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 ALBERT CONTRERAS, PATRICIA GRIGGS, AND JONATHAN KISS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are private citizens who offer care services in home or home-like settings. Two are from Ohio; the third lives in Oregon. Like Petitioners in this case, all three work in states that have taken steps to compel them to accept and fund exclusive union representatives to bargain with the government. They welcome the opportunity to express their views in this case, and they urge the Court to uphold their right to associate—and the concomitant right to *not* associate—with the groups of their choosing.

Amicus Albert Contreras owns and operates Chelsea AFH LLC, a foster home for developmentally disabled adults in McMinnville, Oregon. His business is licensed by the state and offers residential care and services in a home-like environment to disabled adults. In 2007, the State of Oregon designated itself "the public employer of record" for citizens like Mr. Contreras, but only "[f]or purposes of collective bargaining . . . ." S.B. 858 74th Leg. Assemb., Reg. Sess. (Or. 2007) (codified as amended at Or. Rev. Stat. § 443.733). Since then, the union and the state have negotiated a rate structure that sharply cuts the Medicaid funds available to Mr. Contreras's client—even though he still provides the same level of services. Requiring him to support this union activity would thus give rise to First Amendment injuries that are more than academic.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae* or their counsel made a monetary contribution that was intended to fund preparing or submitting this brief. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

Amicus Jonathan Kiss has been a licensed practical nurse in Ohio since 2004. An independent provider, he locates patients on his own initiative, hires and pays a registered nurse supervisor for his practice, submits to an annual criminal-background check at his own expense, and covers all forms, equipment, and compliance costs associated with his business. He is responsible for filing and paying his own taxes, and he is not eligible for state-employee benefits like retirement coverage, state healthcare plans, overtime, paid holidays, or sick days. In 2007, independent providers in Ohio were exposed to forced unionization, *see* Ohio Exec. Order 2007-23S (July 17, 2007), and Mr. Kiss ultimately began seeing union dues deducted from his income.[2] When Mr. Kiss inquired about paying only "fair share" dues, he was informed that the reduced payments would still total around 90% of full-membership dues. Mr. Kiss also understood that he would need to complete a lengthy, intrusive questionnaire before opting for fair-share payments. Faced with disclosing personal information or paying full dues, Mr. Kiss paid the full dues.

Amica Patricia Griggs—a registered nurse—is also an independent provider in Ohio. She pays her own taxes and works for an individual patient, not the state. Like Mr. Kiss, Ms. Griggs did not choose to associate with a labor organization. Indeed, like the example in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), she is opposed to unionism itself. *Id.* at 222. Yet she was "forced to support financially an organization with whose principles and

2. Although this agency-shop arrangement is no longer in force in Ohio, *see* Br. of Pet'rs 50 n.17, the mere fact that it was illustrates the continuing threat to associational rights in that state.

demands" she disagrees. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

SUMMARY OF ARGUMENT

Petitioners argue that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled. *See* Br. for Pet'rs 18-24. *Abood* is certainly on weak footing, as the Court's recent criticism of its constitutional reasoning "cast[s] serious doubt" on its continued vitality. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2299 (2012) (Sotomayor, J., concurring in the judgment). Indeed, *Knox* questioned the entire concept of forced unionization and fee exaction, *see id.* at 2291 (majority opinion), challenged *Abood*'s endorsement of the compelling interest in public employers' maintaining "labor peace," and doubted the derivative interest in curtailing "free riding," *id.* at 2290. *Abood*'s days thus may be numbered.

Though the court of appeals relied on *Abood* in ruling in Respondents' favor, this Court need not overrule *Abood* to reverse the decision below. This is because the ruling of the court of appeals extends *Abood* well beyond the bounds of its own reasoning. The State of Illinois may be the payor of the homecare services provided by Petitioners, but the private-beneficiary customer, as a matter of law, is the provider's "employer." The State thus is in no meaningful sense the employer of the Medicaid homecare providers it is forcing to associate with Respondent SEIU. *See* 20 Ill. Comp. Stat. 2405/3(f) (designating personal assistants "public employees . . . [s]olely for the purposes of coverage under the Illinois Public Labor Relations Act"). Accordingly, the State is not "management," Br. for Pet'rs 44-45, and cannot properly invoke the interests—compelling or not—endorsed by *Abood*.

