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 FOR PETITIONERS

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QUESTIONS PRESENTED

This case concerns two Medicaid-waiver programs run by the State of Illinois: the "Rehabilitation Program" and the "Disabilities Program." Under both, the State subsidizes the costs of homecare services offered to qualifying participants. Illinois has implemented several laws calling for the designation of an "exclusive representative" for the providers of homecare services, that is, a union. Rehabilitation Program providers must also pay compulsory fees to their state-designated representative. The State has not yet designated an exclusive representative for the Disabilities Program providers.

The questions presented in this case are:

1. Whether a State may, consistent with the First and Fourteenth Amendments to the Constitution, compel homecare providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs?

2. Whether homecare providers may challenge a law that permits the State to compel them to associate with a union before the State has designated the particular union that will represent them?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the U.S. Court of Appeals for the Seventh Circuit were:

1. Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, Theresa Riffey, Stephanie Yencer-Price, Susan Watts, and Patricia Withers, plaintiffs-appellants below and all of whom, except Ellen Bronfeld, are petitioners on review; and

2. Pat Quinn, in his official capacity as Governor of the State of Illinois, Service Employees International Union (SEIU) Healthcare Illinois & Indiana, SEIU Local 73, and American Federation of State, County, and Municipal Employees (AFSCME) Council 31, defendants-appellees below and respondents on review.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 656 F.3d 692 and is reprinted in the appendix to the Petition for Certiorari (Pet. App.) at 1a-17a. The opinion of the U.S. District Court for the Northern District of Illinois is not reported, but is available at 2010 WL 4736500, and is reprinted at Pet. App. 18a-39a.

JURISDICTION

The Seventh Circuit's judgment was entered on September 1, 2011. A timely petition for certiorari was filed on November 29, 2011, and granted on October 1, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent state statutes are:

- Illinois Public Act 93-204 (2003), relevant provisions reprinted at Pet. App. 40a-44a;
- Illinois Public Labor Relations Act, 5 Ill. Comp. Stat. 315/1 *et seq.*, relevant provisions reprinted in the addendum;
- Illinois Disabled Persons Rehabilitation Act, 20 Ill. Comp. Stat. 2405/0.01 *et seq.*, relevant provisions reprinted in the addendum; and
- Illinois Developmental Disability and Mental Disability Services Act, 405 Ill. Comp. Stat. 80/0.01 *et seq.*, relevant provisions reprinted in the addendum.

Two state executive orders (EOs) are also at issue. They are EO 2003-08, reprinted at Pet. App. 45a-47a, and EO 2009-15, reprinted at Pet. App. 48a-51a.

INTRODUCTION

This case implicates two rights at the core of the First Amendment: the "[f]reedom of association," *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), and the freedom to "petition the Government for a redress of grievances," U.S. Const. amend. I. Illinois law trammels both rights by requiring individuals who provide in-home care to Medicaid recipi-

ents to accept and financially support a union as their exclusive representative for petitioning the State over its Medicaid rates and policies.

For the State to impose mandatory representation on Medicaid providers, it must show "a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2289 (2012) (5-4 decision) (quoting *Roberts*, 468 U.S. at 623). The State does not come close; its justification for compelled association is entirely circular, relying on the need to compel speech—i.e., "feedback" from providers—to justify the law.

The Seventh Circuit, however, concluded that the providers could be unionized under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (6-3 decision), because it saw them as jointly employed by the State under common-law principles. *Abood* held that public employees could be compelled to support an exclusive representative to facilitate "labor peace," i.e., to avoid workplace disruptions caused by employee support for rival unions, and to prevent employees from "free-rid[ing]" on union representation. *Id*. at 224. *Abood* borrowed these rationales from private sector cases—which had identified them as sufficient to justify Congress' exercise of Commerce Clause powers—and transformed the rationales into a compelling government interest justifying the infringement of public employees' First Amendment associational rights. *Id*. at 220-24.

Concurring only in the judgment, Justice Powell explained why the *Abood* Court's expansion of the "labor peace" rationale ran contrary to basic First Amendment principles. Justice Powell was correct. *Abood* is an errant exception to the "general rule"

that "individuals should not be compelled to subsidize private groups or private speech," *Knox*, 132 S. Ct. at 2295, and is one of this Court's "prior decisions" that "cross[es] the limit of what the First Amendment can tolerate," *id.* at 2291.

At the very least, *Abood* should be limited to its facts. The "labor peace" rationale for permitting the government to compel individuals to accept a representative for petitioning government should be accepted only when (1) the affected individuals are being directly and actively managed and supervised by the government in its workplaces, and (2) the representation does not involve matters of public concern.

That test is not met here. Petitioners work in private homes. They are supervised by participants in Medicaid programs, not the State. And Petitioners are being forced to accept and support representation on matters of public concern; namely, the State's policies governing the distribution of public benefits through Medicaid-funded programs. Illinois has no compelling interest in infringing Petitioners' rights in this manner. Illinois' exclusive-representation laws targeted at homecare providers therefore violate the First Amendment. The Seventh Circuit's decision should be reversed.

STATEMENT

A. Medicaid Homecare Providers in Illinois

1. Petitioners are eight caregivers who provide in-home services to disabled individuals in Illinois. Joint Appendix (J.A.) 16-18. All but one care for a disabled family member. J.A. 16-18. Several provide this care within their own homes.

Three petitioners—Theresa Riffey, Susan Watts, and Stephanie Yencer-Price—serve or served as

"personal assistants" under Illinois' Home Services Program, known as the "Rehabilitation Program."[1] J.A. 17-18. Participants in this program are those who would otherwise face institutionalization due to severe medical impairments; the purpose is "to provide for rehabilitation, habilitation[,] and other services to persons with one or more disabilities, their families[,] and the community." 20 Ill. Comp. Stat. 2405/1. Susan Watts, for example, provides homecare services for her daughter, Elizabeth, who requires constant care and supervision due to quadriplegic cerebral palsy, a stroke, and numerous surgeries. J.A. 18.

The remaining five petitioners—Pamela Harris, Michelle Harris, Carole Gulo, Wendy Partridge, and Patricia Withers—provide homecare for family members under Illinois' Home-Based Support Services Program, known as the "Disabilities Program."[2] J.A. 17-18. This program provides "alternatives to institutionalization . . . to permit mentally disabled adults to remain in their own homes." 405 Ill. Comp. Stat. 80/2-2. For example, Pamela Harris provides homecare services for her son Joshua, who suffers from a rare genetic syndrome that adversely affects his cognitive abilities and muscular and skeletal systems, and causes severe intellectual and developmental disabilities. J.A. 17.

2. Both the Rehabilitation Program and the Disabilities Program are Medicaid-waiver programs. J.A. 19, 20; *see* 42 U.S.C. § 1396n(c). The federal Medicaid

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1 *See* 20 Ill. Comp. Stat. 2405 *et seq.*; Ill. Admin. Code tit. 89, parts 676-88.

2 *See* 405 Ill. Comp. Stat. 80 *et seq.*; Ill. Admin. Code tit. 59, part 117.

program partially funds state programs that, among other things, enable persons with disabilities to live in their homes instead of institutions. *See* Janet O'Keeffe *et al.*, U.S. Dep't of Health & Human Servs., *Understanding Medicaid Home & Community Services: A Primer* (2010) (hereinafter *Medicaid Primer*).[3] In the wake of *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that persons with disabilities have a statutory right to be placed in community settings rather than institutions if feasible, there was a marked increase in the number and scale of these homecare programs. *Medicaid Primer,* 13-14, 22. As of 2008, 48 states operated 314 homecare programs pursuant to a Medicaid-waiver, *id.* at 29, and 36 states provided similar services under traditional Medicaid plans, *id.* at 27.

Under Illinois' Rehabilitation Program, people like Susan Watts may serve as a personal assistant to their severely disabled relatives—in Susan's case, Elizabeth, her daughter. Illinois defines "personal assistant," or "PA," as "an individual employed by the customer to provide . . . varied services that have been approved by the customer's physician." Ill. Admin. Code tit. 89, § 676.30(p). The "customer" is the program participant or her guardian, who "shall serve as the employer of the PA." *Id.* § 676.30(b). The "customer 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

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[3] http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf (last visited Nov. 20, 2013).

the PA, and terminating the employment relationship between the customer and the PA." *Id.*; *see also id.* § 684.20(b) (explaining that as long as a PA meets the minimum requirements, the "customer has complete discretion in which Personal Assistant he/she wishes to hire").

The Rehabilitation Program pays for those services deemed necessary in a physician-approved service plan, subject to a monthly costs cap. *Id.* §§ 679.50, 684.10. The State's role in the Rehabilitation Program is quite limited: "Although DHS [(the Department of Human Services)] shall be responsible for ensuring that the funds available under the [Program] are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c).

The Disabilities Program operates similarly. This program supports homecare for mentally disabled persons—for example, it assists Pamela Harris in providing homecare for her son, Joshua. Participants may use part or all of their subsidy to hire individuals to provide personal care and certain health services in their home. J.A. 21. DHS pays for in-home services to the extent the service plan permits. *See* 405 Ill. Comp. Stat. 80/2-6; Ill. Admin. Code tit. 59, §§ 117.100-240. The maximum subsidy that a participant can receive is set by statute as a percentage of a participant's social security payments. *See* 405 Ill. Comp. Stat. 80/2-6. As with the Rehabilitation Program, the State's role in the Disabilities Program is limited: "Individuals and their families or legal guardians shall select the needed supports and services." Ill. Admin. Code tit. 59, § 117.115(a).

