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 THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 12 million working men and women.[1] This case addresses the constitutionality of contract clauses that require public employees who benefit from union representation to share the costs of negotiating and enforcing collective bargaining agreements. Many AFL-CIO affiliates represent public employees and negotiate collective bargaining agreements containing clauses that require the covered employees to financially support collective bargaining.

STATEMENT

Personal assistants employed in the Illinois Home Services Program provide in-home care to individuals with disabilities in return for hourly wages and fringe benefits that are set and paid by the State of Illinois and not by the individuals receiving care. Pet. App. 3a. The State not only sets the hourly wage rate but also the number of hours the personal assistants work. 89 Ill. Admin. Code § 686.10(h)(2). The State specifies both the general categories of

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[1] Counsel for the petitioners and counsel for the respondents have consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

services personal assistants can provide, *id.* § 686.20, as well as the precise services specific personal assistants must provide individual customers together with the frequency and the time allowed for each task, *id.* § 684.50. In addition to establishing the personal assistants' rate of compensation, benefits package, hours, and tasks, the State establishes minimum, required qualifications for the job. *Id.* § 686.10. Subject to approval by the State, personal assistants enter into State-prescribed service contracts with the individuals receiving in-home care. *Id.* § 677.200(g). The State requires that personal assistants' work hours be recorded in a form that is specified by and must be submitted to the State. *Id.* § 686.10(h)(2). The State also requires that personal assistants' performance be evaluated annually on a State-provided form that must be submitted to the State. *Id.* § 686.30. Finally, the State can terminate a personal assistant for specified forms of misconduct, including failure to perform the State-specified tasks. Illinois Department of Human Services, *Customer Guidance for Managing Providers* 8.

The Illinois Public Labor Relations Act (IPLRA) allows personal assistants to engage in collective bargaining with the State over those terms and conditions of employment controlled by the State. 5 ILCS 315/7. To engage in collective bargaining, a majority of the personal assistants in an appropriate unit select an exclusive bargaining representative. 5 ILCS 315/3(f). Any agreement reached between the State and an exclusive representative must provide for final and binding arbitration to resolve all disputes under the agreement. 5 ILCS 315/8.

In negotiating and enforcing the agreement, the exclusive representative has a duty to fairly represent all employees in the bargaining unit, regardless of whether they are members of the union. 5 ILCS 315/6(d). The exclusive representative and the State may include a "fair share" provision in the agreement requiring all covered employees to pay the representative a fee covering their share of the costs of representation. 5 ILCS 315/6(e). Where a "fair share" provision has been negotiated, the exclusive representative certifies to the State the amount constituting each employee's proportionate share of the costs of representation, and that amount is deducted from the collectively-bargained wages of those employees who are not otherwise paying full membership dues to the representative and transmitted to the representative. *Ibid.*

Several of the petitioners are personal assistants covered by a collective bargaining agreement containing a "fair share" provision. Pet. App. 5a. The covered petitioners brought suit claiming that the requirement to pay fair share fees violates the First Amendment. *Id.* at 6a. The petitioners sought an injunction against being required to provide support to any exclusive representative. Complaint Prayer for Relief ¶ A (1) & (2). In addition, they sought to have the fair share provision in the collective bargaining agreement declared void and to have the fair share fees that had been deducted from their wages by the State returned to them. *Id.* ¶s A (3) & C (1). The petitioners have not sought to strike down any other provision of the agreement, most particularly, the negotiated wage scales and benefit provisions that have provided the unit with annual wage increases and valuable fringe benefits.

The courts below found it dispositive that the petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining" and that "[t]he Supreme Court has long approved collective bargaining agreements that compel even dissenting, nonunion members to financially support the costs of collective bargaining." Pet. App. 7a. *See also id.* at 35a ("Plaintiffs have not alleged that the exclusive representation system here has imposed any burden on Plaintiffs beyond supporting the collective bargaining arrangement from which they benefit."). Finding this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to be controlling, the courts below concluded that "the State may compel the personal assistants . . . to financially support a single representative's exclusive collective bargaining representation." Pet. App. 13a-14a.

