No. 11-681

In The Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, in His Official Capacity as Governor of the State of Illinois, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND MACKINAC CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for the Cato Institute

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington Square, Suite 1100
Washington, D.C. 20036
(202) 861-1500
drivkin@bakerlaw.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments, compel household workers who are neither hired nor supervised by the state to associate with, and subsidize the speech of, a labor union.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. The instant case concerns Cato because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment associational and expressive rights.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small

[1] Pursuant to Rule 37.2(a), all parties have received at least 10 days notice of *amici's* intent to file and have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Founded in 1988, the Mackinac Center for Public Policy is a Michigan-based nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The instant case concerns the Mackinac Center because it has challenged similar governmental activities within the State of Michigan.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners are personal assistants who provide in-home care to disabled family members and other

disabled persons participating in Illinois's Rehabilitation Program and are required by Illinois law to associate with Respondent SEIU Healthcare Illinois & Indiana ("SEIU") and to subsidize its speech made putatively on their behalf.[2] Under Illinois law, the program participant, or "customer," is "the employer of the PA [personal assistant]" and "is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." 89 Ill. Admin. Code § 676.30(b); *see* 20 Ill. Comp. Stat. 2405/3(f) (restating customers' rights). Nonetheless, while expressly preserving customers' rights to hire, supervise, and terminate their personal assistants, the Illinois General Assembly in 2003 designated personal assistants to be "public employees" of the State of Illinois "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act," *id*., which provides for collective bargaining. Shortly thereafter, the State designated SEIU as the exclusive representative for all personal assistants, and the State and SEIU subsequently entered into

[2] In the interest of clarity, because *amici* address only the first question presented in the petition for a writ of certiorari, this brief limits its discussion to Illinois's Rehabilitation Program and refers as "Petitioners" to those plaintiffs below who provide care to individuals participating in that program.

a collective bargaining agreement that requires all personal assistants, including Petitioners, to remit compulsory fees, deducted automatically from their paychecks, to SEIU. App. 22a.

In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224-25 (1977), this Court upheld the constitutionality of assessing compulsory dues from public-sector workers to finance the expenditures of a labor union, reasoning that the "important" governmental interest in "labor peace" justified the impingement upon dissenting individuals' associational and expressive freedoms. The Seventh Circuit's decision carries *Abood* far beyond its holding and logic, absolving the State of Illinois of the burden of demonstrating any particular justification for the abrogation of the rights of workers who are not hired, maintained, or supervised by the State, who do not labor in State facilities, and whom the State does not consider to be its employees for any other purpose, such as benefits or vicarious liability.[3] Abandoning this Court's requirement that compelled association and expression be tailored to "the government's vital policy interest in labor peace," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), the Seventh Circuit was content to presume

[3] The 2003 act specifically provides, "The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." 20 Ill. Comp. Stat. 2405/3(f).

such an interest based on Illinois's claim to be a co-employer due to its regulation and subsidization of personal assistants. App. 10a-11a. In this way, the opinion below provides a roadmap for lawmakers and labor leaders to circumvent the First Amendment's limitations on compelled association and speech and thereby bolster the ranks and finances of organized labor.

Indeed, the Illinois law at issue here is at the leading edge of a nationwide movement over the past decade to organize home-based care workers, including medical assistants and even family childcare providers, and thereby to "reinvigorate organized labor." Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1390 (2008). More than a dozen states have already implemented schemes like Illinois's – in which a state agency is designated as the employer of record for home workers and empowered to recognize a union representative on their behalf – through legislation or (particularly in the family childcare context) executive order.[4] No limiting principle in the decision below prevents the similar misapplication of *Abood's* "labor peace" rationale to curtail the First Amendment rights of any direct or indirect recipient of government subsidies or fees, including doctors and nurses participating in state Medicaid programs, attorneys representing the indigent in state courts, foster parents,

[4] For a current list, *see* Pet. 22 n.10, 23 n.12.

and employees of businesses receiving state tax credits.

In sum, this case presents a question of great and recurring importance that the Court will inevitably be compelled to address. In light of states' increasing use of sham employment relationships to circumvent First Amendment protections and the ongoing injury to Petitioners and others similarly situated, the Court should act now to protect workers' associational and expressive rights before this phenomenon takes greater root in labor law and practice and becomes more costly and difficult to dislodge.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Permits States To Circumvent Limitations On Forced Association And Compelled Speech Recognized By This Court

The Seventh Circuit improperly relieved Illinois of the burden of demonstrating a compelling interest justifying its infringement of personal assistants' First Amendment rights by holding that any worker who provides a service that is subsidized by government may be forced to associate with a labor union and to subsidize its speech.[5] App. 10a-11a. In so doing, the

[5] Even where, as in an agency-shop arrangement, a worker is not made to join a union, a mandatory "fair share" fee "interfere[s] in some way with an employee's freedom to associate for

(Continued on following page)

court sanctioned a cynical legislative scheme specifically designed to circumvent First Amendment protections that would otherwise block attempts to conscript independent workers to bolster the ranks and finances of organized labor.