Nor should *Abood* be extended to immunize the State's intrusion on the rights of homecare providers to freely associate—especially given that the Court has characterized the agency-shop system as an "anomaly" and an "extraordinary" exception to First Amendment free-association principles. *Knox*, 132 S. Ct. at 2290, 2291. The rationales underlying *Abood* simply do not fit where the State is acting as an administrator and sovereign rather than an employer. Indeed, in light of the exacting scrutiny required under this Court's precedent, *id.* at 2289, extending *Abood* to apply here would perhaps require a more significant step than simply overruling that decision.

Moreover, despite the court of appeals' attempt to cabin its ruling, extending *Abood* to apply here would invite abuse. The rationale is boundless, especially given that "[t]he administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (citation and quotations omitted). It requires only a tangential connection between the State and private actors who could then be forced by law to accept a designated union representative over their objections. Indeed, huge swaths of private actors across a spectrum of occupations and programs—court-appointed attorneys, subsidized childcare providers, government contractors, Social Security recipients, and foster parents to name just a few—could be forced to surrender their First Amendment associational rights were the Court to affirm the decision below. These are no mere hypotheticals. Illinois has authorized mandatory representation of subsidized childcare providers, and Oregon has introduced a bill to designate foster parents as "public employees" for

the purposes of collective bargaining. The court of appeals' promise of the "narrowness" of its ruling is thus empty. The sheer breadth of its reasoning shows why this is not the "exceedingly rare" case in which the State can meet "exacting scrutiny." *Knox*, 132 S. Ct. at 2289.

ARGUMENT

I. Coercing Nonmembers to Fund Unions Is an "Extraordinary" Exercise of State Power that Warrants Exacting Scrutiny.

A. State-Mandated Agency Shops Burden Core First Amendment Rights.

As a matter of first principles, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). And a corollary to this freedom to associate is "a freedom *not* to associate." *Knox*, 132 S. Ct. at 2288 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (emphasis added).

"Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups." *Id.* Individual rights "are at serious risk if the government can compel a particular

citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). Such is the case with regard to state-mandated agency shops, which "force individuals to contribute money to unions as a condition of government employment," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007), or in order to receive government funding. State-mandated agency shops like Illinois's therefore "present[] First Amendment 'questions of the utmost gravity.'" *Knox*, 132 S. Ct. at 2284 (citation omitted).

The resulting First Amendment burdens are profound. A nonmember employee "may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 (1977). So when "a State establishes an 'agency shop' that exacts compulsory union fees'" as a condition of public employment or participation in a government program, "'[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.'" *Knox*, 132 S. Ct. at 2282 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 455 (1984)). To echo an example identified in *Abood*, some employees "might object to the union's wage policy because it violates guidelines designed to limit inflation . . . ." 431 U.S. at 222. Others might simply object to unionism itself. *Id.*; *cf. id.* at 231 ("Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs.").

Moreover, although this Court has denied that there is a "critical constitutional" difference between public agency shops and state-backed private ones, *id.* at 232, there is no denying that public-union activity has a political dimension. "[D]ecisionmaking by a public employer is above all a political process." *Id.* at 228. Public-sector unions necessarily "tak[e] many positions during collective bargaining that have powerful political and civic consequences . . . ." *Knox*, 132 S. Ct. at 2289. Nonmembers' ideological objections to public-sector unions may thus be particularly acute. This is especially true in a case like this one, where the individuals forced to accept a designated union as their bargaining representative are employed by individuals or private entities—not the State. Because the State is in no meaningful sense the employer of the dissenting employees, *see* 20 Ill. Comp. Stat. 2405/3(f), the state-mandated union activity is *entirely* political.

Employees may oppose unions for more tangible reasons too. Take a nonmember who is part of a minority group within the union membership—for example, a part-time employee or an elderly worker. *See* Sheldon Leader, Freedom of Association 176 (1992). These workers may have interests that conflict with those of the union's majority, leading to circumstances where "some . . . may well find themselves worse off with [a designated] union than with no union at all." *Id.*; *see, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 253 (2009) ("After the initial arbitration hearing, the Union withdrew the first set of respondents' grievances—the age-discrimination claims—from arbitration. Because it had consented to the contract for new security personnel . . . the Union believed that it could not legitimately object to respondents' reassignments as discriminatory.").

