No. 11-681

In The Supreme Court Of The United States

PAMELA HARRIS ET AL.,

PETITIONER,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, CONNECTICUT, MARYLAND, MASSACHUSETTS, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici States have each enacted homecare systems that, like the Illinois system, include collective bargaining, and we have seen enormous benefits from such systems. States pay homecare workers to care for some of our most vulnerable elderly and disabled citizens, which not only allows these citizens to remain in their homes, but also saves states vast sums as compared to institutionalization. The individual clients who receive services, however, have no ability to look out for such broader goals as ensuring an adequate and well-trained homecare workforce. The amici States have stepped in to fill this role, and collective bargaining is a key component of our efforts. In partnership with homecare workers, the amici States have negotiated training requirements, referral programs, and optimized wage and benefit packages that have allowed us to recruit and better retain a talented pool of homecare workers.

As sovereign states and proprietors of our own homecare programs vital to our residents, states should be allowed the flexibility to structure our programs. Collective bargaining is a key part of these programs and, as this Court has long recognized, exclusive representation and fair-share fees are important parts of a fair and effective collective bargaining system. The amici States want the Court to affirm longstanding precedent recognizing their authority so that we can continue developing an adequate and well-trained supply of homecare workers and ensure that our citizens can receive quality homecare now and into the future.

SUMMARY OF ARGUMENT

Homecare keeps many of our elderly and disabled citizens in their homes and out of institutions. The need for an adequate and well-trained supply of homecare workers is great, but individual clients have no ability to ensure that supply, and historically there has been a shortage of skilled homecare workers in many states, sometimes leading to costly and unnecessary institutionalization.

The amici States have passed laws that allow for collective bargaining to improve the working conditions and training of homecare workers. These laws help ensure that enough workers enter and remain in the profession to meet the needs of an aging population. The amici States passed these laws in justifiable reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), which recognized that effective collective bargaining is grounded in exclusive representation and fair-share fees or union shop agreements.

Although this Court has never questioned the core holdings of *Abood*, petitioners ask the Court to overrule it. But states have for decades acted in justifiable reliance on *Abood*, and petitioners provide none of the special justifications required to abandon longstanding precedent. In addition, the Court traditionally gives great deference to states acting in their proprietary capacities. States act as proprietors when they decide how to most effectively and efficiently deliver state-funded services to state citizens. Each amici State made a proprietary policy decision to authorize collective bargaining to address

homecare workforce issues because a quality and stable homecare workforce is essential to delivery of homecare services.

If the Court were to accept petitioners' unsupported claims and reject longstanding precedent, it would not only undermine the important benefits arising from collective bargaining and potentially lead to increased institutionalization of elderly and disabled citizens, but it would also undermine the amici States' prerogatives to run their own programs. The amici States therefore join Illinois in asking the Court to reject petitioners' arguments and affirm the Seventh Circuit's decision.

ARGUMENT

A. States Have A Vital Interest In Ensuring An Adequate And Well-Trained Homecare Workforce, Which Has Historically Been Extremely Difficult

Most Americans who need long-term care would rather stay at home than be placed into long-term care institutions.[1] Homecare workers allow patients to stay at home by assisting with activities of daily living such as bathing, dressing, and managing medications.[2] Through Medicaid, states fund homecare workers for low-income patients.

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[1] Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1837 (July 2007).

[2] Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy*, 25 Ann. Rev. Pub. Health 521, 522 (2004), *available at* http://www.leadingage.org/uploadedFiles/Content/About/Center_for_Applied_Research/Publications_and_Products/Direct_Care_Worker_Home_Care_Policy.pdf.

Homecare is difficult and physically demanding work.[3] Historically, homecare workers have also faced low wages, few benefits, frequent injuries, and unpredictable hours,[4] with no means to collectively address such challenges in their interactions with their individual clients.

In part, for these reasons, homecare workers have typically turned over at a very high rate,[5] which harms state budgets and makes it difficult to develop a well-trained workforce.[6] Each time a worker leaves, the cost to states can be as high as $5,200.[7] With hundreds of thousands of people working in homecare[8] and an annual turnover rate of roughly fifty percent in many states, the cumulative replacement costs for states are enormous. This high

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[3] Smith, 92 Iowa L. Rev. at 1871.

[4] *Id.* at 1871-72; Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 Buff. L. Rev. 323, 329 (April 2013); Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1397 (May 2008); Dorie Seavey & Abby Marquand, *Caring in America: A Comprehensive Analysis of the Nation's Fastest-Growing Jobs: Home Health and Personal Care Aides* 60 (Dec. 2011), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.