SUMMARY OF ARGUMENT

This Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), hold that requiring employees to contribute financial support to the costs of representation in collective bargaining and contract enforcement does not violate the First Amendment. In this regard, *Hanson* and *Abood* represent a particular application to the collective bargaining context of the principle that a state does not violate the First Amendment by adopting reasonable economic regulations that have incidental effects on the freedom of covered

individuals to speak or to refrain from speaking. The petitioners' contention that *Hanson* is not a First Amendment precedent and was therefore incorrectly treated as such in *Abood* is baseless. Since the petitioners do not allege that they have been compelled to financially support union expressive activities outside the realm of collective bargaining, their First Amendment challenge to the fair share agreement fails.

ARGUMENT

In the courts below, petitioners claimed that the First Amendment forbids the State of Illinois from ncluding in its collective bargaining agreement covering personal assistants a provision requiring all covered individuals to pay their share of the costs incurred by their representative in negotiating and enforcing the agreement. In this Court for the first time, petitioners have added a claim that the First Amendment forbids the State from even negotiating a collective bargaining agreement covering the unit of personal assistants. The collective bargaining agreement here does nothing more than set those economic terms of the personal assistants' employment that are within the State's control. And the petitioners do not allege that the financial support for the collective bargaining representative required by the agreement extends beyond the cost of negotiating and enforcing the agreement. That being so, this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), dispose of petitioners' First Amendment claims.

I. THIS COURT'S DECISION IN *RAILWAY EMPLOYES' DEPT. v. HANSON*, AS CORRECTLY APPLIED IN *ABOOD v. DETROIT BOARD OF EDUCATION*, ESTABLISHES THAT REQUIRING PUBLIC EMPLOYEES TO FINANCIALLY CONTRIBUTE TO THE COSTS OF COLLECTIVE BARGAINING DOES NOT VIOLATE THE FIRST AMENDMENT.

Railway Employes' Dept. v. Hanson considered a First Amendment challenge to § 2, Eleventh of the Railway Labor Act, which authorized the inclusion of a union shop provision in collective bargaining agreements covered by that statute, despite applicable state law prohibiting such provisions. 351 U.S. at 232. The Court unanimously held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* at 238. At the same time, the Court added that "[i]f other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." *Ibid.*

Machinists v. Street, 367 U.S. 740 (1961), "squarely . . . present[ed] the constitutional questions reserved in *Hanson*," *id.* at 749, because the lower court had found that the required financial support had been "used in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plain-

tiffs," *id.* at 746 n. 2. The Court avoided deciding whether requiring financial support for such speech violates the First Amendment by concluding that the Railway Labor Act could be construed as "den[ying] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 750.

The core issue addressed in *Abood v. Detroit Board of Education* was "whether an agency-shop provision in a collective-bargaining agreement covering government employees is, as such, constitutionally valid," and the Court concluded that *Hanson* and *Street* "on their face go far toward resolving th[at] issue." 431 U.S. at 217. Having first observed that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," the *Abood* Court went on to say 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 established by Congress." *Id.* at 222. The Court concluded that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions . . . appear to require validation of the agency-shop agreement before us." *Id.* at 225-26. The Court explained that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights" and thus *Hanson* was "controlling . . . insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232.

In sum, as this Court recently observed,

> "In *Hanson*, *Street*, and *Abood*, the Court set forth a general First Amendment principle: The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment. Taken together, *Hanson* and *Street* make clear that the local union cannot charge the nonmember for certain activities, such as political or ideological activities (with which the nonmembers may disagree). But under that precedent, the local can charge nonmembers for activities more directly related to collective bargaining." *Locke v. Karass*, 555 U.S. 207, 213 (2009).

The petitioners have sought to distinguish *Abood* on the ground that aspects of their employment are under the control of the individuals to whom the assistants provide care, but there is nothing in *Abood* to suggest that variations in the employment relation make any difference to the constitutional analysis. Indeed, the fact that *Abood* treated *Hanson* – a decision involving the railroad industry – as controlling in the public sector establishes that the particular nature of the employment relation does not matter at all. *See also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722 (1996).

The petitioners "have not alleged that the exclusive representation system here has imposed any burden on [them] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App.

35a. *See also id.* at 7a (petitioners "do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining"). Thus, under the square holdings of *Hanson* and *Abood*, their First Amendment challenge to the collective bargaining arrangement and to the fair share fee covering the costs of representation are without merit.