3. Many Medicaid-funded homecare programs are "self-directed," meaning that participants, or their guardians, are actively involved in developing their plans of care, and exercise "employer authority" to recruit, select, hire, supervise, and otherwise manage their caregivers. *Medicaid Primer,* 178-82; Robert Wood Johnson Foundation, *Developing and Implementing Self-Direction Programs and Policies: A Handbook,* 1-1 to 1-11, 2-3 to 2-5 (May 4, 2010) (hereinafter, *Self-Direction Handbook*).[4] Here, both the Rehabilitation and Disabilities Programs allow participants (or their guardians) to direct their own care. *See* Illinois DHS, *Home Services Program*;[5] Illinois DHS, *Division of Developmental Disabilities Waiver Manual: V. Self-Directed Services and Individual Budgeting*.[6] Accordingly, caregivers in these programs are understood to be employees of the *participants*—not the State. *See* pp. 6-7, *supra.*

In 1985, the Illinois State Labor Relations Board (ILRB) held just that. *See In re Ill. Dep't of Cent. Mgmt. Servs. & Rehab. Servs., & SEIU* No. S-RC-115, 2 PERI P 2007 (1985), *superseded by* 2003 Ill. Legis. Serv. 93-204. The Board found that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction

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[4] http://www.bc.edu/content/dam/files/schools/gssw_sites/nrcpds/cc-full.pdf (last visited Nov. 20, 2013).

[5] http://www.dhs.state.il.us/page.aspx?item=36737 (last visited Nov. 8, 2013).

[6] http://www.dhs.state.il.us/page.aspx?item=52804 (last visited Nov. 8, 2013).

and control of private third parties (service recipients)." *Id*. at *2.

B. Exclusive Representation for Providers

1. This all changed in March 2003 when former Illinois Governor Rod Blagojevich issued EO 2003-08. This executive order acknowledged the ILRB's 1985 decision that "personal assistants are in a 'unique' employment relationship and that the State was not 'their "employer" or, at least, their sole employer.'" Pet. App. 45a. Nevertheless, Governor Blagojevich called for State recognition of a union to be the "exclusive representative" of personal assistants vis-à-vis the State. Pet. App. 46a. He reasoned that this representation was necessary "for the State to receive feedback from personal assistants in order to effectively and efficiently deliver home services," and that absent an exclusive representative, PAs purportedly "cannot effectively voice their concerns about the organization of the Home Services Program, their role in the program, or the terms and conditions of their employment under the Program." Pet. App. 46a.

In July 2003, the legislature codified that executive order by amending the Illinois Public Labor Relations Act. Pet. App. 40a-44a (Ill. Pub. Act 93-204, hereinafter, the "2003 Act"). The 2003 Act recognized what has always existed under the Rehabilitation Program: "the right of the persons receiving services . . . to hire and fire . . . personal assistants or supervise them within the limitations set by the Home Services Program." Pet. App. 44a (amending 20 Ill. Comp. Stat. 2405/3(f)). Nevertheless, the Act declared personal assistants delivering Medicaid-reimbursable services under the Rehabilitation Pro-

gram to be "public employees" of the State "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." Pet. App. 43a. The 2003 Act emphasized that personal assistants were *not* State employees *for any other purpose*, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits." Pet. App. 44a; *see also* Pet. App. 41a (similarly amending the definition of "public employee" in 5 Ill. Comp. Stat. 315/3(n)).

The State designated SEIU Healthcare Illinois & Indiana (SEIU-HII or the Union) to be the exclusive representative of Rehabilitation Program personal assistants for petitioning State officials about the Medicaid program's reimbursement rates and related policies. J.A. 23; *see* Pet. App. 43a (amending 5 Ill. Comp. Stat. 315/7); 5 Ill. Comp. Stat. 315/3(f) (defining "exclusive representative"). Illinois then entered into contracts with SEIU-HII that, among other things, require all personal assistants to pay Union fees. J.A. 24-25 (Art. X, § 6).[7] These so-called "fair-use" fees are deducted directly from the personal assistants' Medicaid payments. *Id*. Consequently, each year more than 20,000 Illinois personal assistants are forced to pay the Union more than $3.6 million in fees. J.A. 25.

2. In June 2009, current Illinois Governor Pat Quinn issued EO 2009-15. It is almost identical to EO 2003-08, except that it targets providers in the Disabilities Program. *See* Pet. App. 48a-51a. It too calls for the designation of an "exclusive representative" for those providers and is similarly predicated

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[7] The agreement in place from January 1, 2008 to June 30, 2012 is reprinted at J.A. 35-60.

on the proposition that providers "cannot effectively voice their concerns . . . without representation." Pet. App. 49a. By its express terms, EO 2009-15 "is not intended to and will not in any way alter . . . the fact that individual providers are not state employees"—except that now, for purposes of petitioning the State concerning Medicaid reimbursement rates, they are declared to be such. Pet. App. 50a.

Despite Governor Quinn's support for mandatory representation, Disabilities Program providers defeated efforts by SEIU Local 73 and AFSCME Council 31 to become their representative in a mail-ballot election that concluded in October 2009. J.A. 27. But EO 2009-15 remains in effect, and Disabilities Program providers remain under threat of the State designating an organization to act as their exclusive representative before the State. J.A. 27-28.

3. Illinois continues to expand its definition of State employee to unionize more Medicaid providers. In January 2013, Governor Quinn signed into law Illinois Public Act 97-1158 (the 2013 Act). This statute targets "individual maintenance home health workers" who are reimbursed by the Rehabilitation Program and deems them "public employees"—but again, solely for purposes of unionization. 5 Ill. Comp. Stat. 315/3(n). Individuals now subject to mandatory representation include any "registered nurse" and "licensed-practical nurse" who provides in-home "direct health care services," and therapists who provide "in-home therapy, including the areas of physical, occupational and speech therapy." Ill. Admin. Code tit. 89, § 676.40(d).

Moreover, the 2013 Act applies to these Medicaid providers "no matter whether the State provides those services through direct fee-for-service ar-

rangements, with the assistance of a managed care organization or other intermediary, or otherwise." 5 Ill. Comp. Stat. 315/3(n). In other words, even individual providers who have employment or contracting relationships with private companies may be compelled to accept and financially support a union as their exclusive representative to the State.

C. Proceedings Below

In 2010, Petitioners ("Providers") filed a class action challenging both Illinois' requirement that Rehabilitation Program providers support an exclusive representative (the 2003 Act) and Governor Quinn's executive order authorizing the collectivization of Disabilities Program providers (EO 2009-15). J.A. 15-34 (Complaint). Providers assert that this "compulsory political representation . . . infringes on the fundamental rights of providers to free association, free speech, and to petition the government for a redress of grievances under the First Amendment." J.A. 16. They seek declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983. J.A. 16.

The district court dismissed the complaint. Pet. App. 39a. It dismissed the Rehabilitation Program Providers' claims under Fed. R. Civ. P. 12(b)(6), concluding that their First Amendment claim challenging the State's compelled representation was "unsound." Pet. App. 29a. The district court dismissed the Disabilities Program Providers' claims under Fed. R. Civ. P. 12(b)(1), finding them to be unripe and insufficient to establish standing. Pet. App. 39a.

Providers appealed. The Seventh Circuit affirmed on two grounds. Pet. App. 17a. First, it determined that this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), controlled because

the State was a "joint employer" of the Rehabilitation Program providers. Pet. App. 9a, 13a-14a. And because that was so, the court explained, the "labor peace" justification applied. Pet. App. 12a-13a. The court acknowledged, however, that it was "aware of no cases specifically discussing *Abood* in a joint-employment situation." Pet. App. 10a.

Second, the Seventh Circuit agreed with the district court that the claims of the Disabilities Program Providers were not ripe because they may never be unionized (although it disagreed that the claims should be dismissed with prejudice). Pet. App. 16a.

Providers then sought certiorari. While their petition was pending, this Court decided *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012). There, the Court reaffirmed that "mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2289 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The *Knox* Court also called into question—but did not resolve—whether, in the compelled-association context, "the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *Id.*

The Court granted the petition in October 2013.

SUMMARY OF ARGUMENT

The First Amendment guarantees all individuals the freedom to choose with whom they associate and the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. Illinois arrogated these rights to itself when it forced Providers to accept and financially support an exclusive representa-

tive to petition the State about a public aid program in which Providers participate.

1. Mandatory associations receive "exacting First Amendment scrutiny," *Knox*, 132 S. Ct. at 2289, and may be sustained only if two criteria are met. First, the mandatory association must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts*, 468 U.S. at 623). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United States v. United Foods Inc.*, 533 U.S. 405, 414 (2001)).

Illinois' scheme satisfies neither test. It mandates association with a union without a compelling reason, purports to do so in the interest of obtaining greater "feedback" from providers even though less infringing means are readily available, and its compulsory union dues are not a necessary incident of any legitimate regulatory purpose.

The Seventh Circuit erred in holding that *Abood* controlled because providers could be deemed jointly employed by Illinois under common-law principles. *Abood* should be overturned. Its core rhetorical move—borrowing a "labor peace" concept from Commerce Clause jurisprudence and elevating it to a First Amendment "compelling interest"—was flawed then, as Justice Powell explained in his separate opinion, and it is flawed now. *Abood's* "free-rider" rationale for compulsory fees is also an "anomaly," and "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289-90. *Abood* is in the category of prior Court decisions that "cross[ ] the

limit of what the First Amendment can tolerate," *id.* at 2291.

2. At the very least, *Abood* should be limited to its narrow facts and to true public employees. A government employer should be able to compel association with a union only when (a) the *government* is directly supervising the individuals in its workplaces, and (b) the representation does not involve matters of *public concern*. That test is not met here.

First, forcing providers to petition the State through a monopoly representative serves no compelling state interest. Illinois' homecare providers are not managed by the State. They do not work in State workplaces. The manner in which providers petition the State cannot disrupt any government workplace.

Second, when providers petition Illinois over its Medicaid programs, they act not as public servants speaking to their master, but as citizens petitioning their sovereign over a subject of public concern. Their expressive activity in this respect is no different from that of physicians, nurses, or hospitals seeking changes to a Medicaid program. The State has no legitimate interest in dictating the associations through which providers must petition it.

A contrary conclusion would have vast and damaging implications. If it were constitutional for Illinois to designate a compulsory advocate to speak for individuals because they provide services to Medicaid recipients, then states could impose compulsory advocates on many others whose services are funded by a government program—including, to name just a few, the medical industry and government contractors.

3. Finally, the homecare Providers who serve participants in Illinois' Disabilities Program are entitled

to challenge the State's regime. Those Providers need only show that Illinois' actions have created a substantial risk that they will be harmed. They did so, because EO 2009-15 substantially increases the risk that they will be forced to accept and support an exclusive representative. Because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 & n.29 (1976) (plurality opinion), the Disabilities Program Providers' claims are ripe.