"There is . . . no real solution to such a problem to be found in a union's general duty of fair representation." Leader, *supra*, at 177-78. "'In establishing a regime of majority rule," the labor-relations framework seeks to secure "to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.'" *Penn Plaza*, 556 U.S. at 270-71 (quoting *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 62 (1975)). In these instances, then, coercive agency-shop arrangements force nonmembers to associate with and fund activity that affirmatively harms them. *See Knox*, 132 S. Ct. at 2289.

Lastly, coerced union funding presents other, more mundane burdens too. Even though nonmembers can be compelled to defray only certain union costs, *see infra* 11-12, separating chargeable from nonchargeable fees is a thorny problem, *Knox*, 132 S. Ct. at 2295. Because auditors accept the unions' characterization of expenses without question, labor organizations can easily "take[] a very broad view of what is chargeable" and put the onus on dissenting employees to challenge these determinations. *Id.* at 2294; *see also id.* at 2294 n.8 (remarking on "the painful burden of initiating and participating in such disputes"); Leader, *supra*, at 177 (noting, in a related context, "the lengthy and possibly expensive course of litigation"). With good reason, therefore, the Court considers agency shops an "unusual" and "extraordinary" construct. *See Knox*, 132 S. Ct. at 2291; *Davenport*, 551 U.S. at 184.

B. Coerced Union Funding Must Be Carefully Tailored to Serve the State's Interest in "Industrial Peace."

Because "the agency shop itself impinges on nonunion employees' First Amendment interests," *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 309 (1986), coerced union funding faces exacting scrutiny, *Knox*, 132 S. Ct. at 2289; *see also id.* ("[T]he compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'") (quoting *Ellis*, 466 U.S. at 455). Under the exacting-scrutiny standard, agency-shop systems "are permissible only when they serve a compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citations and quotation marks omitted); *see also id.* at 2291. This sets a high bar. Indeed, though this Court most recently termed it "exacting scrutiny," the standard approximates the traditional strict-scrutiny formulation used for other direct burdens on First Amendment rights. *Cf. Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

The Court has identified only two state interests sufficiently compelling to justify mandatory union fees—"industrial peace" and the derivative interest in avoiding free riders. *Abood*, 431 U.S. at 224; *Ellis*, 466 U.S. at 455-56. Also called "labor peace," the term "industrial peace" is shorthand for the government's interest in stabilizing labor-management relations on core issues like "wages, hours, and working conditions." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). In the workplace, it is argued, individual workers "have little, if any, bargaining power" compared to the management representatives

who oversee their employment. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 735 (1981). Collective bargaining thus serves to "defus[e] and channel[] conflict between labor and management." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 548 (1984). It furthers industrial peace, the Court has held, by facilitating the "amicable settlement of disputes" in the workplace. *Ry. Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956).

In turn, granting unions exclusive bargaining power "prevents inter-union rivalries from creating dissension within the work force . . . and frees the employer from the possibility of . . . conflicting demands from different unions." *Abood*, 431 U.S. at 221; *see also id.* at 224 (noting "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement"). Hence, in the name of industrial peace, unions are given supervening authority over a set of issues unique to the labor-management relationship: "negotiating and administering a collective-bargaining contract and . . . settling grievances and disputes." *Ellis*, 466 U.S. at 448; *Abood*, 431 U.S. at 222.

The interest directly justifying coerced nonmember payments—the so-called "free-rider" interest—follows from the interest in industrial peace. *See Knox*, 132 S. Ct. at 2290 (noting that the free-rider theory is "justified by the interest in furthering 'labor peace'"). Because unions are empowered to represent all members of their bargaining unit—union and non-union alike—the Court has held that coerced-funding arrangements aid industrial peace by taking account of free riders. *Air Line Pilots*

Ass'n v. Miller, 523 U.S. 866, 872-73 (1998). By compelling payments from all represented employees, the agency shop "counteracts the incentive that employees might otherwise have to . . . refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood*, 431 U.S. at 226. Like the industrial-peace interest, this tag-along, "anomalous" interest in eradicating free riders is a narrow one. States can "ma[ke] inroads" on employees' associational freedoms "for the limited purpose of eliminating the problems created by the 'free rider,'" but only in the labor-management sphere. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 767 (1961); *see also Ellis*, 466 U.S. at 452 ("[T]he free-rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members.").