II. *ABOOD* CORRECTLY TREATED *HANSON* AS A CONTROLLING FIRST AMENDMENT PRECEDENT.

Recognizing that *Abood*'s application of *Hanson* to public sector collective bargaining is fatal to their First Amendment claims, petitioners boldly argue that "*Abood* should be overruled because it failed to give adequate recognition to First Amendment rights." Pet. Br. 18 (capitalized and boldfaced heading in original). There is no substance to petitioners' attempt to impugn *Abood*.

Far from being "offensive to the First Amendment," Pet. Br. 23, *Abood* is the fount of this Court's First Amendment jurisprudence concerning compulsory fees in a wide range of settings beyond that of collective bargaining. "A proper application of the rule in *Abood*," *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001), has "provide[d] the beginning point for [this Court's] analysis," *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000), in every subsequent case involving a First Amendment challenge to a compulsory fee. The Court has "repeatedly adhered to [*Abood*'s] reasoning in cases of compelled contributions," and, thus, "the centrality of the *Abood* line of authority for resolving [such cases]" has been beyond

dispute. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 482-83 (1997) (Souter, J., dissenting). *See also id.* at 478 ("I certainly agree with the Court that a proper understanding of *Abood* is necessary for the disposition of this case.").

Petitioners' explication of the asserted failures of *Abood*'s First Amendment analysis simply exposes their own misunderstanding of this Court's decisions. The sum and substance of that critique is as follows:

> "As the *Abood* majority saw it, a mandatory-fee agreement was 'constitutionally justified by the legislative assessment of the important contribution of the union . . . to the system of labor relations established by [the legislature].' *Id.* at 222. * * * For this proposition the Court relied on *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956)[.] * * * However, the First Amendment did not factor into that Commerce Clause decision. Thus, *Abood* turned what had been a Commerce Clause, rational-basis justification for a particular Railway Labor Act provision into a government interest so compelling that it could trump public employees' First Amendment right to free association." Pet. Br. 18-21.

Contrary to the petitioners' premise, *Hanson* is a First Amendment precedent and *Abood* correctly followed *Hanson* in holding that the First Amendment does not prohibit a state government from setting its terms of employment through collective bargaining and requiring the affected state employees to bear the costs of representation in that bargaining process.

In *Hanson*, this Court reviewed a decision of the Nebraska Supreme Court that "held that the union shop agreement violates the First Amendment in that

it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." 351 U.S. at 230. The principal question addressed by this Court was whether the Railway Labor Act's authorization of such agreements raised "problems . . . under the First Amendment" in that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. Addressing this question, *Hanson* held that so long as "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining," *id.* at 235, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," *id.* at 238. Thus, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[]." *Ibid.*[2]

Abood found *Hanson* to be "controlling . . . insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. And, as Justice O'Connor correctly observed, this application of *Han-*

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[2] Precisely because *Hanson* is a First Amendment precedent, it was understood to directly govern a "lawyer['s] claim that he could not constitutionally be compelled to join and financially support a state bar association." *Keller v. State Bar of California*, 496 U.S. 1, 7 (1990). *See id.* at 7-9, quoting *Lathrop v. Donohue*, 367 U.S. 820, 842-43 & 849 (1961).

son is merely a "rul[ing] that a State may compel association for the *commercial purposes* of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances." *Roberts v. United States Jaycees*, 468 U.S. 609, 638 (opinion of O'Connor, J., concurring) (emphasis added). In this regard, Justice Souter has aptly explained:

> "Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and parcel of the very economic transactions between employees and employer that [the government] can regulate, and which it could not regulate without these potential impingements on the employees' First Amendment interests. *Abood* is thus a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions. See *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (commercial conduct may be regulated without offending First Amendment despite use of language); *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (opinion of O'Connor, J., concurring in part and concurring in judgment) (in 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'); see also *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (constitutional right of expressive association is not implicated by every instance in which individuals choose their associates); *Dallas v.*

Stanglin, 490 U.S. 19, 25 (1989) (same); *Ellis v. Railway Clerks*, 466 U.S. [435,] 456 [(1984)] (funding of union social activities, as opposed to expressive activities, has minimal connection with First Amendment rights)." *Glickman*, 521 U.S. at 484-85 (dissenting opinion).[3]

In criticizing *Abood*'s reliance on *Hanson*, petitioners rely principally on Justice Powell's concurring opinion. Pet. Br. 21-23. But *Abood*'s core ruling regarding collective bargaining was so uncontroversial that a short while later the Court in *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of

