analogous situation, an employment agency was deemed an NLRA employer even though it referred workers to clients who could request or refuse referrals and exercised "exclusive control over [employees'] day-to-day activities." *NLRB v. Western Temp. Servs.*, 821 F.2d 1258, 1266 (7th Cir. 1987). And the NLRA covers homecare workers employed by private agencies to serve individual clients, even though the agencies do not directly supervise workers at the worksite. *See, e.g.*, *Human Dev. Ass'n*, 293 NLRB 1228, 1228, 1231-32, 1242 (1989).

This Court has also confirmed the propriety of collective bargaining in such circumstances. *NLRB v. E.C. Atkins*, 331 U.S. 398, 405, 407-13 (1947), upheld the NLRB's determination that a corporation's control over terms and conditions of employment such as wages and hours established its "employer" status under the NLRA, notwithstanding the Army's ultimate control over the employees' hiring, firing, and

physical activities. The Court reasoned that, in determining whether "the conditions of the relation are such that the process of collective bargaining may appropriately be utilized," the necessary "relationship may spring as readily from the *power to determine the wages and hours of another*, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker." *Id.* at 413-14 (emphasis added).

Here, Illinois has sole control over *all* economic terms of the personal assistants' employment, and therefore can and does engage in meaningful collective bargaining to negotiate a contract establishing those terms. Its decision to do so reflects sound labor policy.

2. The system of exclusive representation stabilizes the State's labor relations with this workforce

The State's use of a system of exclusive representation here reflects the same policy judgment that has made exclusive representation systems virtually universal for regulating collective bargaining in the United States: The system best promotes "industrial peace and stabilized labor-management relations," with all the resulting benefits. *Hanson*, 351 U.S. at 234; *see Abood*, 431 U.S. at 220-21; *supra* at 16-18.[13]

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[13] The State's interest in this system of exclusive bargaining representation was never limited to an interest in "feedback." Pet. Br. 42-44. The Legislature amended its PLRA to include personal assistants, and the PLRA declares that its broad purposes include "protect[ing] the public health and safety of the citizens of Illinois, and … provid[ing] peaceful and orderly procedures for the protection of the rights of all." 5 ILCS 315/2. The Executive

a. Petitioners contend that Illinois cannot have a legitimate interest in harmonious labor relations with this workforce because it gives customers the authority to select and supervise their own personal assistants within the Program's rules. That it is plainly incorrect.

First, the State depends on this workforce of more than 20,000 personal assistants to carry out its Rehabilitation Program. Any labor disruption, poor morale, high turnover, or workforce shortages would be of serious concern to the State. Such concerns are not theoretical. Rehabilitation Program personal assistants organized and demanded recognition before the Legislature brought them within the PLRA. Like other workers, homecare workers have gone on strike. *See NLRB v. Special Touch Home Care Servs.*, 708 F.3d 447, 449-50 (2d. Cir. 2013). And homecare workers can support rival unions who might then make competing and destabilizing demands on an employer. Indeed, two rival labor organizations competed to represent the personal assistants in a different State program, albeit unsuccessfully. Pet. App. 5a. The PLRA addresses these threats to workforce stability by enabling the State to negotiate a single contract with the representative chosen by the majority, if one is chosen, who is made responsible for serving the entire unit's interests.

Order cited by petitioners emphasizes that applying that system to personal assistants is "important to … preserve the State's ability to ensure efficient and effective delivery of personal care services" because "each recipient employs only one or two personal assistants and does not control the economic terms of their employment … and therefore cannot effectively address concerns common to all personal assistants." Pet. App. 45a-46a.