For all of these reasons, the Seventh Circuit's decision should be reversed.

ARGUMENT

I. *ABOOD* SHOULD BE OVERRULED OR LIMITED TO WHERE GOVERNMENT DEMONSTRATES THAT EXCLUSIVE REPRESENTATION IS NECESSARY AND THE LEAST RESTRICTIVE MEANS TO PREVENT WORKPLACE DISRUPTION.

A. Mandatory Associations Must Be Justified by Compelling State Interests.

1. The First Amendment guarantees citizens the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. This right "is generally concerned with expression directed to the government." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). It is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967), being implied by "[t]he very idea of a government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The First Amendment also protects the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This includes a freedom to associate to petition the government. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937). As this Court has explained, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981).

Given that "'freedom of association . . . plainly presupposes a freedom not to associate,'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts,* 468 U.S. at 623), a state infringes on First Amendment rights when it compels association for an expressive purpose. 132 S. Ct. at 2289; *see, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This includes when a state compels individuals to accept and support an exclusive union representative for dealing with government, as the purpose for this mandatory association is to "petition the Government for a redress of grievances" within the meaning of the First Amendment.

Just two terms ago, this Court reiterated that "compulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2298 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984)). The Court questioned "whether [its] former cases have given adequate recognition to the critical First Amendment rights at

stake." 132 S. Ct. at 2289. Although the Court did not then overrule any precedent, it emphasized that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* at 2291.

The Seventh Circuit failed to require the State to make this rigorous showing. Instead, it concluded that *Abood* could fairly be read to recognize a compelling government interest in "labor peace" whenever the government is involved in some aspects of the employment relationship. Pet. App. 10a. But *Abood* should not be read to relieve the State of its burden to demonstrate a compelling need for this mandatory association. And to the extent that the case stands for that proposition, it should be overruled.

B. *Abood* Should Be Overruled Because It Failed to Give Adequate Recognition to First Amendment Rights.

1. *Abood* involved a Michigan law that designated a union as the exclusive representative of teachers employed by the Detroit Board of Education. 431 U.S. at 211-12. The Court concluded that these teachers could be compelled to pay compulsory union fees because doing so promoted "labor peace"—a rationale that had previously justified compulsory union fees only in the private sector. 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' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961). In both *Hanson* and *Street*, the Court considered the propriety of a section of the Railway Labor Act that allows private railroads to enter so-called "union shop" agreements. *Hanson* found that Congress had power under the Commerce Clause to enact this section, which provides that "notwithstanding the law of 'any State,' a carrier and a labor organization may make an agreement requiring all employees within a stated time to become a member of the labor organization." 351 U.S. at 228 (quoting 45 U.S.C. § 152 Eleventh). However, the First Amendment did not factor into that Commerce Clause decision. What little First Amendment analysis *Hanson* contained was quite abbreviated: the Court concluded that unconstitutional infringement of the "freedom of expression" was "not presented by this record." *Id*. at 238.

As for "labor peace"—the phrase that was to gain such pride of place years later in *Abood*—the *Hanson* Court only invoked the words "industrial peace" to explain Congress' Commerce Clause authority to invalidate state laws prohibiting union-shop agreements. *See id.* at 233. Reasoning that "the power of Congress to regulate labor relations in interstate industries is likewise well-established," and that "Congress has great latitude in choosing the methods by which it is to be obtained," *id.*, the Court declined to explore further the wisdom of congressional policy, or the "ingredients of industrial peace and stabilized labor-management relations." *Id.* at 234. As *Hanson* put it, "[t]he task of the judiciary ends once it appears that the legislative measure adopted is rele-

vant or appropriate to the constitutional power which Congress exercises." *Id.*

The Court returned to the union-shop question in *Street*, which construed the Railway Labor Act to not permit unions to extract mandatory dues from non-members to finance political or ideological activities. 367 U.S. at 768-69. The Court described *Hanson* as a narrow holding—namely, that the Railway Labor Act "was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." *Street*, 367 U.S. at 749. "Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees." *Id.*

The latter issue was, however, presented in *Street*. *Id.* at 744. The Court acknowledged that this issue raised constitutional questions "of the utmost gravity." *Id.* at 749. But the Court *avoided* answering those questions by construing the Railway Labor Act "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69. *Street* was thus a decision of statutory construction, not constitutional interpretation.

Years later—and despite the narrowness of both of those prior holdings—the *Abood* Court extended *Hanson* and *Street* to the public sector. *Abood* involved a mandatory agency shop imposed by the government on public school teachers. And it involved the First Amendment's prohibition on compelled association, not the Commerce Clause or the Railway Labor Act.

But the *Abood* Court nevertheless determined that *Hanson* and *Street,* which "reflect[ ] familiar doctrines in the federal labor laws," supplied the necessary government interest to justify compelled association: namely, "[t]he principle of exclusive union representation" that "is a central element in the congressional structuring of industrial relations." 431 U.S. at 220; *see id.* at 222, 225-26. The Court held that "labor peace" and the avoidance of "free riders" (who would benefit from the union's bargaining and contract administration efforts without financially supporting them) were per se sufficient to justify the intrusion into individuals' First Amendment prerogatives. *Id.* at 224; *see id.* at 232.

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. The Court never acknowledged that transformation, so it did not explain why it was warranted. Nor did the Court assess whether forcing public employees to support a union was the least restrictive means of achieving the ends it had identified.

2. This radical expansion of the government's ability to compel its employees to associate with a union did not go unnoticed. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment remanding *Abood* for further proceedings—but dissented on the key First Amendment issue presented here. *See id.* at 244-45 (Powell, J., concurring in the judgment). As Justice Powell explained, *Hanson* and *Street* "concerned only congressional authorization of union-shop agreements in the private sector." *Id.* at 245. If anything, he said,

"*Street* suggests a rethinking of the First Amendment issues decided so summarily indeed, almost viewed as inconsequential in *Hanson*." *Id.* at 247-48.

Justice Powell recognized that "[t]he collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Id.* at 252-53. And he concluded that any such "collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation." *Id.* at 253.

Justice Powell then did what *Hanson* and *Street* did not (because they did not need to), and what the *Abood* majority did not (for reasons less clear): he identified and applied precedent recognizing that "even in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" *Id.* at 259 (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion)). Looking to *Buckley v. Valeo*, 424 U.S. 1 (1976), which had been decided the previous Term, Justice Powell observed that "[t]he only question after *Buckley* is whether a union in the public sector is sufficiently distinguishable from a political candidate or committee to remove the withholding of financial contributions from First Amendment protection." 431 U.S. at 256.

Answering that question, Justice Powell found "no principled distinction" between the two: "The ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the views and perceived interests of its membership." *Id.* "In these respects, the public-sector union is indistinguishable from the traditional political party in this country."

Id. at 257. And, Justice Powell concluded, "[u]nder our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters." *Id.* at 258.

3. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 500 (2007)). And Justice Powell was right. There is no principled distinction between forcing individuals to associate with a public-sector union and forcing individuals to associate with a political advocacy group. In either case, the purpose for the mandatory association is to "petition the Government" over public affairs. U.S. Const. amend. I.

Since *Abood*, this Court has recognized that "[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion), and that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences," *Knox*, 132 S. Ct. at 2289. The Court should no longer permit government to compel association for the inherently expressive purpose of petitioning the government. *See United States v. United Foods Inc.*, 533 U.S. 405, 415-16 (2001) (association cannot be compelled for purpose of expressive activity).

Moreover, *Abood* failed to consider whether labor peace can be "'achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts,* 468 U.S. at 623). There are alternative means to ensure workplace

harmony less onerous than forcing all employees to associate with one union. Government employers can deal with any workplace disruptions caused by employee support for rival unions through codes of employee conduct and disciplinary measures. And not engaging in monopoly bargaining impairs no constitutional rights. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009); *Smith v. Ark. State Hwy. Employees*, 441 U.S. 463, 465 (1979). Thus, "labor peace" does not justify compulsory representation vis-à-vis government because alternatives less onerous to associational rights are available.

C. "Labor Peace" Cannot Justify Compelled Association When the Employer Is Not Actively Managing and Supervising the Putative Employees or When Matters of Public Concern Are Involved.

If the Court declines to overrule *Abood*, the decision should at least be limited to its facts. *Abood* should apply only when government is acting in its capacity as an *employer* rather than *lawmaker*, to wit, where (1) the government is actively managing and supervising the affected individuals in its workplaces, and (2) the representation does not extend to matters of public concern.

1. "[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). "The government's interest in achieving

its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." 553 U.S. at 598 (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994)); *see Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

As employer, the "[g]overnment must have authority, in appropriate circumstances, to restrain employees who . . . frustrate progress towards the ends they have been hired to achieve." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). Accordingly, a government employer's interest in effective human-resource management grants it significant authority to control the manner in which its employees petition management. *See id.* at 2495-96, 2500-01. And a government employer's interest in controlling the business occurring on its own property grants it greater authority to regulate expressive activity in its non-public workplaces. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

The "labor peace" interest, such as it is, arises from the government's unique interests in managing its employees within its workplaces. As the *Abood* majority described it, "labor peace" is an interest in avoiding workplace "confusion and conflict" caused by employee attempts to petition their employer through multiple representatives. 431 U.S. at 224. That "peace" is attained by suppressing this diverse petitioning by requiring that all employees deal with their employer only through a single, exclusive representative. *Id.* at 220-21.

In particular, exclusive representation in a public school was said to alleviate "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours,

class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. The "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools," as it "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles." *Perry,* 460 U.S. at 52 (quoting *Haukvedahl v. Sch. Dist. No. 108*, No. 75C-3641 (N.D. Ill. 1976)).

2. Whatever its merits within a traditional employment relationship, the labor peace rationale has no application outside of it when government is acting as a policymaker. In that context, the government's relationship with an individual is that of lawmaker and citizen.