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[3] In *Glickman*, the Court considered whether the First Amendment allows the federal government to "impose assessments on [the growers and distributers of certain tree fruits] that cover the expenses of administering [marketing] orders, including the cost of generic advertising of California nectarines, plums, and peaches." 521 U.S. at 460. While the Court divided over the compelled support for advertising, both the majority and the dissenting opinions proceeded on the understanding that compelled support for the core regulatory activities raised no substantial First Amendment question, even though those activities contained "elements of speech and association" *id.* at 484, such as "joint research and development projects" and "committees composed of producers and handlers of the regulated commodity . . . who recommend rules to the Secretary [of Agriculture] governing marketing matters," *id.* at 461-62. *Accord United Foods*, 533 U.S. at 415 ("[T]he majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns.").

employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). Justice Powell joined the summary affirmance of the lower court decision in *Knight*, which is not surprising since he agreed with *Abood*'s holding that spreading the costs of negotiating economic terms and handling employment-related grievances among all benefitted employees does not raise any substantial First Amendment issue. *Abood*, 431 U.S. at 263 n. 16. Justice Powell's objection to the *Abood* majority opinion was its "apparent[] rul[ing] that public employees can be compelled by the State to pay full union dues to a union with which they disagree, subject only to a possible rebate . . . [of] some portion of their dues . . . spent on 'ideological activities unrelated to collective bargaining.'" *Id.* at 245. *See also id.* at 250 & 253.

Knight relies on *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), as establishing that the First Amendment leaves "the State . . . free to consult or not to consult whomever it pleases" on employment matters. 465 U.S. at 285. In *Smith*, the Court rejected a claim that the Highway Commission's requirement that its employees submit their employment grievances on an individual basis "denied the union representing the employees the ability to submit effective grievances on their behalf and therefore violated the First Amendment." 441 U.S. at 463. The Court did so based on its conclusion that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize the [union] and bargain with it." *Id.* at 465.

While in *Smith* "the government listened only to individual employees and not to the union," the Court in *Knight* held the "applicable constitutional principles" are the same where "the government [negotiates] with the union and not with individual employees." 465 U.S. at 286-87.

Knight explained that "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" intended to result in a collective bargaining agreement for the simple reason that "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Knight*, 465 U.S. at 291. "To attain the desired benefit of collective bargaining, union members and nonmembers [a]re required to associate with one another, and the legitimate purposes of the group [a]re furthered by the mandated association." *United Foods*, 533 U.S. at 414. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 50 (1983) (granting union access to school mail system allows it "to perform effectively its obligations as exclusive representative" and thus "may reasonably be considered a means of insuring labor peace within the schools"). There can be little doubt that requiring the represented employees to financially support the costs of representation is rationally related to the system of collective bargaining. *See* Richard A. Posner, *Economic Analysis of Law* 430 (8th ed. 2011) ("The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that

would otherwise plague the union as a large-numbers cartel.").[4]

The only thing at issue in this case is the decision by the State of Illinois to engage in collective bargaining with the chosen representative of the personal assistants over the compensation paid by the State for their services and to include in the resulting agreement a provision requiring the personal assistants to contribute to the costs incurred by their representative in negotiating and enforcing the agreement. The State's decisions in these regards are rationally related to its system for establishing the economic terms of employment for personal assistants and thus do not result in any infringement of the personal assistants' First Amendment rights.

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[4] The economic literature recognizes that "union bargaining services . . . have economic properties identical to those which define that class of goods and services traditionally labeled 'collective' or 'public' in economic literature" and that "the existence of collective goods requires that coercive arrangements be created if the society is to provide these goods equitably and efficiently." Allan G. Pulsipher, *The Union Shop: A Legitimate Form of Coercion in a Free-Market Economy*, 19 Ind. & Lab. Rel. Rev. 529, 529 & 531 (1965-66). Thus, "widely accepted principles of economic theory can be used to substantiate union demands for the power to force those who benefit from their bargaining activities to pay for them." *See id.* at 530-31 (surveying the literature on the "theory of collective or public goods").

III. THE *ABOOD* LINE OF CASES ESTABLISHES A BALANCING TEST FOR DETERMINING WHETHER THE USE OF FAIR SHARE FEES FOR EXPRESSIVE ACTIVITIES UNRELATED TO COLLECTIVE BARGAINING IS CONSTITUTIONAL.