Second, workforce shortages, excessive turnover, and lack of training present enormous problems for states seeking to provide home-based care, and the demand for homecare workers is increasing as the population ages. Individual customers do not have the authority, interest, capacity, or incentive to address issues that affect the personal assistant workforce *as a whole*. Addressing such workforce-wide issues, however, is critical to ensuring that eligible individuals can find a personal assistant and obtain quality care, and thereby avoid the greater expense to the State of institutionalization. Illinois reasonably concluded that this system of exclusive collective bargaining representation would allow the State to address such systematic concerns and maximize worker satisfaction in a cost-effective way. A contract with the personal assistants' own representative, chosen by the majority and having a duty to fairly represent all providers, is likely to have value and legitimacy to the workforce. The reasonableness of that judgment is confirmed by the existence of similar systems in other states.[14]

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[14] Although each has its differences, at least nine other states have systems for delivering home care that divide employer authority between the government and customers, and that statutorily designate a public entity as the providers' "employer" for purposes of collective bargaining about matters within the government's control, should the providers so choose. *See* Cal. Gov't Code §110000 *et seq.*; Cal. Welf. & Inst. Code §§12300.7, 12301.6(c), 12302.25(a); Conn. Gen. Stat. §§17b-706, 17b-706a(e), 17b-706b; Md. Code, Health-Gen. §15-901 *et seq.*; Mass. Gen. Laws ch. 118E, §73; Minn. Stat. Ann. §§179A.54, 256B.0711; Mo. Rev. Stat. §208.862; Or. Const., art. XV, §11(3)(f); Or. Rev. Stat. §§410.608-410.614; Vt. Stat. Ann. Tit. 21, §1634; Rev. Code Wash. §74.39A.270.

Third, that the terms about which executive branch officials can bargain are to some extent limited by the authority delegated to individual customers does not undermine the State's interests. That delegation reflects the State's policy to promote customer independence, not its lack of interest in workforce issues. Indeed, many public-sector bargaining relationships are subject to comparable limitations on bargaining, such as limits on bargaining over job security issues because of civil service laws or (in the educational sector) limits on bargaining over class size and school year length. The existence of such "statutory restrictions" on public-sector bargaining did not alter the holding in *Abood*. *See* 431 U.S. at 228. If anything, by limiting collective bargaining solely to economic terms of employment, Illinois *reduces* the risk that bargaining will involve matters with more profound ideological significance. *See, e.g.*, *id.* at 263 n.16 (Powell, J., concurring) (distinguishing bargaining over wages and benefits from policy issues such as "how best to educate the young").[15]

Fourth, the fact that personal assistants work at separate sites does not change the State's interest in establishing employment terms common to all. Many public- and private-sector workers employed across scattered locations, from repairmen to visiting nurses, bargain through systems of exclusive representation.

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[15] Petitioners contend that the exclusive representative "petition[s] the State over its Medicaid rates and policies," including "policies governing the distribution of public benefits through Medicaid-funded programs," Pet. Br. 3-4, but there is nothing in the relevant CBAs that addresses eligibility for Program benefits or the scope of Program services. Rather, such issues are outside the scope of bargaining. *See* CBA, Art. V; J.A. 41-42.

There also are a variety of collective bargaining structures in the private sector in which an employer association bargains a "master" labor agreement that provides stability by setting the employment terms for a workforce performing labor at scattered locations for different employers. *See NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-95 (1957).

In arguing that collective bargaining here serves no "labor peace" interests, petitioners caricature that interest as solely an interest in preventing discord or violence at a particular physical workplace. Pet. Br. 25-26, 39.[16] But this Court has long used that phrase, as well as references to "industrial peace *and stabilized labor-management relations*," *Hanson*, 351 U.S. at 234 (emphasis added), as shorthand for the myriad benefits resulting from the negotiation and enforcement of a collectively bargained agreement covering an entire unit, and has recognized that such benefits extend far beyond preventing fights among employees and their supervisors. *See Abood*, 431 U.S. at 220-22, 224; *see also supra* at 16-18.