The government has no legitimate interest in preventing similarly situated *citizens* from making competing demands on it through diverse associations. That is the very essence of democratic pluralism. "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 132 S. Ct. at 2288 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). Thus, "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976). "The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v.*

Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

This is true even if competing demands from diverse groups of citizens might be disruptive to government. The First Amendment demands tolerance for "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate." *Cohen v. California*, 403 U.S. 15, 24-25 (1971). Thus, association to influence public affairs cannot be lawfully suppressed absent extraordinary circumstances. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-13 (1982); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937).

3. In cases involving compelled association, the line between policymaker and employer should draw from the compelling-interest test that is the core of the relevant First Amendment analysis. If the government purports to require exclusive representation as an employer, it must demonstrate that this exclusive representation is necessary to its efficient internal operations and is narrowly tailored to that end. This, in turn, should require the government to show, at a minimum, that: (a) the government is directly and actively managing and supervising the putative employees in its workplaces, and (b) the representation does not involve matters of public concern.

a. The first element—that the government directly manage the individuals subject to compelled association—speaks to the labor-management concerns that make designation of an exclusive representative arguably permissible in the first place. And it recognizes that those concerns are "compelling" only when individuals are actively managed and supervised by the government.

In virtually all of this Court's precedents recognizing the limits of a public employee's First Amendment rights, the right at issue was exercised in a workplace setting where the government directly and actively supervised the employee. For example, in *Guarnieri*, 131 S. Ct. at 2492, a police officer challenged the town council's directives against him that included, among other things, an admonishment that he not smoke in the municipal building. In *Perry Education Ass'n*, 460 U.S. at 39, a rival public school teachers' association challenged their exclusion from the use of the interschool mail system and teacher mailboxes. In *Garcetti*, 547 U.S. at 413-15, a deputy district attorney challenged adverse actions taken by his supervisors allegedly in retaliation for statements made to his supervisors (among others) in the course of his official duties. And in *Connick v. Myers*, 461 U.S. 138, 141 (1983), an assistant district attorney challenged adverse action taken against her after she prepared and distributed at work a questionnaire soliciting the views of her fellow staff members concerning, among other things, office morale and their level of confidence in supervisors.

These cases "reflect[ ] the importance of the relationship between the speaker's expressions and employment." *Garcetti*, 547 U.S. at 410. They also demonstrate that the criteria used to define the requisite "employment" relationship in the First Amendment context should establish the government's compelling need to restrict the putative employee's right to speak, associate, or petition—such as the government's active management and supervision of the individual.

b. The second element—that exclusive representation cannot regard matters of public concern—draws

from the law defining permissible restrictions on public employees' speech and petition rights. Those precedents recognize the distinction between matters of private concern and matters of public concern. *See, e.g.*, *Guarnieri*, 131 S. Ct. at 2501.

Whether "an employee's petition relates to a matter of public concern will depend on 'the content, form, and context of [the petition].'" *Id.* (quoting *Connick*, 461 U.S. at 147-48). The question is whether the issue can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. If it is one for which "free and open debate is vital to informed decision-making by the electorate," then it is a matter of public concern. *Id.* at 145 (quoting *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563, 571-72 (1968)).

Holding that exclusive representation cannot extend to matters of public concern serves three critical functions. *First*, it recognizes that the First Amendment prohibits unions from forcing nonmember employees to financially support political and ideological activities. *See Knox*, 132 S. Ct. at 2284-85. As this Court has acknowledged, "[l]abor peace is not especially served by allowing" unions to charge a nonmember fees for lobbying the government—even for "financial support of the employee's profession." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520-21 (1991) (plurality opinion); *accord id.* at 559 (Scalia, J., concurring in judgment in relevant part). It follows that individuals cannot be exclusively represented for the purpose of lobbying government over public policies affecting their profession.

Second, not allowing exclusive representation to extend to matters of public concern ensures that in-

dividuals are not affiliated with political and ideological positions with which they may disagree. Designation of an exclusive representative forces individuals into an involuntary fiduciary relationship with a union, akin to that between trustee and beneficiary, in which the union has the legal right to speak and contract for the individuals, whether they approve or not. *See Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990). The putative employee is excluded "from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union." *Abood*, 431 U.S. at 262 (Powell, J., concurring in the judgment). When the subjects of collective bargaining include issues of public concern, that bargaining is "'political' in any meaningful sense of the word." *Id.* at 257. And this has constitutional significance: "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values," as "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Claiborne Hardware*, 458 U.S. at 913 (citation omitted).

Third, not permitting exclusive representation for influencing public policy is consistent with this Court's recognition that when even a real public employee "seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or petition, 'it is necessary to regard the [employee] as the member of the general public he seeks to be.'" *Guarnieri*, 131 S. Ct. at 2500 (quoting *Pickering*, 391 U.S. at 574); *see also City of Madison,* 429 U.S. at 174-76 (unconstitutional to prohibit public employees exclusively represented by union from individually petitioning state employer in public forum). "[T]he

principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions." *Abood*, 431 U.S. at 230. Accordingly, the principle of exclusivity cannot extend to governmental decisions of concern to citizens.

D. The Seventh Circuit and Illinois' Tests for When Association Can Be Compelled Are Unacceptable.

1. The Seventh Circuit adopted a very different test from that required by this Court's First Amendment precedents. It relied on a common-law definition of employment, and the concept of "joint employment," to determine whether *Abood* applied. Pet. App. 10a. Applying those concepts, the court held that homecare providers are jointly employed by Illinois because the State controls (1) how much providers are paid for their services; (2) which services are subsidized; and, (3) who is eligible to receive payment. Pet. App. 10a-11a.

But these factors do not establish—or even bear upon—whether Illinois has a compelling reason for forcing providers to accept and support an exclusive representative for petitioning the State. This Court has already rejected the proposition that constitutional claims for compelled association turn on the degree to which an individual or entity is economically dependent on government. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722-23 (1996).

O'Hare held that First Amendment protections applicable to public employees also applied to the removal of a tow-truck operator from a municipality's list of approved contractors due to the operator's refusal to support the mayor's reelection campaign.

The Court could see "no reason" why a First Amendment claim "should turn on [a] distinction, which is, in the main, a creature of the common law of agency and torts." *Id.* at 722. Such a distinction "'is at best a very poor proxy for the interests at stake.'" *Id.* at 721 (quoting *Board of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996)). The Court "ha[s] been, and . . . remain[s], unwilling to send courts down that path." *Id.* at 723.[8]

The joint employment concept is inapposite not only for this reason, but also because it does not focus on the constitutionally relevant relationship. The pertinent question here is whether *Illinois'* relationship with providers is by itself sufficient to justify compulsory representation for dealing with the State. If not, that is the end of the matter. That the State and homecare patients, taken together, may constitute a full employer of providers is irrelevant.

Indeed, joint employment is a statutory concept that arises from the National Labor Relations Act's definition of "employee," which excludes "independent contractors." 29 U.S.C. § 152(3). Whether someone is a joint employee, as opposed to an independent contractor, is relevant to whether they are subject to that federal law, s*ee Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), and similar state labor laws. This statutory concept has no relevance to the constitutional analysis here.

2. Although the lower court's standard is unsound, it pales in comparison to the State's standard. In its

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[8] The common-law employment test is particularly ill-suited for First Amendment line drawing; it has 13 factors, none of which is determinative. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

appellate brief, Illinois asserted that "the *political branches* have authority to determine the circumstances that justify collective bargaining," (emphasis added), and proffered the following rule:

> The State may compel contributions to a diverse array of "mandatory associations" analogous to unions when (a) the State has concluded that collective action among participants in a government enterprise *will facilitate the goals of that enterprise*; and (b) compelled contributions are necessary to prevent free riders from undermining the association and thwarting its purpose.

State Br. 5-7 (7th Cir. Docket No. 25, filed Apr. 20, 2011) (emphasis added).

Almost any person or entity with some connection to a public program could be collectivized under that standard. Illinois' boundless assertion of power shows utter disregard for the fundamental right of each person to choose with whom he or she associates to petition government, and cannot be adopted.

Instead, if allowed at all, government should be permitted to compel individuals to associate with a union only when it serves a compelling government interest. Such an interest can exist only when government is actively managing the individuals and the representation does not extend to matters of public concern. This ensures that the "labor peace" justification burdens First Amendment freedoms only as necessary to avoid workplace disruptions, and does not impair the right of citizens to choose with whom they associate to influence public policy.

E. As *Knox* Implied, Compulsory Fees Are Not a Necessary Incident of Exclusive Representation.

"[I]n the rare case where a mandatory association can be justified" by a compelling state interest, "compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods,* 533 U.S. at 414). If this Court leaves *Abood*'s labor peace rationale for exclusive representation intact, it should make clear that its "free-rider" rationale for compulsory fees—i.e., the proposition that individuals who may benefit from that representation should pay for its costs, 431 U.S. at 222—is invalid.

In *Knox*, this Court held that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 132 S. Ct. at 2289. The Court should disavow the free-rider argument entirely because it is: (1) "not well reasoned," *Citizens United,* 558 U.S. at 363; (2) not a state interest; and (3) not necessary for exclusive representation.

First, "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." *Knox*, 132 S. Ct. at 2290. It is an anomaly because it is well established that individuals are not obligated to pay for unsolicited services they were forced to accept. *See id*. at 2289-90 (citing examples); Restatement (Third) of Restitution & Unjust Enrichment, § 2(4) ("Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse."); *Force v. Haines*, 17 N.J.L. 385, 386-87 (1840) ("Now the

great and leading rule of law is, to deem an act done for the benefit of another, without his request, as a voluntary courtesy, for which, no action can be sustained.").

This principle is particularly apposite here given that imposing exclusive representation on dissenting individuals for purposes of petitioning government infringes on their First Amendment rights. *See* p. 37, *infra*. To additionally force those individuals to financially support this infringement on their rights is to use one constitutional injury to justify yet another. It is akin to requiring that kidnapping victims pay their captor for room and board.

Unions often assert that their statutory duty to represent all individuals in a bargaining unit justifies compulsory fees. This contention fails because unions voluntarily seek and assume the mantle of exclusive representative. Nothing requires that they do so—unions could choose to represent only their voluntary members if they wished. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938).