Of course, *Abood* did more than simply apply *Hanson* to public sector collective bargaining. Where the *Abood* decision broke new ground was in addressing the extent to which public employees could be compelled to financially support expressive activities outside the realm of collective bargaining.

Abood "present[ed] constitutional issues not decided in *Hanson* or *Street*," because the state law at issue had been construed to allow "the use of nonunion members' fees for purposes other than collective bargaining." *Abood* 431 U.S. at 232. The *Abood* Court concluded that "[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id.* at 234. And, the Court held that the same "principles [that] prohibit a State from compelling any individual to affirm his belief in God or to associate with a political party" also "prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

In remanding the case for further proceedings, the *Abood* majority remarked that "[t]here will, of course, be difficult problems in drawing lines between collective-bargaining, for which contributions may be compelled, and ideological activities unrelated to col-

lective bargaining, for which such compulsion is prohibited," and that the "line . . . may be hazier" in the public sector where "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities" and where "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236. The *Abood* majority also instructed the lower court that "[i]n determining what remedy will be appropriate if the appellants prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. Justice Powell objected to this aspect of the majority opinion, because he felt that this ruling was "not only unnecessary on th[e] record" but "unsupported by either precedent or reason." *Id.* at 245 (Powell, J., concurring in the judgment).

The *Abood* majority opinion expressly left "some leeway for the leadership of the group" in "act[ing] to promote the cause which justified bringing the group together." 431 U.S. at 223 (quotation marks and citation omitted). "In *Ellis* [*v. Railway Clerks*, 466 U.S. 435 (1984),] and *Lehnert* [*v. Ferris Faculty Assn.*, 500 U.S. 507, 516 (1991)], the Court . . . refined the boundaries of *Abood*'s constitutional 'leeway' by describing the nature of the cost elements that the [union], constitutionally speaking, could include, or which the [union] could not constitutionally include, in the serv-

ice fee." *Locke*, 555 U.S. at 214.[5] In so doing, the Court has articulated the following test for determining which nonbargaining uses – i.e., uses beyond the representational activities – are chargeable:

> "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.

The *Ellis/Lehnert* elaboration of *Abood* defines a legal analysis that is similar to that followed in determining the constitutionality of a public employer's restrictions on its employees' speech as citizens on matters of public concern. *See Borough of Duryea v. Guarnieri*, 564 U.S. ___, 131 S.Ct. 2488, 2493 (2011) ("Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against 'the in-

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[5] The Court subsequently elaborated the procedural aspects of *Abood* by specifying "the constitutional requirements" for agency fee objection procedures in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). *Knox v. Service Employees Local 1000*, 132 S.Ct. 2277, 2291 (2012), further elaborated the procedural requirements by ruling that a union may not charge nonmembers "a special assessment billed for use in electoral campaigns." Contrary to what the petitioners apparently believe, the *Knox* opinion did not invite a wholesale attack on *Abood*'s central holding regarding financial support for collective bargaining; indeed, the *Knox* opinion expressly stated that it was "not revisit[ing]" prior cases in the *Abood* line of precedents. *Id.* at 2289.

terest of the State, as an employer, in promoting the efficiency of the public services it performs through it employees.'"); *Connick v. Myers*, 461 U.S. 138, 150 (1983) ("[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."). The state's authority to act is at its greatest with respect to the regulation of employment-related matters such as collective bargaining over terms of employment and controlling an employee's performance on the job. When the state goes beyond regulating employment-related matters, it is necessary to weigh the state's interests against the adverse effects of its actions on the affected employees' First Amendment rights. But here the State has required nothing more than financial support for the costs of representation within a system of collective bargaining over economic terms of employment.

IV. THE COLLECTIVE BARGAINING AT ISSUE HERE IS NOT SIMILAR TO LOBBYING IN ANY CONSTITUTIONALLY RELEVANT SENSE.

Petitioners attempt to invoke *Lehnert* by asserting that the collective bargaining provided for by the Illinois statute is "functionally indistinguishable" from "lobby[ing]." Pet. Br. 38. However, *Lehnert*'s description of what characterizes "lobbying" in the sense relevant here makes it clear that the negotiations supported by the personal assistants' fees do not constitute "lobbying."

Lehnert identified three aspects of "lobbying" that were relevant to the "hold[ing] that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities

outside the limited context of contract ratification or implementation." 500 U.S. at 522. In each respect, the negotiations at issue here are fundamentally different from "lobbying."