This Court has quoted with approval Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31. Accordingly, it has recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values 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," schemes that compel such subsidies "must pass First Amendment scrutiny." *Id*. at 411. At the very least, the government's interest must be substantial, and the compulsion tailored to achieve that interest. *See id*. at 409-10 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

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the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood*, 431 U.S. at 222.

Similarly, the Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234-35). That freedom may be impinged only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658-59. And, consistently, even compelling state interests – eradicating discrimination, assuring equal access to places of public accommodation – have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995); *Boy Scouts*, 530 U.S. at 559. With equal consistency, the Court has upheld those laws that impose no "serious burden" on expressive association. *See Boy Scouts*, 530 U.S. at 658-59 (discussing cases); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,

547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire' ").

There can be no question but that Illinois's scheme to compel personal assistants' association with, and subsidization of, labor unions flunks traditional First Amendment scrutiny. As in *United Foods*, Illinois has instituted a system of "compelled subsidies for speech in the context of a program where the principal object is speech itself." 533 U.S. at 411. This is so because, as a matter of law, the State and union lack the traditional labor-management relationship that might be the basis for any broader regulatory activity. Federal law specifies the basic requirements for a Medicaid waiver program, such as Illinois's Rehabilitation Program, including that the State provide "payment for part or all of the cost of home or community-based services . . . which are provided pursuant to a written plan of care." 42 U.S.C. § 1396n(c)(1).[6] State law, in turn, lays out specific and objective requirements for personal assistants, 89 Ill. Admin. Code § 686.10, and their duties, which are limited to household tasks and contained in "service plans" approved by the customer's physician, §§ 686.20, 684.10. Crucially, state law is explicit that the customer – not the State or any other party – "is responsible for controlling all aspects of the employment relationship between the customer and the PA," from

[6] Further requirements are provided by federal regulation. *See* 42 C.F.R. § 440.180 (requirements for home- or community-based services), § 441.301 (waiver requirements).

hiring to evaluation and termination. § 676.30(b). It is therefore the customer alone – and not the State – who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation. The State has obliged itself to pay for care provided by personal assistants to Rehabilitation Program participants "at the hourly rate set by law." § 686.40.

Accordingly, the labor union, in this instance, can fulfill no role besides petitioning the State for higher wages or more generous benefits – that is, speech on behalf of its members. This is reflected in the collective-bargaining agreement struck between the State and SEIU, which largely echoes the preexisting requirements of federal and state law, but for pay, benefits, "union rights," and the all-important "fair share" requirement.[7] It is also confirmed by Illinois's initial authorization of exclusive representation for personal assistants, which relied solely on the purpose of "receiv[ing] feedback" from workers it deemed unable to "effectively voice their concerns about the organization of the [program], their role in the program, or the terms and conditions of their employment . . . without representation." Ill. Exec. Order 2003-08. Six years later, the State cited this very same

[7] Agreement Between the State of Illinois, Departments of Central Management Services and Human Services, and the Service Employees International Union, Local 880, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf [hereinafter "CBA"].

justification, again standing alone, for authorizing exclusive representation of providers in its Disabilities Program. Ill. Exec. Order 2009-15.

But Illinois has *no* legitimate interest, let alone a "substantial" one, in compelling personal assistants to subsidize "feedback" to the State for their own good. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). A state "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id*. at 791. Nor does the First Amendment permit it to "sacrifice speech for efficiency." *Id*. at 795. And if the State has no interest in this speech, it certainly has no "vital" interest in compelling association for the sole purpose of facilitating the speech.

Even if compelling "feedback" were a legitimate state interest, the means selected by Illinois are far too blunt. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Elrod*, 427 U.S. at 362. In particular, a state may override the freedom of expressive association only where its interests "cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. If the State's genuine purpose is to seek feedback from personal assistants, it might survey or interview them or undertake any of a number of far "less drastic" alternatives. It therefore

may not command them to assemble for *the very purpose* of expressive association.

Whether viewed as a burden on associational or expressive rights, Illinois's scheme to compel the organization and speech of personal assistants who service participants in its Rehabilitation Program cannot survive traditional First Amendment scrutiny, reflecting the serious injury that the decision below works on the rights of Petitioners and those similarly situated.