Here, SEIU-HII could lobby Illinois over its homecare policies for providers who *voluntarily* choose to support it, just like other advocacy groups that depend on voluntary support. Instead, the Union chose to have Governor Blagojevich designate it as the exclusive representative of all providers by executive order. SEIU-HII cannot now complain that the power it demanded is somehow an onerous burden.

Exclusive representation is not a burden on unions, but an extraordinary power that almost no other organization enjoys. It gives unions the legal right to speak, contract, and otherwise represent all individuals in a group, whether they approve or not. Any

union complaints about the heaviness of this crown are difficult to take seriously.

Second, even if unions had an equitable interest in exacting fees from dissenters (which they do not), that is not a *government* interest. In cases of compelled association, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Elrod*, 427 U.S. at 362. States cannot force individuals to support unions merely because that serves union self-interests.

Third, the free-rider rationale fails because compulsory fees are not "a 'necessary incident'" of exclusive representation, *Knox*, 132 S. Ct. at 2289 (quoting *United Foods,* 533 U.S. at 414). Exclusive representation exists without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and the nation's twenty-four right-to-work states.[9] It does so because unions can solicit voluntary support for their representation.

As experience proves, compulsory fees are not necessary to support exclusive representation. Accordingly, even if individuals can be forced to accept this type of mandatory association, it is unconstitutional to force them to pay for this infringement on their First Amendment rights.

II. ILLINOIS' PROVIDER UNIONIZATION LAWS ARE UNCONSTITUTIONAL.

If this Court overrules *Abood*, the Seventh Circuit's decision necessarily falls with it. If this Court instead limits *Abood* to its facts by adopting the Pro-

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[9] *See* http://www.nrtw.org/rtws.htm (last visited Nov. 19, 2013).

viders' test, the Seventh Circuit's decision should still be reversed because Illinois neither actively manages the providers nor limits exclusive representation to matters not of public concern—not to mention that Illinois has failed to use the least restrictive means to achieve its ends. And if the Court were to apply the common-law employment test the Seventh Circuit used, shorn of its errant reliance on *Abood*, that court's decision still fails because the providers are not State employees even under common law. All roads lead to reversal.

A. Illinois Is Compelling Association for Purposes of Petitioning the State.

Illinois forces Rehabilitation Program providers to associate with SEIU-HII in two ways. *First*, the State requires that providers accept SEIU-HII as their "exclusive representative" for dealing with State agencies. J.A. 23-24. Thrusting providers into this mandatory agency relationship infringes on their associational rights, as it inextricably affiliates them with the Union's petitioning, speech, and policy positions. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010). Indeed, that is the entire point of the "exclusive representative" designation—to establish that SEIU-HII speaks not for itself, but as the proxy of all providers.

Second, Illinois compounds this associational injury by forcing providers to financially support SEIU-HII—to the tune of at least $3.6 million every year. J.A. 24-25. "[C]ompulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2289 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Indeed,

exacting compulsory fees even from public employees is an "'unusual' and 'extraordinary'" exercise of state power. 132 S. Ct. at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184, 187 (2007)).

Illinois' compulsory fee is particularly odious because it is not only a condition of working as a provider, but, for many providers, is a condition of caring for a disabled family member so that he or she may live at home. For example, Providers Susan Watts and Theresa Riffey are forced to choose between paying hundreds of dollars each year to the SEIU-HII or not being able to provide homecare to their daughter and sister, respectively, to prevent their institutionalization. J.A. 18. Illinois' decision to impose this Hobson's choice on providers is not only unconstitutional, it is unconscionable.

The State is forcing providers to associate with the SEIU-HII for an inherently expressive purpose: "petition[ing] the Government for a redress of grievances." The SEIU's statutory function as providers' mandatory representative is to meet and negotiate with State officials over the Rehabilitations Program's reimbursement rates and related policies. *See* 5 Ill. Comp. Stat. 315/7; 20 Ill. Comp. Stat. 2405/3. This is "petition[ing] the Government" over a matter of public concern. *See* pp. 40-41, *infra*. It is functionally indistinguishable from forcing these providers to lobby the State for greater Medicaid reimbursement rates through a State-appointed lobbyist.

Given that Illinois is compelling association for an expressive purpose, its conduct is subject to the "exacting First Amendment scrutiny" tests set forth in *Knox*, 132 S. Ct. at 2289. As established below, the State cannot satisfy these tests.

B. Illinois Has No Compelling Interest in Designating an Exclusive Representative for Homecare Providers to Petition the State.

1. Illinois cannot rely on the "labor peace" rationale to justify its exclusive-representation laws, because homecare providers are not managed or supervised by the State, but by the persons with disabilities who employ them. Nor do the providers work in State workplaces; they work in the private homes of the person they serve. The State, therefore, cannot plausibly claim that exclusive representation is necessary to prevent providers from disrupting its internal managerial functions or workplaces by petitioning it over Medicaid rates through multiple associations.[10]

For the same reasons, when homecare providers petition the State on matters related to the Rehabilitation and Disabilities Programs, they do so in their capacity as *citizens*. Providers' expressive activity in this respect is no different from that of physicians, hospitals, or any other health-service provider seeking changes to Medicaid policies.

The State has no interest in suppressing providers' ability to petition it through diverse associations. *See Abood*, 431 U.S. at 261 (Powell, J., concurring in the judgment) ("I would have thought the 'conflict' in ideas about the way in which government should operate was among the most fundamental values pro-

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[10] There is no record here of any unrest caused by providers' petitioning. To the contrary, the State complains about an ostensible *lack* of effective petitioning by providers, not too much of it. *See* Pet. App. 46a (EO 2003-08) (positing that personal assistants "cannot effectively voice their concerns" to the State "without representation"); Pet. App. 49a (EO 2009-15) (same).

tected by the First Amendment."). Diverse association among providers to influence State policy is a proper functioning of the democratic process. The First Amendment guarantees freedom to associate to petition government precisely to encourage such pluralism. *See, e.g.*, *Knox*, 132 S. Ct. at 2288; *City of Madison Joint Sch. Dist.*, 429 U.S. at 175-76; *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Illinois has no lawful interest in imposing exclusive representation on providers to prevent them from making conflicting demands on the State about its Medicaid policies through multiple advocacy organizations.

2. The "labor peace" rationale also fails in this case because the Union exclusively represents providers to "negotiate" with State officials over matters of *public concern*; namely, the Rehabilitation Program's reimbursement rates and related policies. *See* 5 Ill. Comp. Stat. 315/7; 20 Ill. Comp. Stat. 2405/3 (defining subjects of "collective bargaining" for personal assistants). There is a better word to describe these "negotiations" with the State: the word is "lobbying." *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); *cf.* 2 U.S.C. § 1602(7)-(8) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

Interest groups representing medical practitioners often lobby government over Medicaid programs. In

2012 alone, organizations representing "health professionals" expended over $80 million lobbying just the federal government, and over 800 individuals or entities hired someone to lobby the federal government over Medicaid and Medicare.[11] The Union's function is no different than that of other interest groups or lobbyists that petition government on behalf of medical practitioners.

For example, a voluntary association of homecare providers would be lobbying the State over a matter of public concern if it met and spoke with DHS officials to request higher Medicaid rates. Under the Seventh Circuit's view, however, when SEIU-HII engages in this activity, it is "collective bargaining" that all providers can be forced to support under *Abood*. But the expressive activity is *identical*. Whatever the label, the act of seeking an audience with the State is quintessentially "petition[ing] the Government" over a matter of public concern within the First Amendment's meaning.

A contrary conclusion—i.e., that policy issues like Medicaid rates are internal employment matters fit for mandatory "collective bargaining"—would erase the already tenuous distinction between lobbying and collective bargaining found in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520-21 (1991) (plurality opinion). If this distinction is going to be maintained

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[11] *See* Center for Responsive Politics at http://www.opensecrets.org/lobby/indusclient.php?id=H01&year=2012 (last visited Oct. 15, 2013), and http://www.opensecrets.org/lobby/issuesum.php?id=MMM&year=2012 (last visited Oct. 15, 2013) (data based on lobbying reports filed with the U.S. Senate Office of Public Records).

at all,[12] petitioning regarding government programs that affect individuals must be considered issues of public concern for which association cannot be lawfully compelled. *See Knox,* 132 S. Ct. at 2294-95 (holding union fee for "lobbying the electorate" not germane to collective bargaining because that "would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997) (Silberman, J.) (holding union's contacts with federal agencies about safety regulations not chargeable to nonmembers because it "would swallow the *Lehnert* rule"), *aff'd on other grounds*, 523 U.S. 866 (1998).

Accordingly, the State's designation of an advocacy group to serve as providers' representative is not justified by the mere incantation of "labor peace." That interest is neither present nor cognizable here.

3. In any event, Illinois' reliance on labor peace is a relatively late-breaking one. Originally, the State rested on its belief that "it is essential for the State to receive feedback from the personal assistants in order to effectively and efficiently deliver home services," and that providers "cannot effectively voice their concerns . . . without representation." Pet. App. 46a (EO 2003-08); *accord* Pet. App. 49a (EO 2009-15). But that claimed interest in "feedback" goes much the same way as labor peace: neither is so

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[12] Providers submit that petitioning regarding wages and benefits given to public employees also involves matters of public concern, and that *Abood* should be overruled for this reason. *See* p.23, *supra*. However, even if the Court disagrees with that, petitioning regarding Medicaid programs must cross the line into policymaking, lest such a line not exist at all.

compelling as to override providers' First Amendment rights.

The "feedback" rationale fails at the outset because association cannot be compelled for the very purpose of generating speech. In *United States v. United Foods*, a federal program requiring business owners to subsidize an advertising campaign was held unconstitutional because the program's principal purpose was to require speech. 533 U.S. 405, 415-16 (2001). This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415. Thus, Illinois cannot compel providers to petition it through an exclusive representative because the State believes that petitioning may be useful to it. [13]

Conversely, an ostensible lack of "feedback" from providers is no justification for compelling them to speak to the State through a designated advocate. This Court has steadfastly rejected the "paternalistic premise" that expressive activities can be regulated because persons "are incapable of deciding for themselves the most effective way to exercise their First Amendment rights." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790 (1988). "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." *Id.* at 790-91. Thus, "the government, even with the purest of motives, may not sub-

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[13] For similar reasons, the State cannot impose a compulsory representative on providers based on an assertion that they lack sufficient political influence or power. *Cf. Citizens United v. FEC*, 558 U.S. 310, 350 (2010) ("reject[ing] the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections'") (*quoting Buckley v. Valeo*, 424 U. S. 1, 48 (1976)).

stitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Id.* at 791.