The collective bargaining system here, though relatively new, has channeled potentially disruptive labor demands into a mutually productive relationship whereby the State and union, through the sustained give-and-take of regulated bargaining, have negotiated three binding agreements; designed and administered new benefit, training, and orientation programs; established a dispute-resolution system; created continuing labor-management committees to develop

[16] Petitioners cite *Perry*'s discussion of "labor peace within the schools" (Pet. Br. 26 (quoting *Perry*, 460 U.S. at 52)), but *Perry* nowhere held that the government's interest in exclusive representation is limited to contexts involving a common workplace.

solutions to workforce problems, including the development of a registry to connect workers and customers; and agreed to "no strike" obligations. Such innovations—tailored to the needs of this low-income, dispersed population working irregular hours—help to create a workforce of providers able to stay within the State program over a career, serving obvious and vital labor stability interests.

b. While the Seventh Circuit correctly held that Rehabilitation personal assistants *do* have a common-law employment relationship with Illinois, Pet. App. 9a-11a, if that were not the case the arrangements here would still be fully constitutional. As petitioners themselves admit, "the common-law employment test is particularly ill-suited for First Amendment line drawing; it has 13 factors, none of which is determinative." Pet. Br. 32 n.8. As the Court held recently in *NASA*, 131 S.Ct. at 758-59, "the Government's interest as 'proprietor' in managing its operations … does not turn on such formalities." *See id.* at 759 (rejecting argument that constitutional claim by government contractors should be analyzed differently from claim by government employees); *Umbehr*, 518 U.S. at 673, 679-80 (applying same First Amendment framework to independent contractors and employees); *O'Hare*, 518 U.S. at 721-22 (same). Certainly in this case, the State's need for developing a stable and committed workforce within its program would remain undiminished.

Moreover, nothing about collective bargaining limits its utility to precise common-law lines. The workforce development it engenders is equally valuable whether or not the State meets a vague common-law "employer" test. Indeed, this Court considered and rejected the proposition that the public policy interests

served by collective bargaining are necessarily limited to common-law employer-employee relationships. *See NLRB v. Hearst Publications*, 322 U.S. 111, 126-28 (1944).[17] The nature of the States as separate sovereigns in our federal system counsels against imposing any limitation on their ability to legislate that turns on labels or common-law tests developed for unrelated purposes. *Cf. Guarnieri*, 131 S.Ct. at 2496 (describing "serious federalism and separation-of-powers concerns" posed by judicial involvement in a government's proprietary affairs).

c. Equally unpersuasive is petitioners' claim that Illinois' interest in stabilized labor relations turns upon whether state law defines personal assistants as employees for *other* state law purposes. This Court has recognized that "whether state law labels a government service provider's contract as a contract of employment or a contract for services [is] a distinction which is at best a very poor proxy for the interests at stake." *Umbehr*, 518 U.S. at 679. It cannot be dispositive that the Illinois Legislature, as a matter of state policy and to conserve limited public resources, did not classify the personal assistants as "employees" of the State for purposes of State tort liability or retirement benefits. *See id.* at 680 ("The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law."). The State

[17] Congress later amended the NLRA to overrule *Hearst*'s specific holding regarding NLRA coverage, but that legislative judgment does not bind the States or undermine this Court's recognition that the benefits of collective bargaining are not confined to common-law employment relationships. *See E.C. Atkins*, 331 U.S. at 413 (judgment whether "collective bargaining may appropriately be utilized" must be made "with more than the common law concepts in mind").

can engage in collective bargaining with its personal assistant workforce to establish their employment terms and advance its proprietary workforce development interests whether or not it waives sovereign immunity for their torts or includes them in a particular retirement plan.

B. Petitioners' Proposed Limitations On State Legislative Authority Should Be Rejected

Petitioners urge the Court to "limit" *Abood* by adopting a rule that state governments may *never* use systems of exclusive collective bargaining representation and fair-share fees to set employment terms unless: "(1) the government is actively managing and supervising the affected individuals in its workplaces, and (2) the representation does not extend to matters of public concern." Pet. Br. 24. Petitioners' rule should be rejected because it does not reflect the government's legitimate interests as a proprietor for First Amendment purposes, and it would require overruling *Abood*.