The mere assertion of these interests does not suffice to justify compelled funding, however. In each case, state-mandated unions must demonstrate that every aspect of compelled funding is "justified by the governmental interests behind the union shop itself." *Ellis*, 466 U.S. at 456; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 518-19 (1991). Coerced funding must be "germane" to collective-bargaining activity. Nonmembers can be compelled to support only union pursuits that further the justifying state interests—that is, "the negotiation or administration of collective agreements," the "adjustment of grievances and disputes," and closely related activities. *See Street*, 367 U.S. at 768; *cf. Lehnert*, 500 U.S. at 552 (Scalia, J., concurring in the judgment in part and dissenting in part) ("In past decisions . . . , we have focused narrowly upon the union's role as an exclusive bargaining agent.").

When agency-shop measures do not serve "the governmental interests underlying [judicial] acceptance of union-security arrangements," *Lehnert*, 500 U.S. at 520, this Court has not hesitated to invalidate them, *see, e.g.*, *Street*, 367 U.S. 768 (disallowing compelled funding for political contributions); *Lehnert*, 500 U.S. at 527 (plurality op.), 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (lobbying activities unrelated to collective bargaining); *id.* at 528-29 (plurality op.), 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (public-relations campaigns). Unions may not exact fees—even temporarily—that are not tied to the state interests justifying agency shops. *Hudson*, 475 U.S. at 305. Indeed, the Court's solicitude for nonmember rights is so high that unions must follow *Hudson*'s strict notice regime before collecting any nonmember fees, *id.* at 309, as well as affirmative "opt-in" measures for certain assessments, *Knox*, 132 S. Ct. at 2296. In short—and in keeping with the heightened scrutiny the Court demands—"any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech." *Id.* at 2291.

II. The Illinois Agency-Shop Scheme Fails Exacting Scrutiny Because the State Interests Justifying Forced Association Have No Purchase Here.

The Seventh Circuit's analysis in this case bore little resemblance to exacting scrutiny. Borrowing from an assortment of statutory sources, the court concluded that Illinois exercised "significant control" over the Home Services Program (Rehabilitation Program). *Harris v. Quinn*, 656 F.3d 692, 697-98 (7th Cir. 2011). As a result, the court continued, the State could plausibly be viewed

as a "joint employer" of personal assistants. The case was thus "controlled by *Abood*," and objecting personal assistants could be bound to the full range of agency-shop obligations. *Id.* Even though Petitioners challenged the State to show how forced unionization served any compelling interest, the court gave short shrift to the case's constitutional dimensions. The state interest in industrial peace raises "numerous and complex" issues, the court reasoned, *id.* at 699 (quoting *Hanson*, 351 U.S. at 234), rendering it "a question of policy outside of the judiciary's concern," *id.*

By treating Illinois's decision to coerce support for unions as a barely reviewable policy judgment, the court of appeals failed to account for the First Amendment interests at stake. Under exacting scrutiny—the correct standard—the State's justifications for compelled union fees do not withstand inspection. By regulation, Illinois has vested individual customers with full management authority over their personal assistants; the State's role is simply "ensuring that the funds . . . are administered in accordance with all applicable laws." Ill. Admin. Code tit. 89, § 676.10. By its own design, therefore, the State of Illinois acts as an administrator, not an employer. And because the State is acting in this traditional sovereign capacity, forced unionization serves no compelling interest recognized by this Court. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (viewing the government's general interest "in achieving its goals as effectively and efficiently as possible" as "a relatively subordinate interest"). To the contrary, the labor-management issues the State cites to justify collective bargaining are exclusively the responsibility of private customers, not government actors.

A. The Medicaid Programs Vest Management Authority in the Customers, Not the State.

Under Illinois's Rehabilitation Program, each private beneficiary—or "customer"—exercises near-plenary control over his or her personal assistant (PA). By law, a customer's duties under the program include "the obligation to serve as the employer of the PA." Ill. Admin. Code tit. 89, § 676.30(a). The customer "control[s] all aspects of the employment relationship with the PA," *id.* § 676.30(b), "including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing (where, in the opinion of the customer, it is appropriate or necessary) disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." *Id.* § 676.30(a); *see also id.* § 677.200.