Illinois' essentially limitless "feedback" rationale therefore should be rejected as incognizable.[14] A governmental desire for input on policy issues cannot justify imposing monopoly representation on an interested subset of its citizens.

4. The Seventh Circuit's analysis also was flawed on its own terms. Even if this Court were to conclude that labor peace justifies compelled association anytime a common-law employment relationship exists, there is no such relationship here. S*ee* J.A. 20-21.

Illinois regulations recognize that the Medicaid "*customer shall serve as the employer* of the [personal assistant]." Ill. Admin. Code tit. 89, § 676.30(b) (emphasis added). Those regulations further require that "[i]n order to be employed by a customer as a PA . . . an individual must: . . . complete an EMPLOYMENT AGREEMENT between the customer and PA that certifies the PA . . . shall agree that the customer is responsible for locating, choosing, employing, supervising, training, and disciplining as necessary the PA." *Id.* § 686.10(h)(7) (emphasis in original). And, "[a]lthough DHS shall be responsible for ensuring that the funds available under the [Rehabilitation Program] are administered in accordance with all applicable laws, DHS shall *not* have control or input

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[14] The feedback rationale is also not compelling, as it defies credulity that the State has such a desperate need for SEIU-HII's advice on provider reimbursement rates that it could justify annually forcing 20,000 providers to subsidize that interest group. As with other public-assistance programs, the State can competently address how to administer Medicaid programs through normal administrative and legislative procedures

in the employment relationship between the customer and the personal assistants." *Id.* § 676.10(c) (emphasis added).

The ILRB thus was correct in finding that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (service recipients)." *Dep't of Cent. Mgmt. Servs.*, 2 PERI P 2007, at *2.

The Seventh Circuit erred in finding that the State exercises employer-like "control by approving a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions and annually reviews each personal assistant's performance." Pet. App. 11a. The service plan is jointly developed by the Medicaid customer, his physician, and a State-appointed counselor, and must be approved by a physician. *See* Ill. Admin. Code tit. 89, § 684.10. The plan's purpose is to identify which homecare services are medically necessary and best serve the customer's needs. *See id.* §§ 684.10(a), 684.70(a). Annual evaluations are conducted "*by the customer* with assistance of the counselor." *Id.* § 686.30(a) (emphasis added). These program requirements only show that the Medicaid customer, not the State, is in charge of his or her provider.

Illinois itself does not consider providers to be its employees—*except for the sole purpose of unionization*. *See* 20 Ill. Comp. Stat. 2405/3(f). The State's decision to change the label affixed to this relationship solely for the purpose of unionization does not change the practical reality: Program participants, not the State, are the providers' "employers."

* * *

For all of these reasons, Illinois lacks a compelling reason for forcing providers to accept and support an exclusive representative to petition the State over its Medicaid policies. The mandatory association required by the 2003 Act should be struck down.

C. Substantially Less Intrusive Means Are Available to the State to Encourage Feedback from Homecare Providers.

Even if Illinois had a compelling interest for its mandatory-association regime, Illinois must still prove that the specific method it chose—forcing providers to associate with SEIU-HII—is the least restrictive way to fulfill that purpose. For

> it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the government "must emplo[y] means closely drawn to avoid unnecessary abridgment."

Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (plurality opinion) (quoting *Buckley*, 424 U.S. at 25). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 363 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)); *see Knox*, 132 S. Ct. at 2291 & n.3.

Precision is sorely lacking here. If "feedback" is the goal, there are numerous alternatives readily available short of forcing homecare providers to affiliate with a union. To name one, if State officials want to meet and confer with SEIU-HII over Medicaid rates, they can simply do so. *See Minnesota State Bd. for*

Cmty. Colls. v. Knight, 465 U.S. 271, 282-83 (1984).[15] The State does not need to conscript providers into the Union's ranks in order to consult with the Union about matters of public policy.

The State can also solicit feedback from providers themselves, by requesting comments in rulemaking, holding meetings, sending them questionnaires, or polling them. Such means are commonly used to solicit citizens' input on issues of public policy and are "significantly less restrictive of associational freedoms," *Roberts*, 468 U.S. at 623, than forcing the providers to accept a compulsory representative.

If anything, making SEIU-HII the providers' exclusive representative serves only to *reduce* "feedback" on potential policy changes. DHS now cannot confer with providers themselves over Medicaid rates; it may deal only with the Union. *See Board of Educ. v. IELRB*, 250 Ill. App. 3d 878, 883, 620 N.E.2d 418, 421 (1993). The State's means thus are not narrowly tailored to its professed end; indeed, they are at odds with it.[16]

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[15] *Knight* held that government officials can generally choose with whom they meet and confer because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." 465 U.S. at 283. Of course, that Illinois can choose to whom it listens under *Knight* does not give it any right to dictate who shall speak for providers. *Knight* twice states that claims of compelled association were not at issue there. *Id.* at 289 n.11, 291 n.13.

[16] For similar reasons, Illinois cannot justify collectivization as necessary for improving the Rehabilitation or Disabilities Programs. If the State wants to increase reimbursement rates, or make any other changes to these Medicaid programs, it can simply do so, without forcing providers to accept and support mandatory representation.

The State has never explained how a compulsory union fee is even rationally related to encouraging greater feedback from the providers—much less narrowly tailored to that interest. The State's silence is understandable; for there is *no* connection between the compulsory fees and the asserted "feedback" rationale. For this reason also, the Illinois provider unionization laws violate the First Amendment.

D. Compulsory Fees Are Not a Necessary Incident of a Valid Regulatory Purpose.

Illinois' exaction of compulsory fees from providers in the Rehabilitation Program also fails the second requirement for mandatory association—that such fees be "a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods,* 533 U.S. at 414). In other words, the fees must be "germane to a purpose related to an association independent 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* . . . would be empty of meaning and significance." *Id*.

The purpose Illinois identified in the executive orders was the need for more "feedback" from homecare providers. Pet. App. 46a (EO 2003-08); Pet. App. 49a (EO 2009-15). The infringement on First Amendment rights is not incidental to this governmental purpose; it *is* the purpose. And that contravenes *United Foods* because association cannot be compelled for the very purpose of generating speech. 533 U.S. at 415; *see* p. 43, *supra*.

The State also cannot rest on an argument that compulsory fees are necessary to prevent providers from "free riding" on SEIU-HII's petitioning of the

State for the reasons stated at pp. 34-36, *supra*. In *Knox*, this Court recognized that "'[i]f a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.'" 132 S. Ct. at 2289-90 (quoting Summers, Book Review, *Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory*, 16 Comp. Lab. L.J. 262, 268 (1995)). The same principle applies to providers forced to support the Union's lobbying of the State for higher Medicaid rates—they should have no obligation to pay for this unsolicited political activity.

E. Affirmance of the Seventh Circuit Could Subject Participants in Many Public Benefit Schemes to Collectivization.

The Seventh Circuit applied a watered-down First Amendment test (we will not even call it "scrutiny") to conclude that Illinois could properly compel providers to accept and support an exclusive representative for dealing with the State. The implications of that extension of compulsory representation to individuals who provide services to public-aid recipients are vast. If upheld, the precedent will open the door to the collectivization of many professions for purposes of petitioning government over public-aid programs that pay for their services to others.

The Seventh Circuit attempted to minimize these implications. It asserted that "[w]e hold simply that the State may compel personal assistants as *employees*—not contractors, health care providers, or citizens—to financially support a single representative's exclusive collective bargaining representation." Pet. App. 14a-13a (emphasis in original).

But even this holding has broad ramifications, given that similar self-directed Medicaid programs exist in almost every state. *See* p.8, *supra*. These programs share the basic features of the Rehabilitation Program. *See Self-Direction Handbook*, 1-2 to 1-10, 2-3 to 2-5; *Medicaid Primer*, 179-80; *see also* 42 C.F.R. § 441.301(b)(1) (condition of Medicaid waiver that state furnish homecare services pursuant to a plan of care). Any providers reimbursed by these Medicaid programs—i.e., personal assistants, nurses, and therapists—are susceptible to compulsory representation under the lower court's ruling. Indeed, fourteen states have authorized the collectivization of these types of Medicaid providers.[17]

The implications of the Seventh Circuit's standard extend far beyond homecare providers. The court's rule deems individuals jointly employed by government under *Abood* if a public-aid program exerts "significant control" over their jobs by: (1) *paying* for the service; (2) defining *what* services will be reimbursed; and/or (3) limiting *who* is eligible to receive payment. Pet. App. 10a-11a. It is unclear if all factors must be present, or just one. Importantly, that an individual is hired, managed, supervised, and

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[17] Cal. Welf. & Inst. Code, § 12301.6(c)(1); Conn. Pub. Act 12-33 (May 14, 2012); 20 Ill. Comp. Stat. 2405/3(f); Md. Code Ann. Art. 9, §§ 15-901 *et seq.*; Mass. Gen. Laws ch. 118G, § 31(b); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-County Aging Consortium (June 10, 2004) (rescinded); Minn. Stat. §§ 179A.50-52; Mo. Rev. Stat. § 208.862(3); Ohio H.B. 1, §§ 741.01-.06 (July 17, 2009) (expired); Or. Const. art. XV, § 11(f); Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (Sept. 14, 2010) (rescinded); Wash. Rev. Code § 74.39A.270; Wis. Stat. § 111.81 *et seq*. (repealed); Vt. Pub. Act 13-48 (May 24, 2013).

otherwise employed by a third party is irrelevant under the lower court's rule. Pet. App. 11a.