For that reason, the State seeks refuge within the holding of *Abood* and its progeny, which propound a lesser "germaneness" standard for impositions on First Amendment rights incidental to broader regulatory programs. *See Abood*, 431 U.S. at 235-36; *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990); *Lehnert*, 500 U.S. at 519. But this standard too is unavailing.

Only where forced association or compelled subsidization of speech are incidental to some legitimate government interest may the government avoid exacting scrutiny of actions germane to that interest. *United Foods*, 533 U.S. at 413-14; *Abood*, 431 U.S. at 222. The State of Illinois may rely on neither of the interests, "labor peace" and avoiding "free riders," that *Abood* recognized may justify workers' forced association and subsidization of a labor union as a collective-bargaining agent.

First, Illinois has no interest in maintaining "labor peace" among household workers or family

members merely because they provide services to individuals who participate in a state program or because they are subject to state regulation. "Labor peace" is not an empty semantic vessel that the State may fill up merely by asserting that it is an employer. Rather, its contents were set at a time when Congress's Commerce Clause power was less robust than today, and the "labor peace" doctrine reflects its roots, referring to the pacification of those types of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the National Labor Relations Act was passed to address "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"); *see also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937); *Ry. Emp. Dept. v. Hanson*, 351 U.S. 225, 233 (1956); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

Abood expressly adopted this "familiar doctrine[]" as a justification for compelled speech and association in limited circumstances. 431 U.S. at 220; *id*. at 224 (explaining that a Michigan agency-shop provision was justified by the same "evils that the exclusivity rule in the Railway Labor Act was designed to avoid"). It described that doctrine thus:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of

> employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-21. *Ellis*, following *Abood*, explained that a union could charge a non-member only for union "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v. Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 448 (1984); *see id*. at 456 (citing *Abood*, *Hanson*, and *Street*).

Labor-management issues are necessarily absent here because Illinois does not manage the personal assistants who provide services to participants in its Rehabilitation Program and exercises no control over labor conditions. As described above, Illinois law provides that the program participant – not the State – "is responsible for controlling all aspects of the employment relationship between the customer and the PA." 89 Ill. Admin. Code 676.30(b); 20 Ill. Comp. Stat. 2405/3(f). Indeed, although the collective-bargaining agreement provides for a union-administered "grievance procedure," it does not apply to "any action

taken by the Customer" or, for that matter, the hiring, firing, or reduction in hours of a personal assistant. CBA, art. XI. Further, the confusion, rivalries, and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or State-provided workplace at all and personal assistants carry out their duties in participants' homes. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added). Because the State does not manage personal assistants and takes no responsibility for their labor conditions, it lacks the power to bargain with SEIU over the terms of employment that implicate labor peace.

Moreover, because the union is limited to the role of petitioning the State for greater pay and benefits, there can be no serious claim that its exclusive representation of workers in this activity has freed the State from any great burden due to "conflicting demands" by personal assistants. Surely the State faces more numerous and diverse demands by Rehabilitation Program beneficiaries seeking additional benefits – a group that it has yet to attempt to organize coercively – and other recipients and would-be recipients of State benefits. Petitioners have no greater or qualitatively different a relationship with the State than do other indirect recipients of State benefits, such as doctors serving Medicaid beneficiaries, and are, if anything, further attenuated from the State's

actions than direct beneficiaries, such as the Rehabilitation Program participants whom they serve.

Finally, federal and state labor laws reflect that the organization of household workers such as Petitioners does not further the interest of labor peace. The National Labor Relations Act ("NLRA") specifically excludes "any individual employed . . . in the domestic service of any family or person at his home" from coverage. 29 U.S.C. § 152(3). The Ninth Circuit, interpreting the NLRA shortly after its passage, described Congress's logic: "[T]here never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940). For similar reasons, until this past decade, states generally excluded such workers from coverage under their collective-bargaining statutes. *See* Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