These contractual terms are formalized in an employment agreement between customer and PA in order "to confirm their understanding of the nature of the employment relationship involved and the extent of control that the customer retains over the services performed by the personal assistant." *Id.* § 676.130(c); *see also id.* § 676.30(q) (customer is "responsible for designating the backup personal assistant"). Customers may also require any candidate to submit to a criminal-background check, with "no obligation to share the results of the investigation with [the State]." *Id.* § 686.25. In short, the private customer is decidedly "management."[3]

3. Participants in the Home-Based Support Services Program enjoy similar autonomy in their hiring and oversight of personal-

The State has a role as well—not surprising for a government-funded program. But the State's involvement is circumscribed. The Department of Human Services (DHS) is "responsible for ensuring that the funds . . . are administered in accordance with all applicable laws." At the same time, though, the agency has no "control or input in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c). DHS counselors—the primary points of contact for customers—act as guardians of the public fisc, not overseers. By definition, counselors "help[] to ensure that the funds available . . . are properly distributed . . . ." *Id.* § 676.30(c). In defining the scope of services to be funded, they deal with the private customer, establishing a "service plan" based on the customer's needs and ensuring that the monthly expenses are within a range calculated by regulatory formula. *Id.* §§ 684.70(a), 679.50. Once the plan is established, the customer has "complete discretion" to hire any person who meets the regulation's requirements. *Id.* §§ 684.20(b), 686.10. DHS has no power to influence this employment decision—beyond confirming that the threshold regulatory conditions are met—or to ensure the quality of a personal assistant's performance.

Nor does the State's role as wage payor have the significance ascribed to it by the Seventh Circuit. True enough, the State pays Medicaid funds "directly to . . . personal assistant[s]." *Harris*, 656 F.3d at 698. But this

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care providers. As expressed in the regulation, "[t]he type, intensity and source of support services shall vary according to the individual's needs, other supports available and personal preferences, shall promote community integration, independence and self-sufficiency, and shall change as the individual's needs and preferences change." Ill. Admin. Code tit. 59, § 117.115(f).

does not signify a labor-management relationship; it is an administrative measure called for by federal law. "Because [federal] regulations . . . prohibit re-assignment of provider claims, no payment [can] be made directly to any customer . . . ." Ill. Admin. Code tit. 89, § 676.200; *see also* 42 C.F.R. § 447.10(d). Thus, Illinois regulations make clear that these payments are "on behalf of" the private customers. Ill. Admin. Code tit. 89, §§ 676.200, 676.130.

Similarly, the State is hardly in a position to "effectively" fire a personal assistant by withholding funding, contrary to the court of appeals' conclusion. *Harris*, 656 F.3d at 698. To be sure, a customer is not entitled to funding for a person who does not meet the regulatory conditions for personal assistants (for example, "hav[ing] a Social Security number"). Ill. Admin. Code tit. 89, § 686.10(a). But for those who qualify under these threshold provisions, the State has no power to second-guess the customer's employment decision. Even the counselor's role in annual PA reviews—another point the court of appeals noted—is purely advisory. *See id.* §§ 686.30(a) (requiring the customer to complete the evaluation "with assistance of the counselor"), 686.30(c) (providing that the counselor shall "mediate" the outcome of the evaluation). At base, DHS is a program administrator, ensuring that government funds aid Illinois residents "in accordance with all applicable laws." *Id.* § 676.10(c). This role exemplifies the State as sovereign, not supervisor. *See Engquist*, 553 U.S. at 598.

B. Forcibly Unionizing Personal Assistants Does Not Serve a Compelling State Interest.

Since the interactions between PAs and the State have so little in common with labor-management dealings, the interests justifying coerced union funding are not an easy fit. In the executive orders authorizing personal-assistant and provider unionization, the State cited its need for "feedback," Pet'rs App. 46a, 49a—an interest it has since recast as a need to combat "high turnover, low morale, excessive absenteeism, poor training, lack of productivity, or any combination thereof . . . ." Illinois Br. in Opp. 17; *see also* Br. of U.S. as Amicus Curiae 21. Given the complexity of the "ingredients of industrial peace," the State maintains that these "legitimate interest[s]" are insulated from judicial review. *See* Illinois Br. in Opp. 17. The Seventh Circuit agreed.