First, *Lehnert* noted that "it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities." 500 U.S. at 521. This is so, "because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all," and thus "[i]ndividual employees are free to petition their neighbors and government in opposition to the union which represents them" so that "worker and union cannot be said to speak with one voice." *Ibid.*

Negotiating sessions held pursuant to the IPLRA constitute "collective bargaining negotiations between union and management" and are certainly not "public fora open to all." *Lehnert*, 500 U.S. at 521.[6] IPLRA follows typical public sector bargaining laws in providing that in such "closed bargaining sessions" the govern-

[6] Correspondingly, the union is not free to bargain with any public official it chooses but must bargain with the State's designated representative. As in other bargaining under the IPLRA, the Illinois Department of Central Management Services and a designee of the relevant program department, here the Department of Human Services, act as the State's representatives in collective bargaining over the terms of the personal assistants' employment. *See* http://www2.illinois.gov/cms/Employees/Personnel/Pages/PersonnelLaborRelations.asptx. When the union engages in lobbying it is free to address any public official who is willing to listen.

ment will "admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Jt. School Dist, No. 8. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167, 178 (Brennan, J., concurring). Such sessions are exempt from the Illinois Open Meetings Law. 5 ILCS 120/2(c)(2). And, what occurs at such sessions is exempt from public disclosure under § 7 of the Illinois Freedom of Information Act. 5 ILCS 140/7(1)(p). Illinois law thus shields collective bargaining from public disclosure in the same manner that it shields other types of commercial contract negotiations. *See, e.g.*, 5 ILCS 120/2(c)(5)("purchase or lease of real property") & (c)(7) ("sale or purchase of securities, investments, or investment contracts"); 5 ILCS 140/7(1)(h)("Proposals and bids for any contract, grant, or agreement") & (r)("records, documents, and information relating to real estate purchase negotiations"). *See City of Madison Jt. School Dist.*, 429 U.S. at 175 n. 6 (drawing a distinction of constitutional significance between the school board's "open session where the public was invited" and "true bargaining sessions between the union and the board . . . conducted in private").

Second, *Lehnert* noted that "the so-called 'free-rider' concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement," because the "policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." 500 U.S. at 521.

Collective bargaining on behalf of personal assistants, however, is expressly limited to establishing the

terms of employment controlled by the State through negotiations with designated executive branch representatives. 5 ILCS 315/7. Thus, the negotiations primarily concern the personal assistants' compensation and have, in fact, resulted in annual increases in their wages and an expanded range of fringe benefits. The State has a rational basis for "distribut[ing] fairly the cost of [bargaining] among those who benefit." *Abood*, 431 U.S. at 221. *See Hall v. Cole*, 412 U.S. 1, 9 (1973) (citation and quotation marks omitted) (endorsing a rule that "shifts the costs of litigation to the class that has benefited from them").

Finally, and "most important," *Lehnert* observed that "allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present additional interference with the First Amendment interests of objecting employees." 500 U.S. at 521 (internal quotation marks omitted). "There is no question as to the expressive and ideological content of these activities," and "unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Ibid.*

Once again, the limited scope of negotiations under the IPLRA demonstrates how fundamentally different that activity is from lobbying. Such negotiations involve no effort "to communicate to the public or to advance a political or social point of view beyond the employment context." *Guarnieri*, 131 S.Ct. at 2501. And, the matters discussed – principally the economic terms of the personal assistants' employment – are entirely nonideological and virtually certain to be uncontroversial among

the fee payers. Significantly in this regard, while the petitioners have sought to strike down the contract provision requiring that they contribute a very modest amount to the cost of collective bargaining, they have been content to leave standing the provisions guaranteeing them substantial annual wage increases and valuable health insurance benefits.

V. POLICY CHOICES REGARDING PUBLIC SECTOR COLLECTIVE BARGAINING SHOULD BE MADE THROUGH THE LEGISLATIVE AND POLITICAL PROCESSES.