Nor may Illinois rely on its interest in preventing "free riders" from taking advantage of the benefits of union representation, which this Court has in every instance recognized only as subsidiary to maintaining labor peace or some other legitimate interest, and never as a standalone interest. *See*, *e.g.*, *Hanson*, 351 U.S. at 233; *Street*, 367 U.S. 760-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Hanson*); *Abood*, 431 U.S. at 220-21, 224; *id*. at 229 (for constitutional analysis, overriding

purpose of exclusive representation is "labor stability"); *Ellis*, 466 U.S. at 448; *United Foods*, 533 U.S. at 415-16. Indeed, this Court has expressly allowed nonmembers to "free ride" on union political expenditures that may accrue to their benefit, because such expenditures are not, themselves, justified by the labor peace doctrine. *See*, *e.g.*, *Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 235-36; *Ellis*, 466 U.S. at 448 (nonmembers may be made to pay only for "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"); *Lehnert*, 500 U.S. at 521; *id*. at 556-57 (Scalia, J., concurring and dissenting). If avoiding free riders could stand alone as a justification for compelled association and subsidization of speech, First Amendment rights would be powerless to resist government paternalism in any instance. That is not the law. *Riley*, 487 U.S. at 790 (rejecting a "paternalistic premise"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Seventh Circuit's decision presses far beyond *Abood* to present a roadmap for states to compel independent workers or contractors to associate with a union for no other purpose than to subsidize speech favored by the state and its union allies. For good reason, this Court has never upheld compelled association or subsidies for speech detached from "some broader regulatory scheme," apart from the speech itself. *United Foods*, 533 U.S. at 415. "Were it sufficient to say speech is germane to itself, the limits

observed in *Abood* and *Keller* would be empty of meaning and significance." *Id*. The Court should act to avoid that very result in this instance.

II. The Petition Presents A Question Of Great And Recurring Importance

Though the court below took pains to "stress the narrowness" of its holding, App. 13a-14a, its decision carries major implications. More than a dozen states have, like Illinois here, established legally fictitious employer relationships for the purpose of facilitating the compelled organization of home-care workers, and the Seventh Circuit's decision sanctions these efforts, while encouraging other states to accede to campaigns by labor unions to do the same. Although to date these campaigns have focused on personal assistants like Petitioners and home childcare providers, no legal principle limits the use of this technique to those fields. Unless reversed by this Court, the decision below leaves all recipients of state funds, whether direct or indirect, vulnerable to compelled association with a labor union and subsidization of its speech.

A. Home Workers in Many States Are Being Denied Their First Amendment Rights

Though a recent phenomenon, the use of sham employment relationships to support mandatory union representation has spread rapidly across the nation. In just the decade since SEIU waged a "massive

campaign to pressure [ ] policymakers" in Los Angeles to authorize union bargaining for home-care workers,[8] home-based care workers "have become the darlings of the labor movement" and "helped to reinvigorate organized labor." Smith, *Publicization of Home-Based Care Work*, at 1390. From around zero a decade ago, now well more than one hundred thousand home workers are covered by collective-bargaining agreements. *Id*.

This quick growth is the result of a concerted campaign by national unions, particularly SEIU, to boost sagging labor-union membership through the organization of individuals who provide home-based services to Medicaid recipients. Since SEIU's Los Angeles victory in 1999, labor unions have undertaken successful campaigns to establish nominal employers for homecare workers in Oregon (2000), Washington (2001), Illinois (2003), Michigan (2004), Wisconsin (2005), Iowa (2005), Massachusetts (2006), Missouri (2008), Ohio (2009), Pennsylvania (2010), Connecticut (2011), Maryland (2011).[9] (Three states – Ohio, Pennsylvania, and Wisconsin – subsequently repealed this

[8] *See generally* Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1 (2002).

[9] Smith, *Publicization of Home-Based Care Work*, at 1404; Pet. 22 n.10.

authority.) These campaigns have "been hailed as labor's biggest victory in over sixty years."[10]

Nor has this model been limited to homecare providers. Over the past five years, organized labor has directed its efforts to organizing home-based childcare providers, including childcare provided by family members who receive public support or subsidies. *See generally* Helen Blank, et al., *Getting Organized: Unionizing Home-Based Child Care Providers* (2010). By February 2007, seven states had recognized unions as the exclusive representative of home-based childcare providers; over the next three years, an additional seven states followed suit. *Id*. at 5. In five of these latter seven states, collective bargaining was instituted by executive order, rather than by legislation, reflecting the controversial nature of organizing home workers. *Id*. Two states, so far, have mandated some foster parents to support an exclusive representative. Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

While these types of organizing campaigns can be exceptionally expensive, owing to the changes to state law that are required, the representation of home workers can be quite lucrative for unions, which may explain the rapid spread of this phenomenon. The

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[10] Patrice M. Mareschal, *Agitation and Control: A Tactical Analysis of the Campaign Against New Jersey's Quality Home Care Act* 14 (undated), *available at* http://depts.washington.edu/pcls/caringlaborconference/Mareschalpaper.pdf.

approximately 20,000 personal assistants who provide care to Rehabilitation Program recipients pay SEIU over $3.6 million per year to support its activities. Pet. 6. In addition, the State contributes more than $10 million per year to a "Benefit Fund" "selected or established by the Union," as well as $9 million per year in "Additional State Funding" to be allocated at SEIU's "sole discretion." CBA, art. VII.