[5] Smith, 61 Buff. L. Rev. at 336 (explaining that at least forty-four percent and possibly as high as ninety-five percent of homecare workers annually leave the homecare workforce).

[6] Dorie Seavey, *The Cost of Frontline Turnover in Long-Term Care* 6, 20 (Oct. 2004), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf.

[7] *Id.* at 11; Smith, 61 Buff. L. Rev. at 334-35.

[8] Smith, 92 Minn. L. Rev. at 1393 n.17.

turnover also may drive more long-term care clients from their homes to institutions, thereby limiting clients' freedom and escalating the costs to states and taxpayers.[9]

These problems will compound as the nation's baby boomers age. As of 2010, about forty million Americans, or thirteen percent of the population, were sixty-five or older.[10] By 2030, that number will likely increase to seventy-two million, or twenty percent of the population.[11] As a result, two categories of homecare jobs are expected to rank as the second and third fastest-growing occupations in the nation.[12]

Although the need for homecare workers is great, many states face a crisis in attracting and retaining homecare workers.[13] In a recent survey, ninety-seven percent of responding states reported that the homecare worker shortage is a serious problem.[14] For that reason, many states are taking

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[9] Smith, 92 Iowa L. Rev. at 1848; Charlene Harrington, Terence Ng & Martin J. Kitchener, *Do Medicaid home and community based service waivers save money?*, 30 Home Health Care Servs. Q. 198, 208-09 (2011) (homecare rather than institutionalization saves states approximately $57 billion annually).

[10] Smith, 61 Buff. L. Rev. at 325.

[11] *Id.*

[12] Paraprofessional Healthcare Institute (PHI), *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (Dec. 2009), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-StateSweepReport%20final%2012%209%2009.pdf.

[13] Smith, 61 Buff. L. Rev. at 336.

[14] PHI, *The 2007 National Survey* at 2.

steps to improve homecare working conditions, thereby enticing workers into homecare and trying to keep them there.[15]

B. Collective Bargaining Has Proven To Be An Effective Tool To Improve Homecare Working Conditions, Which In Turn Improves The Stability And Quality Of The Homecare Workforce

Like Illinois, all of the amici States use the same tool of collective bargaining to improve homecare workers' working conditions. As a result, homecare working conditions in the amici States rank among the best in the nation. This is a perfect example of states effectively serving as "laboratories of democracy," and the Court should respect our policy choices and success.

In Washington, for example, collective bargaining for homecare workers resulted from a 2001 ballot initiative that the people overwhelmingly voted to enact. Initiative 775 (codified in pertinent part at Wash. Rev. Code § 74.39A.270); Wash. Sec'y of State, [*2001*] *Official Returns of the State General Election* (Nov. 6, 2001)[16] (nearly sixty-three percent approval of Initiative 775). In the official voter's pamphlet, the initiative proponents decried that "high turnover and wages barely above minimum wage have led to a shortage of caregivers," and noted that the initiative "helps workers make a profession

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[15] PHI, *The 2007 National Survey* at 7-20.

[16] *Available at* https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/Pre2004/Documents/2001/2001%20General%20Abstract.pdf.

of providing quality homecare by receiving better training and negotiating for a living wage and benefits." Wash. Voter's Pamphlet 8 (2001).[17]

After the initiative passed, eighty-four percent of Washington's homecare workers voted to be unionized. Rebecca Cook, *Home Care Workers Say Yes to Union in Record Vote*, Seattle Post-Intelligencer, Aug. 16, 2002.[18] Collective bargaining in Washington has led to a wide range of improvements. For example, Washington homecare workers receive annual training and a peer mentoring program has been established to help new homecare workers excel at the work. 2013-2015 Collective Bargaining Agreement, art. 9.2[19]; Wash. Rev. Code § 74.39A.331. Homecare workers can climb a "career ladder" that creates eight wage rates based on a worker's experience and training, thereby rewarding workers for their longevity and expertise. 2013-2015 Collective Bargaining Agreement, App. A. Homecare workers also can be placed on a registry for referral to clients. 2013-2015 Collective Bargaining Agreement, art. 15.1, 15.3.

Collective bargaining in Washington also has led to increased wages; paid time off for workers; and health, dental, and vision insurance benefits. 2013-

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[17] *Available at* https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/voters%27pamphlets/2001_general_election_voters_pamphlet.pdf.

[18] *Available at* http://www.seattlepi.com/default/article/Home-care-workers-say-yes-to-union-in-record-vote-1093759.php.

[19] *Available at* http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf.