1. Petitioners do not offer a definition of "actively managing and supervising" a workforce, and their rule is not administrable in practice, nor does it reflect the wide variety of employment relationships. Here, for example, the State *does* "actively manage" its personal assistant workforce by establishing the tasks to be performed, defining compensable hours, setting wages, administering payroll, setting minimum qualifications, creating the required contract, providing health benefits, orienting and training personal assistants, approving selection decisions, attending annual reviews, negotiating a collective bargaining agreement, and resolving grievances. As for "active supervision" in a common "workplace,"

there are many employees who work independently in the field, rather than in common workplaces; some employees work in vehicles or telecommute from their own homes. Major private-sector employers such as Manpower and Kelly Services—as well as countless homecare agencies—place their employees with customers who "actively manage and supervise" those employees at customer worksites and homes.

Umbehr expressly rejected the claim that the government's proprietary interests turn upon its "right to supervise and control the details of how work is done." 518 U.S. at 676. And *Keller* upheld fair-share fees in a non-employment context where the very purpose was to permit "self-regulation" in place of government supervision and control. 496 U.S. at 12. Congress has never excluded employees who work independently and outside common workplaces from the NLRA's definition of "employee," *see* 29 U.S.C. §152(3), and the benefits of a system of exclusive representation apply with respect to such employees.

Accepting petitioners' argument that the State cannot extend its PLRA to cover its relationship with the personal assistants, simply because the State allows customers to choose and supervise their own personal assistants, also would put the interests of the State and the personal assistants at odds with customers' interests. The State should be able to decide for reasons of policy to give customers limited authority over personal assistants, while at the same time deciding for reasons of workforce development, fairness, and harmonious labor relations to engage in collective bargaining with the personal assistants' chosen representative.

2. Petitioners' "matters of public concern" test is equally arbitrary, unworkable, and without basis in

this Court's First Amendment decisions. As stated above, this case involves only collective bargaining about narrowly defined economic terms of employment. Petitioners make no effort to explain what subjects of public-sector collective bargaining constitute "matters of public concern" under their theory, but contend that public employee wages are *always* matters of public concern. Pet. Br. 42 n.12. Petitioners therefore effectively admit their proposed "limitation" requires *overruling Abood* based on a theory no Justice in *Abood*, including Justice Powell, accepted. *See* 431 U.S. at 263 n.16 (Powell, J., concurring).

Moreover, the very First Amendment decisions in which this Court has distinguished between matters of public and private concern in other contexts establish that public employee speech or petitioning regarding matters of public concern is *not* "automatically privileged" in the manner petitioners suggest—particularly within the employment context. *Guarnieri*, 131 S.Ct. at 2493. Rather, where a public employer's actions implicate such speech or petitioning, "[c]ourts balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering*, 391 U.S. at 568).

Finally, this Court's well-developed First Amendment caselaw already protects employees' First Amendment rights as citizens. The designation of an exclusive bargaining representative cannot prevent employees from speaking as citizens in public fora about "matters of public concern" (or any other issues). *See supra* at 23-24. And fair-share fees must be limited to costs germane to the economic activity of

negotiating and enforcing a collective bargaining agreement. *See supra* at 30. No further restrictions are necessary or justified.

3. Petitioners ultimately urge the Court to adopt some bright-line limitation on the States' authority because *other* statutes may authorize fair-share fees outside the employment context or in employment contexts where, in petitioners' characterization, the State has neither retained the authority to set economic terms of employment nor empowered executive branch officials to negotiate binding contracts. Pet. Br. 51-55. This case is not the appropriate vehicle for considering those other statutes.

The Court has recognized that, for purposes of the First Amendment, the government's relationships with individuals "span a spectrum." *Umbehr*, 518 U.S. at 680. The government's employees are at one end of the spectrum, true independent contractors are somewhat further removed, and "recipients of small government subsidies" are treated "more like ordinary citizens." *Id.* This Court has declined to consider interests implicated in relationships not actually before the Court. *See, e.g.*, *id.* at 685. While the Court has upheld fair-share fees in the context of exclusive representation systems that promote stabilized labor relations in a manner legally indistinguishable from the system here, other important government interests may be served by other systems, and any government entity that adopts such a system should have the opportunity to defend its system on its own terms. *See, e.g.*, *Keller*, 496 U.S. at 12-16 (considering permissible use of mandatory dues for bar association).

CONCLUSION

The judgment below should be affirmed.

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