Given the vast sums of money and numbers of workers involved, as well as the gravity of the infringement of those workers' rights, it is natural that the issues raised by the petition have arisen in other litigation challenging similar arrangements. *See*, *e.g.*, *Serv. Employees Int'l Union, Local 434 v. Cnty. of L.A.*, 275 Cal. Rptr. 508, 510 (Ct. App. 1990); *State v. State Labor Relations Bd.*, 2005 WL 3059297 (R.I. Super. Ct. 2005) (an administrative decision defining home workers as state employees "offends any reasonable notion of orderly and responsible expansion of the State's workforce" and "may be applied to a myriad of groups that supply goods or services to the State"); *Schlaud v. Snyder*, No. 1:10-cv-147 (E.D. Mich. 2011) (granting summary judgment due to mootness in challenge to compelled unionization of home childcare workers who receive subsidies from the State of Michigan). If the Court does not act on the instant Petition, it will inevitably confront these issues in a future case.

B. No Limiting Principle Prevents The Seventh Circuit's Reasoning From Reaching Doctors, Nurses, Lawyers, And Government Contractors

Future cases, however, may not concern only home workers, but professional workers who, whether directly or indirectly, receive state funds. This is a result of the great breadth of the Seventh Circuit's holding, which (despite the lower court's protestations) cannot be logically limited to personal assistants.

While claiming to "pay no particular heed" to the State's designation of personal assistants as employees, App. 9a, the court propounded a standard scarcely, if at all, more demanding. A state may choose to be a "joint employer," it held, when it regulates a worker's activities (such as by approving the services to be provided), conducts performance reviews,[11] and pays for the services rendered. App. 11a. And because it is an "employer," it may categorically invoke the "labor peace" rationale, no matter the facts or circumstances of the asserted employment relationship, to take advantage of *Abood's* exception to traditional First Amendment scrutiny. App. 13a.

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[11] The court below erred on this count; the relevant regulation, to which it correctly cited, makes clear that annual reviews are conducted "by the customer" and that a State counselor is responsible only for providing "assistance," rather than conducting the review itself. 89 Ill. Admin Code § 686.30(a).

By this reasoning, a state may claim any recipients of state funds as employees and compel their unionization, even where (as in the instant case) the state's control over their work is minimal and its interest in quelling disruptive labor disputes nonexistent. Illinois, for example, imposes numerous conditions on medical providers, such as doctors, seeking to participate in its Medicaid program. *See* 89 Ill. Admin. Code § 140.11 *et seq*. Approved providers are paid by the State for care that they provide to beneficiaries, according to State regulation and at rates set by the State. § 140.23(a). The State even reserves the right to impose prior approval requirements on all services, § 140.40, as well as the right to conduct an audit of all services, § 140.30. As the State exercises far greater control over Medicaid providers than personal assistants, the decision below would allow Illinois to claim doctors, dentists, or nurses who provide services to Illinois Medicaid beneficiaries as State employees and then force those individuals to accept and pay a mandatory representative to "bargain" over the terms of their participation in the program.

Attorneys also may be swept up under this standard. Illinois law, for example, provides for the appointment of counsel on appeal to indigent defendants convicted of felonies and directs the State court to review the services rendered and approve payment. 725 Ill. Comp. Stat. 5/121-13(b). Again, the state specifies the attorney's duties and provides for his payment. He may therefore be claimed as an employee and made to support a union – despite that, as a

practical matter, the state exercises little or no control over the discharge of his duties and that its interest in his representation is commensurately minimal. The same would be true for any state contractor, recipient of state benefits, and potentially even employees of businesses receiving state tax credits or other incentives to create jobs within a state.

This situation should be a familiar one. This Court has already rejected the claim that "an independent contractor's First Amendment rights . . . must yield to the government's asserted countervailing interest in sustaining a patronage system." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996). The decision below, by absolving a state government of the burden of demonstrating any real interest in compelled association and speech, reverses *O'Hare* in *sub rosa* fashion: a state *may* maintain a patronage system, and compel its support, so long as that system is in the form of a labor union and the state claims its contractors, for that purpose alone, as its own employees.

CONCLUSION

The decision below upholds a state law designed to achieve no purpose other than to circumvent Petitioners' First Amendment rights to be free of compelled association and expression. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for the Cato Institute

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington Square, Suite 1100
Washington, D.C. 20036
(202) 861-1500
drivkin@bakerlaw.com

Counsel for Amici Curiae