2015 Collective Bargaining Agreement, App. at A-1, A-2; art. 12; art. 10. These improved working conditions further Washington's goal of attracting and retaining a qualified homecare workforce.

In Oregon, collective bargaining also passed by popular initiative. In 2000, the voters passed ballot measure 99 which amended Oregon's constitution with the Oregon Homecare Quality and Accountability Act.[20] Or. Const. art. XV, § 11, note. The law established the Home Care Commission, which is the employer of record of homecare workers for collective bargaining purposes. Or. Const. art. XV, § 11(1). Homecare workers have the right to form, join, and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with the commission on matters concerning employment relations. Or. Const. art. XV, § 11(3)(f). Homecare workers have public employees' collective bargaining rights, with mediation and interest arbitration as the method of concluding the collective bargaining process. Or. Const. art. XV, § 11(3)(f).

In Massachusetts, the 2006 legislature enacted a similar law overriding the governor's veto by unanimous votes in both houses. *See* 2006 Mass. Acts and Resolves, ch. 268.[21] The law, now codified at Mass. Gen. L. ch. 118E, §§ 70-75, established a state Personal Care Attendant Quality Home Care

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[20] The ballot measure is available at http://oregonvotes.org/pages/history/archive/nov72000/guide/mea/m99/m99.htm.

[21] *Available at* https://malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter268.

Workforce Council, in order "to ensure the quality of long-term, in-home, personal care by recruiting, training and stabilizing the work force of personal care attendants." Mass. Gen. L. ch. 118E, § 71(a). Homecare workers in Massachusetts, called Personal Care Attendants (PCAs), were allowed to choose whether to unionize under the state's public-sector labor relations law and to collectively bargain, with the PCA Council representing the state. Mass. Gen. L. ch. 118E, § 73(b)-(e). In 2007, ninety-four percent of the homecare workers voting favored unionization,[22] and their union has since negotiated three collective bargaining agreements, the first in 2008 and the most recent covering 2012-2015.[23]

The current agreement's goals are to provide homecare workers' clients with the "highest possible quality of care," to treat consumers and homecare workers alike with the "highest degree of dignity and respect," and to promote "quality jobs" for homecare workers. 2012-2015 Collective Bargaining Agreement, Preamble.[24] The agreement includes provisions promoting continuity of care for clients (art. 6); broadly protecting homecare workers against job discrimination (art. 7); allocating $1 million in state money to a Training and Upgrading Fund to be used for training programs as determined by a Joint

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[22] *See* Associated Press, *Mass. Home Health Care Workers Vote to Unionize*, *available on* Westlaw at 11/8/07 APALERTMA 19:53:41.

[23] http://www.mass.gov/pca/union/labor-agreements.html.

[24] *Available at* http://www.mass.gov/pca/docs/pca-fully-executed-cba-2012.pdf.

Labor-Management Committee (art. 8); studying how best to provide health insurance for homecare workers beginning July 1, 2014 (art. 11); providing training on client and worker health and safety (art. 12); providing paid time off (art. 13); and providing for time-and-one-half pay for homecare workers who work on any of four specified holidays (art. 14).

California also authorizes collective bargaining with homecare workers. However, California differs from other states in that it has implemented homecare collective bargaining on a county-by-county level. In 1992, the state legislature authorized and provided a funding mechanism for counties to establish public authorities to coordinate the delivery of homecare services. 1992 Cal. Stat. ch. 722, § 54; 1993 Cal. Stat. ch. 69, § 55. Six years later, the legislature required all counties that had not yet done so to establish public authorities or adopt one of a number of specified alternate methods for managing the homecare workforce. 1999 Cal. Stat. ch. 90, § 4.

Beginning in 1993, and continuing to the present day, homecare workers in fifty-five of California's fifty-eight counties have voted for unionization, so that 365,000 homecare workers are currently represented by unions and bargain Memoranda Of Understanding (MOU) with county public authorities. Some contracts provide for additional training of homecare workers through measures including free trainings on first aid, cardiopulmonary resuscitation, and other relevant topics; stipends for training sessions arranged by the

public authority; and reimbursements for training materials. *E.g.*, Santa Clara 2012-14 MOU, art. 8[25]; San Mateo 2012-14 MOU, art. 11. Other agreements require public authorities to make safety equipment such as masks and examination gloves available to homecare workers, and to provide health, dental, and vision benefits and transportation subsidies for homecare workers. *E.g.*, Solano 2011-15 MOU, § 13(A); Santa Cruz 2011-2014 MOU, art. 11, art. 17; Santa Clara 2012-14 MOU, art. 7, § 7-1; San Mateo 2012-14 MOU, art. 13; Alameda 2009-13 MOU, §§ 14, 17. And some include provisions related to statutorily required referral registries, such as mandates that referral priority be given to more experienced homecare workers. *E.g.*, Los Angeles 2012-14 MOU, art. XIV; Del Norte 2013-2015 MOU, art. XIII; San Bernardino 2013-14 MOU, "Registry Seniority."