The arguments advanced by petitioners make it "appropriate to emphasize the difference between policy judgments and constitutional adjudication." *Glickman*, 521 U.S. at 475. "Much might be said pro and con if the policy issue [of fair share fees] were before [the Court]." *Hanson*, 351 U.S. at at 233. Indeed, much has recently been said pro and con in legislative and political debates over public sector collective bargaining generally and fair share fee agreements specifically. *See* Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512 (2013) (noting "major swings in the pendulum concerning public employee collective bargaining rights"); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. Lab. & Emp. Law 149, 150 (2012) (noting "significant rewriting of statutes, and the creation and elimination of statutes").

In 2012, for example, two states adopted laws prohibiting fair share fee agreements in the public sector. *See* Mich. Pub. Acts No. 349 (2012); Ind. Code § 22-6-6-8 (2012). Other states have recently enacted legis-

lation affecting specific groups of public employees' rights to bargain collectively. In Wisconsin, for example, the legislature decided to drastically limit collective bargaining and bar the negotiation of fair share agreements for most state employees but saw fit to preserve bargaining for public safety and transit employees and, over a more limited range, for municipal employees. 2011 Wis. Act 10 §§ 265 & 279-80 (amending Wis. Stat. § 111.70(1)(a)). In 2011, recognizing the sensitive balancing of interests that adjusting collective bargaining rules requires, the Indiana legislature determined that it would be prudent to limit the scope of public school teachers' permissible subjects of bargaining but to otherwise maintain collective bargaining. Ind. Code § 20-29-6. *See also* Tenn. Code Ann. § 49-5-601 (replacing formal collective bargaining rights for public school teachers with "collaborative conferencing" rights). Other states, like Oklahoma, declined to resolve the complex political questions involved in altering collective bargaining schemes on a state-wide basis, instead vesting municipal authorities with discretion to decide whether or not to engage in collective bargaining with their employees. H.B. 1593 (Okla. 2011).

State efforts to restrict or limit collective bargaining and to alter fair share fee arrangements are often accompanied by considerable public debate. For instance, in Ohio, the state legislature passed a bill that would have sharply limited public employees' collective bargaining rights, *see* S.B. 5 (Ohio 2011), but it was repealed by Ohio voters by referendum. Given the fraught nature of these political decisions, it is unsurprising that many states that considered enacting legislation to limit or eliminate

public sector collective bargaining[7] or to abolish fair share fee arrangements[8] ultimately declined to do so.

"The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234. The political process is the appropriate means for resolving this policy dispute. And petitioners should not be allowed to substitute adjudication for engagement in the democratic process.

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[7] *See*, *e.g.*, H.B. 200 (Alaska 2011); S.B. 38 (Colo. 2011); H.B. 416 (Ga. 2011); S.B. 278 (Haw. 2011); S.B. 1242 (Idaho 2012); S.B. 1556 (Ill. 2011); S.B. 2187 (Iowa 2012); Leg. Res. 29 (Neb. 2012) (proposing a constitutional amendment to prohibit the state from engaging in collective bargaining); H.B. 1645 (N.H. 2012); H.B. 4194 (S.C. 2012); H.B. 1261 (S.D. 2012); S.B. 5349 (Wash. 2012); H.B. 58 (Wyo. 2012).

[8] *See*, *e.g.*, S.B. 41 (Ala. 2013) (proposing a state constitutional amendment); H.B. 5168 & 5169 (Conn. 2013); H. J. Res. 1 (Iowa 2013) (proposing a state constitutional amendment); H.B. 144 (Ga. 2013) (proposing a state constitutional amendment); H.B. 3160 (Ill. 2013); H.B. 308 (Ky. 2013); H.B. 537 & 582 (Me. 2013); H.B. 318 (Md. 2013); H.B. 323 (N.M. 2013); H.B. 192 (Minn. 2012); H.B. 95 (Mo. 2013); Draft B. 229 (Mont. 2012); H.B. 323 (N.H. 2013); Assemb. B. 136 (N.J. 2013); H.B. 53 (N.C. 2013) (proposing a state constitutional amendment); H. J. Res. 5 (Ohio 2013) (proposing a state constitutional amendment); H.B. 151 & 152 (Ohio 2013); H.B. 3062 (Or. 2013); H.B. 50 (Pa. 2013); H. J. Res. 7 (Va. 2013) (proposing a state constitutional amendment); H.B. 2010 (W. Va. 2013); H. J. Res. 30 (W. Va. 2012) (proposing a state constitutional amendment); S.B. 409 & 2258 (R.I. 2012); H.B. 134 (Alaska 2011); S.B. 1998 (Mass. 2011).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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