This broad standard can encompass almost anyone receiving government money for a service. When it pays for a service, the government necessarily defines *how much* it will pay, for *what* services it will pay, and *whom* it will pay to perform them. By way of example:

Medicare Home Health Benefits. Medicare subsidizes certain home-based services, 42 U.S.C. § 1395x(m). As of 2008, there were 290,439 Medicare-funded home health employees.[18] As with Medicaid-funded programs, Medicare requires that home-based services be provided pursuant to "a plan (for furnishing such items and services to such individual) established and periodically reviewed by a physician," *id.*; *see* 42 C.F.R. § 424.22(a)(1)(iii), and limits who can perform these services. *See, e.g.*, 42 U.S.C. § 1395bbb(a)(3) (qualification requirements); 42 C.F.R. § 484.4 (same).

Much like the providers here, a Medicare-funded "home health aide provides services that are ordered by the physician in the plan of care," to "include the provision of hands-on personal care, performance of simple procedures as an extension of therapy or nursing services, assistance in ambulation or exercises, and assistance in administering medications that are ordinarily self-administered." 42 C.F.R. § 484.36(c)(2). However, unlike here, Medicare-funded home health aides are not directly employed by the patient, but are employees or contractors of a

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[18] National Ass'n for Home Care & Hospice, *Basic Statistics About Home Care*, Table 8 (2010), www.nahc.org/assets/1/7/10HC_Stats.pdf (last visited Nov. 20, 2013).

home health agency. *See id.* § 484.36(d)(4); 42 U.S.C. § 1395x(o)(2). But, under the Seventh Circuit's "joint employer" standard, that is a distinction without a difference. It simply makes the federal government the Medicare providers' joint employer along with the home health agency.

Adult Foster Care. A number of state Medicaid programs pay for care of the disabled and elderly in private residential settings other than their homes—i.e., "adult foster care."[19] Two states, Oregon and Washington, have already moved to compel proprietors of adult foster homes to accept exclusive union representatives to bargain with the states over Medicaid reimbursement rates for their services. *See* Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

Traditional Medicare and Medicaid. Nothing limits the reach of the Seventh Circuit's standard to homecare. It extends to practitioners reimbursed by traditional Medicare and Medicaid plans, who logically satisfy the court's tripartite control criteria.

Under Medicare Part B, the federal government (1) sets the rate of payment for medical services via a fee schedule, *see* 42 C.F.R. § 414.1–414.68; (2) controls which services it will subsidize, *see id.* §§ 424.5(a)(1), 424.24; and (3) limits whom it will pay to perform those services. *Id.* § 424.500-565 (enrollment requirements for healthcare practitioners to receive payment). Fee-for-service Medicaid plans

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[19] *See* Janet O'Keeffe *et al.*, U.S. Dep't of Health & Human Servs., *Using Medicaid to Cover Services for Elderly Persons in Residential Care Settings* (Dec. 2003), http://aspe.hhs.gov/daltcp/reports/med4rcs.pdf (last visited Nov. 20, 2013).

work much the same way.[20] Under the lower court's standard, physicians and other practitioners who care for Medicare patients could be deemed half-employed by the federal government, and thus susceptible to the imposition of a mandatory representative to bargain with their ostensible federal employer over Medicare rates.

This includes practitioners who have contracting or employment relationships with hospitals or other organizations, for that is no barrier to collectivization vis-à-vis government under the lower court's "joint employer" standard. For instance, Illinois' 2013 Act extends unionization to those who provide homecare services "no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise." 5 Ill. Comp. Stat. 315/3(n). If being employed by a Medicaid enrollee is no barrier to being collectivized for petitioning the State, then being employed by a hospital or managed care organization is not either.

Childcare Providers. Every state operates a program that subsidizes childcare expenses of low-income families pursuant to federal Child Care and Development Fund programs.[21] Families enrolled in these programs can generally choose the private

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[20] *See generally* 42 C.F.R. § 430.0 ("Within broad Federal rules, each State decides . . . types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services."); 42 U.S.C. § 1396a(a)(30).

[21] *See* U.S. Gov't Accountability Office, GAO-04-786, *Child Care: State Efforts to Enforce Safety & Health Requirements*, 4-6 (2004).

childcare provider of their choice, including: (1) home-based "family child care" businesses; and (2) "relative care providers" who, as the name implies, are family members who care for related children in their own homes. *See* 45 C.F.R. § 98.2 (defining "eligible child care provider" and "family child care provider").

Beginning in 2005—with Illinois again in the vanguard—states began imposing mandatory representatives on these childcare providers to petition states over their childcare subsidy rates for indigent children. To date, eighteen (18) states have authorized mandatory representation for home childcare providers, and fourteen (14) permit or permitted the exaction of compulsory fees.[22] The constitutionality of this forced association is being challenged. *See Schlaud v. UAW*, 717 F.3d 451 (6th Cir. 2013), *petition for cert. filed,* 82 U.S.L.W. 3101 (U.S. Aug. 19, 2013) (No. 13-240); *Parrish v. Dayton*, No. 13-2739

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[22] Conn. Pub. Act 12-33 (May 14, 2012); 5 Ill. Comp. Stat. 315/3, 315/7; Iowa Exec. Order 45 (Jan. 16, 2006); Kan. Exec. Order 07-21 (July 18, 2007); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed); Md. Code Ann. art. 5, § 5-595 *et seq*.; Mass. Gen. Laws ch. 15D, § 17; Interlocal Agreement Between Mich. Dep't of Human Serv. and Mott Cmty. Coll., (July 27, 2006) (repealed); Minn. Stat. § 179A.54; N.M. Stat. Ann. § 50-4-33; N.J. Exec. Order 23 (Aug. 2, 2006); N.Y. Lab. Law § 695; Ohio H.R. 1, § 741.01-.06 (July 17, 2009) (expired); Or. Rev. Stat. § 657A.430; Pa. Exec. Order 2007-06 (June 14, 2007); R.I. Gen. Laws § 40-6.61 *et seq*.; Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (codified at Wis. Stat. § 111.02 *et seq*.) (repealed). Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New York, New Mexico, Oregon, Rhode Island, and Washington authorize the exaction of compulsory fees from childcare providers, and the exactions were formerly permitted in Michigan, Ohio, and Wisconsin.

(8th Cir. 2013) (appeal pending). But under the Seventh Circuit's standard, it could be constitutional.

Government Contractors. Perhaps most susceptible of all to collectivization under the lower court's ruling are government contractors, as their relationship with government is much closer than that of Medicaid, Medicare, or childcare providers, who are third-party recipients of benefits provided to individuals enrolled in those public-aid programs. Government bodies necessarily (1) pay their contractors to (2) perform a defined service and (3) choose with whom they contract.[23] In fact, the government-contractor hypothetical proves the lack of structure to the Seventh Circuit's rule: Government contractors are not public "employees," but these contractors more than satisfy the Seventh Circuit's expansive criteria governing when mandatory representation is constitutionally permissible.

* * *

This Court should close the Pandora's Box opened by the Seventh Circuit. It should overrule *Abood*, or at least limit it to its facts by adopting the First Amendment test the Providers advance. And the Court should conclude that the Seventh Circuit has permitted an unconstitutional encroachment on the fundamental right of every person to choose the organization with which he or she associates "to petition the Government for a redress of grievances." The

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[23] *Cf., e.g.*, Office of Federal Procurement Policy Act (1974), Pub. L. No. 93-400, 88 Stat. 796, § 2(1) ("Establishing policies, procedures, and practices which will require the government to acquire . . . services of the requisite quality and within the time needed at the lowest reasonable cost, utilizing competitive procurement methods . . . .").

decision below should be reversed, and the case remanded with instructions to find Illinois' exclusive-representation laws unconstitutional.

III. THE DISABILITIES PROGRAM PROVIDERS' CLAIMS ARE RIPE FOR ADJUDICATION.

The Seventh Circuit upheld the district court's dismissal of the Disabilities Program Providers' claims as unripe because those providers have not yet been involuntarily unionized by the State. But they remain under threat of unconstitutional action. If they want to ward off such action, they must expend resources to encourage other providers to vote any union down. And adding constitutional insult to injury, under the Seventh Circuit's ruling, they must wait until their fundamental First Amendment rights have been violated to challenge the imposition of an exclusive representative.

1. This Court has recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). This principle is vital in the First Amendment context because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 & n.29. Accordingly, Providers in the Disabilities Program are entitled to seek injunctive relief against EO 2009-15 *before* they are unconstitutionally collectivized under it.

For this reason, a plaintiff should be required only to show standing in order to state a ripe claim in cases involving First Amendment compelled-

association claims. That is, a claim can be ripe if it is "based on a 'substantial risk' that [a] harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013).

Babbitt is instructive. There, a union challenged a labor statute on constitutional grounds, including provisions governing union elections. 442 U.S. at 299-301. Even though the union never invoked those election procedures, the Court found the union's challenge ripe for adjudication because "awaiting . . . an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment." *Id*. at 300-01.

Babbitt's reasoning applies with particular force here because "[t]he Disabilities Program plaintiffs complain of the same conduct as the Rehabilitation Program plaintiffs." Pet. App. 14a. And the Seventh Circuit recognized that its decision with respect to the Disabilities Providers would likely be controlled by its decision regarding the Rehabilitation Providers. Pet. App. 16a. This justifies consideration of the merits of the Disabilities Program Providers' claims along with the merits of the Rehabilitation Program Providers' claims as set forth above.

2. Providers in the Disabilities Program are subject to an "actual and ongoing threat" of being unionized under EO 2009-15. J.A. 28; *see Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010) (employee had standing to challenge union organizing agreement because it "will substantially increase the likelihood that [he] will be unionized against his will"). To avoid compelled unionization, Providers will "reasonably incur costs to mitigate or

avoid th[e] harm." *Clapper*, 133 S. Ct. at 1150 n.5. They already spent time and treasure campaigning against unionization in the last election called under EO 2009-15. J.A. 27. "Harris alone spent $1,342.02 for this purpose." J.A. 27. If another election is requested, they will again have to "expend time and money to prevent this infringement on their Constitutional rights." J.A. at 28. Accordingly, these Providers' constitutional claims against EO 2009-15 are ripe for adjudication.