As these examples show, the amici States have used collective bargaining to train, build, and stabilize their homecare workforces by cooperatively addressing working conditions most important to

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[25] The Memoranda Of Understanding are located at the following links: Santa Clara: http://www.seiu521.org/files/2011/05/IHSS-Contract-Feb.-1-2012-Feb.-2-2014.pdf; San Mateo: http://www.seiu521.org/files/2011/05/SM-IHSS-contract-june-2014.pdf; Solano: http://ultcw.org/files/2013/12/Solano-County-MOU-2011-2015.pdf; Santa Cruz: http://www.hsd.co.santa-cruz.ca.us/Portals/0/ihss/Santa-Cruz-MOU.pdf; Alameda: http://ultcw.org/files/2013/12/Alameda-MOU-2009-2013.pdf; Los Angeles: http://ultcw.org/files/2013/12/Los-Angeles-County-2012-2014-.pdf; Del Norte: http://www.countyofdelnorte.us/agendas/bos/MG94706/AS94719/AS94720/AI95872/DO95885/1.PDF; San Bernardino: http://ultcw.org/files/2013/12/San-Bernardino-MOU-2013-2014-MOU.pdf

homecare workers within each state. Collective bargaining is a give-and-take process that allows states and workers to negotiate the optimal mix of wages and benefits; implement training programs; create a grievance procedure or other dispute resolution process; establish a registry to refer workers to clients; and turn homecare into a career choice instead of a job of last resort. Unlike the individual clients who receive homecare services, the amici States have the will and the ability—by establishing a continuing process of bargaining and cooperation with a professionally staffed workforce representative—to address the overarching issues of this particular workforce, together finding innovative solutions tailored to the unique needs of these geographically dispersed and historically hard-to-recruit and retain workers.

Moreover, the evidence shows that collective bargaining works. For example, homecare workers with collective bargaining rights are over twice as likely to have health insurance as workers without those rights.[26] Studies also show that worker turnover has dropped in large part due to gains from collective bargaining.[27]

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[26] John Schmitt et al., *Unions and Upward Mobility for Low-Wage Workers* 6 (Aug. 2007), *available at* http://www.cepr.net/documents/publications/unions-low-wage-2007-08.pdf.

[27] Nari Rhee & Carol Zabin, *The Social Benefits of Unionization in the Long-Term Care Sector*, *in Academics on Employee Free Choice* 83, 91 (John Logan ed., May 2009), *available at* http://laborcenter.berkeley.edu/laborlaw/efca09.pdf.

The amici States have given their homecare workers the option of collective bargaining—an option that has successfully addressed the causes of high worker turnover by improving a range of work conditions. A stabilized and quality homecare workforce is good for the aging and disabled clients who need these services and for state budgets. The collective bargaining tool should remain available to states that have made the policy decision to use it, and to states who may see our success and adopt this approach in the future.

C. *Abood* Should Not Be Overruled, And Supports The Amici States' Proprietary Interest In Authorizing Collective Bargaining With Homecare Workers Who Deliver State-Funded Services To State Clients

The use of collective bargaining to ensure an adequate and well-trained homecare workforce is well within each state's authority recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977). Petitioners urge the Court to overrule *Abood*, but none of the factors that justify overruling longstanding precedent are present here, and this Court unanimously reaffirmed the core principles of *Abood* in *Locke v. Karass*, 555 U.S. 207 (2009). Petitioners also argue that *Abood* does not apply to homecare workers, but their arguments all miss the mark.