This is not exacting scrutiny. The reference to "reasonable" legislative judgments suggests something closer to rational basis. *Id.* at 17-18. And the State's justifications do not withstand inspection under any heightened review. Whatever their legitimacy, the State's declared interests do not sound in "industrial peace." Misappropriating the industrial-peace interest is nothing new. For more than a quarter-century, commentators have deplored the term as "so vague and overused in labor law that it provides little guidance to disputants or decision makers." Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 Cornell L. Rev. 245, 253 (1987). It has long been criticized as "a buzz word for any argument relying on the national interest distinct from the narrow aims of labor or management." *Id.* (discussing federal labor-relations law) (footnote omitted); *see also*

Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. Chi. L. Rev. 1012, 1017 (1984) (consigning "industrial peace" to a group of "formulas repeated until they have become platitudes").

Little has changed. The State's interest in the success of its Medicaid programs—critical though those programs may be—is not synonymous with the "familiar doctrine[]" of industrial peace. *See Abood*, 431 U.S. at 220. Again, industrial peace refers to the State's interest in stabilizing uniquely workforce-centered relations by means of a designated bargaining representative. *See Maryland v. Wirtz*, 392 U.S. 183, 191 (1968); *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180; *cf. Street*, 367 U.S. at 775 (Douglas, J., concurring). There is a "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor to manage [its] internal operation[s].'" *Engquist*, 553 U.S. at 598 (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). And the State's bare recitation of "labor peace" does not change matters. When the First Amendment is implicated, the determination whether a state has shown a compelling interest "is not to be made in the abstract." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) (citation omitted); *see also Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012) ("[O]verly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest."); *cf. Gilardi v. U.S. Dep't of Health & Human Servs.*, --- F.3d ----, 2013 WL 5854246, at *10 (D.C.

Cir. Nov. 1, 2013) (deeming government's "*ipse dixit* . . . [in]sufficient to survive strict scrutiny").

Even if the State's asserted interest were compelling, it is not clear that the interest is served by unionization—let alone that the agency-shop arrangement is "carefully tailored" to advance that interest. *See Knox*, 132 S. Ct. at 2292. High turnover, low morale, excessive absenteeism, poor training, and lack of productivity—the ills cited in the State's opposition brief—relate to personal assistants' dealings with their private customers. Training, for example, is exclusively the province of the customer. Ill. Admin. Code tit. 89, § 676.30. Absenteeism and lack of productivity, too, fall under the customers' duty to "direct[], evaluat[e,] . . . otherwise supervis[e]," and "impos[e] . . . disciplinary action against" their personal assistants. *Id.* The State is categorically excluded from these matters. *Id.* § 676.10. Compelling payments so that a union may bargain with the State on matters in which the State has neither "control [n]or input," *id.*, does not "defus[e] and channel[] conflict between labor and management," *Bildisco & Bildisco*, 465 U.S. at 548. Nor does "the union's exercise of this extraordinary power" further any other plausible state interest. *Davenport*, 551 U.S. at 184.[4]

4. Coerced union funding cannot be sustained under the "free-rider" theory either. The government's "anomalous" interest in eliminating free riders is wholly derivative of the "interest in furthering 'labor peace.'" *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2290 (2012) (citation omitted). Outside that context, the "free-rider argument[] … [is] generally insufficient to overcome First Amendment objections." *Id.* at 2289; Br. of Pet'rs 34-35.

In fact, coercing personal assistants to back unions disrupts the balance of responsibilities contemplated in the Medicaid programs themselves. These programs serve to empower beneficiaries by allowing them to preserve their autonomy and "retain control over the services they receive." Ill. Dep't of Human Servs., *Home Services Program DHS 4243*, http://www.dhs.state.il.us/page.aspx?item=36737 (last visited Nov. 27, 2013); Ill. Dep't of Human Servs., *Division of Developmental Disabilities Waiver Manual: V. Self-Directed Services and Individual Budgeting*, http://www.dhs.state.il.us/page.aspx?item=52804 (last visited Nov. 27, 2013); Br. of Pet'rs 8. To that end, Rehabilitation Program regulations exclude the State from inserting itself into "the employment relationship between the customer and the personal assistants." Ill. Admin. Code tit. 89, § 676.10; *see supra* 14-16.

Yet despite a statutory guarantee that unions would bargain with the State only on matters "that are within the State's control," 20 Ill. Comp. Stat. 2405/3(f), the resulting collective-bargaining agreement encroaches on the rights of private customers. For example, as noted, Illinois regulations assure each customer the exclusive power to control personal-assistant training. Ill. Admin. Code tit. 89, § 677.200(g). But Respondents' collective-bargaining agreement intrudes directly on customer discretion in that sphere, mandating that all new personal assistants complete a State-run orientation program and authorizing a joint union-State committee to develop a "schedule of orientations" and "guidelines for completing orientation." Agreement Between the State of Ill., Dep'ts of Cent. Mgmt. Servs. & Human Servs., and the Service Employees, Int'l Union, Local 880 Art. IX § 1 (2012), *available at* http://

www2.illinois.gov/cms/employees/personnel/documents/emp_seiupast.pdf. The agency-shop arrangement is not just detached from any compelling state interest; it does the State's Medicaid programs an open disservice.