3. The Seventh Circuit failed to appreciate the substantial likelihood of constitutional injury to the Disabilities Program Providers because it mischaracterized the injury as occurring only *after* the State had designated a particular union as the exclusive representative. But for the State to put to a vote the Providers' individual rights to choose with whom they associate to petition government is itself antithetical to constitutional guarantees. The First Amendment exists to protect individual rights *from* majority rule. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (noting that the "right [to associate] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"). The Disabilities Program Providers' right to free association should not be subjected to the tyranny of the majority. Their claims should be adjudicated now.

CONCLUSION

For all of the foregoing reasons, the Seventh Circuit's judgment should be reversed, Illinois' exclusive-representation laws for homecare providers held unconstitutional, and the case remanded with instructions to the lower court to grant appropriate relief to Providers.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

Illinois Public Labor Relations Act (relevant sections only)

5 Ill. Comp. Stat. 315/3(f),(g),(n) Definitions.

As used in this Act, unless the context otherwise requires: * **

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the Board, that the labor organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003-8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section; or (v) recognized as the ex-

clusive representative of child and day care home providers, including licensed and license exempt providers, pursuant to an election held under Executive Order 2005-1 prior to the effective date of this amendatory Act of the 94th General Assembly, and the organization shall be considered to be the exclusive representative of the child and day care home providers as defined in this Section.

* * *

(g) "Fair share agreement" means an agreement between the employer and an employee organization under which all or any of the employees in a collective bargaining unit are required to pay their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and other conditions of employment, but not to exceed the amount of dues uniformly required of members. The amount certified by the exclusive representative shall not include any fees for contributions related to the election or support of any candidate for political office. Nothing in this subsection (g) shall preclude an employee from making voluntary political contributions in conjunction with his or her fair share payment.

* * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including (i) interns and residents at public hospitals, (ii) as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Reha-

bilitation Act, (iii) as of the effective date of this amendatory Act of the 94th General Assembly, but not before, child and day care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code, (iv) as of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (n), home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise . . ..

Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be considered public employees for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disa-

bled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

Child and day care home providers shall not be considered public employees for any purposes not specifically provided for in this amendatory Act of the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

5 Ill. Comp. Stat. 315/7. Duty to Bargain

A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act" unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification: * * *

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representa-

tive of the employees pursuant to the provisions of subsection (a) of Section 9, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Collective bargaining for home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in Public Act 93-204 or this amendatory Act of the 97th General Assembly, as applicable.

Collective bargaining for child and day care home providers under the child care assistance program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 94th General Assembly.

Illinois Disabled Persons Rehabilitation Act (relevant sections only)

20 Ill. Comp. Stat. 2405/1. Purpose

It is the purpose of this Act to provide for rehabilitation, habilitation and other services to persons with one or more disabilities, their families and the community.

20 Ill. Comp. Stat. 2405/3(f). Powers and Duties

The Department shall have the powers and duties enumerated herein: * * *

(f) To establish a program of services to prevent unnecessary institutionalization of persons with Alzheimer's disease and related disorders or persons in need of long term care who are established as blind or disabled as defined by the Social Security Act, thereby enabling them to remain in their own homes or other living arrangements. Such preventive services may include, but are not limited to, any or all of the following:

(1) home health services;
(2) home nursing services;
(3) homemaker services;
(4) chore and housekeeping services;
(5) day care services;
(6) home-delivered meals;
(7) education in self-care;
(8) personal care services;
(9) adult day health services;
(10) habilitation services;
(11) respite care; or
(12) other nonmedical social services that may enable the person to become self-supporting.

The Department shall establish eligibility standards for such services taking into consideration the unique economic and social needs of the population for whom they are to be provided. Such eligibility standards may be based on the recipient's ability to pay for services; provided, however, that any portion

of a person's income that is equal to or less than the " protected income" level shall not be considered by the Department in determining eligibility. The "protected income" level shall be determined by the Department, shall never be less than the federal poverty standard, and shall be adjusted each year to reflect changes in the Consumer Price Index for All Urban Consumers as determined by the United States Department of Labor. The standards must provide that a person may have not more than $10,000 in assets to be eligible for the services, and the Department may increase the asset limitation by rule. Additionally, in determining the amount and nature of services for which a person may qualify, consideration shall not be given to the value of cash, property or other assets held in the name of the person's spouse pursuant to a written agreement dividing marital property into equal but separate shares or pursuant to a transfer of the person's interest in a home to his spouse, provided that the spouse's share of the marital property is not made available to the person seeking such services.

The services shall be provided to eligible persons to prevent unnecessary or premature institutionalization, to the extent that the cost of the services, together with the other personal maintenance expenses of the persons, are reasonably related to the standards established for care in a group facility appropriate to their condition. These non-institutional services, pilot projects or experimental facilities may be provided as part of or in addition to those authorized by federal law or those funded and administered by the Illinois Department on Aging. The Department shall set rates and fees for services in a fair

and equitable manner. Services identical to those offered by the Department on Aging shall be paid at the same rate.

Personal care attendants shall be paid:

(i) A $5 per hour minimum rate beginning July 1, 1995.

(ii) A $5.30 per hour minimum rate beginning July 1, 1997.

(iii) A $5.40 per hour minimum rate beginning July 1, 1998.

Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315/), personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public employees, and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. Solely for the purposes of coverage under the Illinois Public Labor Relations Act, home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also provide services under the Department's Home Services Program shall be considered to be public employees, no matter whether the State provides such services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, and the State of Illinois shall be considered to be the employer of those persons as of the effective date of this amendatory Act of the 97th General Assembly, but not before except as otherwise provided under this subsection (f). The

State shall engage in collective bargaining with an exclusive representative of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right of the persons receiving services defined in this Section to hire and fire home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program or to supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers working under the Home Services Program for any purposes not specifically provided in Public Act 93-204 or this amendatory Act of the 97th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also provide services under the Department's Home Services Program shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

The Department shall execute, relative to the nursing home prescreening project, as authorized by Section 4.03 of the Illinois Act on the Aging, written in-

ter-agency agreements with the Department on Aging and the Department of Public Aid (now Department of Healthcare and Family Services), to effect the following: (i) intake procedures and common eligibility criteria for those persons who are receiving non-institutional services; and (ii) the establishment and development of non-institutional services in areas of the State where they are not currently available or are undeveloped. On and after July 1, 1996, all nursing home prescreenings for individuals 18 through 59 years of age shall be conducted by the Department.

The Department is authorized to establish a system of recipient cost- sharing for services provided under this Section. The cost-sharing shall be based upon the recipient's ability to pay for services, but in no case shall the recipient's share exceed the actual cost of the services provided. Protected income shall not be considered by the Department in its determination of the recipient's ability to pay a share of the cost of services. The level of cost-sharing shall be adjusted each year to reflect changes in the "protected income" level. The Department shall deduct from the recipient's share of the cost of services any money expended by the recipient for disability-related expenses.

* * *

Illinois Developmental Disability and Mental Disability Services Act (relevant sections only)

405 Ill. Comp. Stat. 80/2-2. Purpose

The purpose of this Article is to authorize the Department of Human Services to encourage, develop, sponsor and fund home-based and community-based services for mentally disabled adults in order to provide alternatives to institutionalization and to permit mentally disabled adults to remain in their own homes.

405 Ill. Comp. Stat. 80/2-3. Definitions

As used in this Article, unless the context requires otherwise:

(a) "Agency" means an agency or entity licensed by the Department pursuant to this Article or pursuant to the Community Residential Alternatives Licensing Act.

(b) "Department" means the Department of Human Services, as successor to the Department of Mental Health and Developmental Disabilities.

(c) "Home-based services" means services provided to a mentally disabled adult who lives in his or her own home. These services include but are not limited to:

(1) home health services;
(2) case management;
(3) crisis management;
(4) training and assistance in self-care;

(5) personal care services;
(6) habilitation and rehabilitation services;
(7) employment-related services;
(8) respite care; and
(9) other skill training that enables a person to become self-supporting.

(d) "Legal guardian" means a person appointed by a court of competent jurisdiction to exercise certain powers on behalf of a mentally disabled adult.

(e) "Mentally disabled adult" means a person over the age of 18 years who lives in his or her own home; who needs home-based services, but does not require 24-hour-a-day supervision; and who has one of the following conditions: severe autism, severe mental illness, a severe or profound intellectual disability, or severe and multiple impairments.

* * *

405 Ill. Comp. Stat. 80/2-4. Program

The Department shall establish a Home-Based Support Services Program for Mentally Disabled Adults ("the Program") under this Article. The purpose of the Program is to provide alternatives to institutionalization of mentally disabled adults and to permit these individuals to live in their own homes. The Department shall implement the purpose of the Program by providing home-based services to mentally disabled adults who need home-based services and who live in their own homes.

405 Ill. Comp. Stat. 80/2-6. Application

An application for the Program shall be submitted to the Department by the mentally disabled adult or, if the mentally disabled adult requires a guardian, by his or her legal guardian. If the application for participation in the Program is approved by the Department and the mentally disabled adult is eligible to receive services under this Article, the mentally disabled adult shall be made aware of the availability of a community support team and shall be offered case management services. The amount of the home-based services provided by the Department in any month shall be determined by the service plan of the mentally disabled adult, but in no case shall it be more than either:

(a) three hundred percent of the monthly federal Supplemental Security Income payment for an individual residing alone if the mentally disabled adult is not enrolled in a special education program by a local education agency, or

(b) two hundred percent of the monthly Supplemental Security Income payment for an individual residing alone if the mentally disabled adult is enrolled in a special education program by a local education agency.

Upon approval of the Department, all or part of the monthly amount approved for home-based services to participating adults may be used as a one-time or continuing payment to the eligible adult or the adult's parent or guardian to pay for specified tangible items that are directly related to meeting

basic needs related to the person's mental disabilities. Tangible items include, but are not limited to: adaptive equipment, medication not covered by third-party payments, nutritional supplements, and residential modifications.

405 Ill. Comp. Stat. 80/2-7. Service Providers

Services supported by this Article shall be offered by community health and developmental service providers which have been approved and designated by the Department.