For several decades, state legislatures have relied upon *Abood* to pass laws that structure state labor relations, and workers have relied on the collective bargaining contracts negotiated as a result

of these laws. For example, Washington State has numerous statutes governing its collective bargaining process and currently has collective bargaining agreements with wide segments of public workers and contractors.[28]

The Court especially respects *stare decisis* when state legislatures have passed laws in reliance on prior Court decisions. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (refusing to overrule *Buckley v. Valeo* after Congress and state legislatures passed campaign finance laws in reliance on it); *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (O'Connor, J., plurality) (refusing to overrule opinions permitting challenges to racial gerrymandering that state legislators relied upon in their districting practices); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785-86 (1992) (refusing to overrule limitations on state taxation of certain corporations when state legislatures relied upon prior decisions in enacting tax codes). Furthermore, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved[.]" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). States have justifiably relied on the longstanding rule of *Abood*, and workers have

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[28] Wash. Rev. Code 41.56; Wash. Rev. Code 41.80; Wash. Rev. Code 47.64. *See also* http://www.ofm.wa.gov/labor/agreements/13-15/default.asp (identifying twenty-seven collective bargaining agreements with different categories of workers, including healthcare workers who staff state hospitals, educational employees, state police troopers, and craftspeople who maintain the state ferry system).

justifiably relied on the contracts negotiated under their states' collective bargaining laws. Petitioners identify no basis to upset that justifiable reliance.[29]

Abood recognizes that effective collective bargaining relies upon exclusive representation. *See Abood*, 431 U.S. at 220-21. Exclusive representation promotes labor peace and avoids the confusion that would arise from multiple agreements covering the same categories of workers. *Id.* at 220-21. Labor peace benefits not only the negotiating parties but serves a substantial public interest as well. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1990).

Petitioners argue that states have no interest in labor peace when the workforce is spread across multiple worksites. Pet'rs' Br. at 24-28. But nothing could be farther from the truth. The amici States cannot realistically negotiate individually with tens of thousands of homecare workers scattered across tens of thousands of worksites. Negotiating a single binding contract that covers the entire category of workers avoids the confusion and conflict that would arise from multiple labor agreements, which is one of the evils that the exclusivity rule is designed to avoid. *Abood*, 431 U.S. at 224. And the states' need for authority to negotiate a single contract with an exclusive collective bargaining representative may be even more compelling in relation to a large,

[29] The amici States also agree with the arguments in New York's amicus brief addressing in more detail why *Abood* should not be overruled.

dispersed, and historically transient workforce without expertise in such matters. With such a workforce, learning about workers' views, needs, and priorities—and developing workforce policies to cost-effectively address those views, needs, and priorities—would be virtually impossible without the aid and expertise of the workers' representative.

Fair-share provisions are integral to exclusive representation. Such provisions ensure that the costs of representation are borne equally by those who benefit. *Abood*, 431 U.S. at 221-22. The alternative is that some workers who enjoy the shared benefits of improved working conditions will nevertheless become "free riders" by refusing to contribute to the collective bargaining activities that bring about the benefits. *Id.* at 222-23. Fair-share provisions advance the amici States' interest in labor peace by eliminating discord between those workers willing to fund collective bargaining and those who are not willing (but who still reap the benefits). Even more important, they remove an incentive that might make even those fully supporting bargaining reluctant to pay what would be more than their fair share, leading to serious underfunding of the process, even where full funding would benefit the workforce (and the states' programs) overall.

Petitioners also suggest that *Abood* does not apply here because homecare workers in Illinois are not treated as state employees for all purposes. This is a distinction without a constitutional difference. When states address homecare workforce issues,

they act as proprietors of their own state-funded programs to deliver services to state citizens. This Court accords great weight to decisions made by the government as proprietor and as manager of its own internal affairs. *See, e.g.*, *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 757-58 (2011). This is true whether government is involved with managing employees or contractors. *Id.* at 758-59.

Here, each amici State made a legislative policy judgment allowing its homecare workers to choose collective bargaining. States as proprietors of their own state-funded programs are entitled to make this judgment. The Court respected the Michigan legislature's establishment of the collective bargaining system challenged in *Abood*. And the Court respected Congress's establishment of a collective bargaining system under the Railway Labor Act. *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956). The Court should likewise respect Illinois' decision to allow its homecare workers to collectively bargain and to permit the use of fair-share fees, a practice that is consistent with decades of precedent.

Moreover, contrary to petitioners' argument, upholding the Seventh Circuit's decision will not prevent homecare workers from individually petitioning their governments. Pet'rs' Br. at 39-46. Indeed, belonging to a union, including a public sector union, does not in any way deprive an individual of his right to express his views to government on any issues at all, including labor relations. *Abood*, 431 U.S. at 230. Rather than causing the harm prophesied by petitioners, upholding the Seventh Circuit decision will improve

homecare workers' lot by allowing the amici States, Illinois, and potentially other states in the future to continue using collective bargaining to stabilize and improve the quality of the homecare workforce.

CONCLUSION

The Court should affirm the Seventh Circuit and conclude that Illinois' fair-share provisions are consistent with the First Amendment.

RESPECTFULLY SUBMITTED.

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