III. The Seventh Circuit's Deferential Review Does Not Square with First Amendment Principles, and It Invites Abuse.

For the past half-century, this Court has rebuffed invitations to "extend [agency-shop decisions] beyond their proper ambit." *Davenport*, 551 U.S. at 185. Not only did the Seventh Circuit's analysis depart from that precedent, it broke faith with First Amendment principles at a fundamental level. Where government trenches on its citizens' First Amendment rights, "[p]recision of regulation must be the touchstone." *Hudson*, 475 U.S. at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (vagueness gives rise to "ad hoc and subjective" abuse). Yet in the Seventh Circuit, a state's decision to coerce support for unions answers to no limiting principle at all; citizens can qualify as public employees if they operate anywhere on an undefined spectrum of governmental control.

In an increasingly regulated private sector, this reasoning has profound consequences. Petitioners and other *amici* have identified an array of private actors who could be labeled "public employees" under the Seventh Circuit's analysis, from Social Security recipients to government contractors, from doctors to court-appointed lawyers, and even subsidized childcare providers (for whom Illinois has already authorized mandatory representation).

See Br. of Pet'rs 48-55; *see also* Amicus Br. of Cato Inst. 22-24; Amicus Br. of Ctr. for Constitutional Jurisprudence 11.

On the Seventh Circuit's reasoning, state-backed unions could conceivably intrude even further into the family unit. Take foster parents, for instance. Unlike personal assistants, Illinois unquestionably exerts "substantial control" over foster families. Foster parents must "accept agency supervision," Ill. Admin. Code tit. 89, § 402.12(f), submit to background checks, *id.* § 402.12(b), and complete agency-approved trainings, *id.* § 402.12(k)-(m). Those who own pools, hot tubs, or "outdoor fountains" must obtain CPR certification. *Id.* § 402.8(d)(5). Indoors, "[t]he springs and mattresses on each bed . . . shall be level, clean, unsoiled with no rips, tears or sags in the mattress or mattress cover . . . ." *Id.* § 402.9(k). In return, foster parents are entitled to payment from the State "commensurate with the care needs of the child as specified in the service plan." *Id.* § 340.40(a)(4); *see also id.* § 347.70(a)(1) (Grievances are adjudicated by a State agency through procedures "developed with input from foster parents"). In the Seventh Circuit, presumably, the State's decision to authorize unions to coerce fees from foster parents would be a clear-cut case. And the prospect is far from hypothetical; earlier this year, Oregon lawmakers considered a bill that would designate foster parents as "public employees" with "the right to form, join and participate in the activities of labor organizations . . . ." S.B. 570 77th Leg. Assemb., Reg. Sess. (Or. 2013).

Like the unions that pressed an unacceptably "broad definition of germaneness" two Terms ago, *see Knox*, 132 S. Ct. at 2295, Respondents here invite a boundless

conception of "public employees." The Seventh Circuit accepted Respondents' view, though it tried to soften the blow by addressing itself only to the parties' controversy. *Harris*, 656 F.3d at 699 ("We once again stress the narrowness of our decision today."). But the court's respect for that "essential limit" on judicial power does not reduce the weight of its ruling. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). "Precedents once established often gain momentum by the force of their existence." *Lathrop v. Donohue*, 367 U.S. 820, 878 (1961) (Douglas, J., dissenting). This Court should thus reaffirm that coerced union support—like all other forms of compelled association—is constitutional only in the "exceedingly rare" case in which a state actor meets exacting scrutiny. *Knox*, 132 S. Ct. at 2289. "[E]xceptional circumstances should be shown," *Lathrop*, 367 U.S. at 882 (Douglas, J., dissenting), and Respondents have offered none here.

CONCLUSION

For all of the reasons set forth herein and all those set forth in Petitioners' brief, *amici curiae* Albert Contreras, Patricia Griggs, and Jonathan Kiss respectfully request the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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