No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state may, consistent with the First and Fourteenth Amendments to the Constitution, compel public employees to support a labor union as their exclusive representative for collective bargaining.

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

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

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae*, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

ation, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court candidly observed in *Knox* that its "acceptance of the opt-out approach" for dissenting employees forced to financially support a labor union against their will "appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2777, 2290 (2012). The same can and should be said of the Court's acceptance of "labor peace" as a state interest so compelling that a state may mandate its employees' association with a labor union, force them to subsidize its speech, and compel them to submit to it as their exclusive representative for petitioning government for redress of grievances regarding the conditions of their employment as state workers—invariably matters of public concern.

The "labor peace" rationale for infringing employees' First Amendment rights rests on the flimsiest of structures. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply assumed that the Court's de-

cisions in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), had already recognized "labor peace" as a First Amendment "compelling interest." But those cases regarded "labor peace" only as justifying Congress's exercise of its Commerce Clause authority to regulate labor relations, not as a basis to override workers' First Amendment rights. In fact, careful review of the Court's precedents shows that, prior to *Abood*, it had never squarely addressed the First Amendment rights of employees to be free from compelled association with and coerced support of a labor union. *Abood's* assumption to the contrary was incorrect.

Its holding on that point is also unsupportable. As *Abood* recognized, the very purpose of forcing dissenting employees to associate with a labor union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve "labor peace." 431 U.S. at 224. But the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988). The State of Illinois' transparent scheme to compel personal homecare providers to associate with and subsidize a labor union absent any legitimate state interest is the predictable result of *Abood's* casual disregard of public employees' First Amendment rights. *Abood* was wrong when it was decided and still cannot be reconciled with the

Court's cases recognizing "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 132 S. Ct. at 2288. It should be overruled now to put an end to the wholesale violation of public workers' First Amendment rights.

Even if the Court is unwilling to recognize at this time that "labor peace" was never a persuasive justification to countenance the violation of public workers' First Amendment rights, it should still reject the State of Illinois' scheme because it is unsupported by any compelling state interest. Whatever a government's interest in furthering "labor peace," that interest is not at all implicated where the government does not manage its putative "employees" and exercises no control over their working conditions. To hold otherwise would distort *Abood* far beyond its holding and logic, allowing the government to forcibly "organize" any recipients of state subsidies.

ARGUMENT

I. "Labor Peace" Is Not a First Amendment Compelling Interest

Abood held that *Hanson* and *Street's* recognition of "labor peace" as an "important" government interest "presumptively support[s] the impingement upon associational freedom" inherent in compelling public employees to support a labor union. 431 U.S. at 225. But what *Abood* took to be settled law was, in fact, nothing of the sort. Prior to that errant decision, the Court had never recognized "labor peace" as an in-

terest that is *per se* sufficiently compelling to override employees' First Amendment rights. The slightest scrutiny demonstrates that it is not. *Abood's* holding to the contrary should be overruled.

A. The "Labor Peace" Doctrine: Another "Historical Accident"

To the extent that there is a "labor peace" doctrine, it concerns Congress's authority under the Commerce Clause to regulate labor relations, not employees' First Amendment rights.

1. "Labor Peace" Emerges as a Commerce Clause Doctrine

The "labor peace" concept first appeared in the Court's 1917 case *Wilson v. New*, 243 U.S. 332, 342, 348 (1917), which challenged Congress's authority to set the hours of work and wages of railroad employees so as to settle a nationwide railroad-worker strike that threatened to "interrupt, if not destroy, interstate commerce." In those circumstances—"that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent"—the Court found that Congress's exercise of power was appropriate. *Id.* at 347-48.

A 1937 decision, *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), extended that holding more generally to the regulation of railroads'

labor relations. The defendant was a railroad that refused to recognize the union that shop craft employees had chosen in a government-supervised election pursuant to the Railway Labor Act. The railroad argued that the Act, "in so far as it attempts to regulate labor relations between [itself] and its 'back shop' employees, is not a regulation of interstate commerce authorized by the commerce clause because . . . they are engaged solely in intrastate activities." *Id.* at 541. Citing evidence of disruptive strikes, "industrial warfare" between the railroads and their employees, and the phenomenon of "general strikes," the Court found the Act to be an appropriate means of "settl[ing] industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement." *Id.* at 553.[2]

That same year, the Court upheld the National Labor Relations Act (NLRA) on "industrial peace" grounds. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), was a broadside attack on Congress's power under the Commerce Clause to regulate labor relations generally. The respondent, a major iron and steel manufacturer, challenged both the

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[2] *See also id.* at 556 ("Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation.")

scope of the Act and the Act's application to its operations, contending that its business was not a part of the "stream of commerce" and therefore was outside of Congress's reach. The Court disagreed, based on the "effects" on interstate commerce of labor discord in the respondent's business:

> [T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. Congress had therefore acted appropriately to facilitate employee representation, it held, because "collective bargaining is often an essential condition of industrial peace." *Id.* at 42.

The Court quickly came to view promoting "industrial peace" or "labor peace" as the fundamental policy and purpose of the NLRA, interpreting and applying the Act in dozens of cases with that goal in mind. *See, e.g., N.L.R.B. v. Fansteel Metallurgical Corp.*,

306 U.S. 240, 257 (1939) ("[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce . . . ."); *N.L.R.B. v. Local Union No. 1229, Intern. Broth. of Elec. Workers*, 346 U.S. 464, 476 (1953) (rejecting application of Act contrary to its "declared purpose of promoting industrial peace and stability"). None of these cases involved employees' First Amendment rights, until *Hanson*.

2. Hanson *and* Street *Skip Past the Central First Amendment Question*

But *Hanson*, a challenge by railway employees to a union-shop arrangement under the Railway Labor Act, also did not suggest that "labor peace" has anything to do with speech or associational rights. Instead, it used "labor peace" in exactly the same manner as its predecessors. A threshold issue was whether the federal Act could preempt a conflicting provision of the Nebraska Constitution that barred union-shop arrangements. 351 U.S. at 233. Citing *Jones & Laughlin Steel*, the Court found the question an easy one: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Id*. at 233. That is it for "labor peace" in *Hanson*.

In fact, *Hanson* has little or nothing to say about the kind of First Amendment argument raised in *Abood* and in the present case. To begin with, the

employees actually did not challenge Congress's authority *vel non* to authorize union-shop agreements consistent with the limitations of the First Amendment. Instead, they argued that the Act infringed their speech and associational rights because they were "compelled not only to become members of the union but to contribute their money to be used in the name of the membership of the union for propaganda for economic or political programs which may be abhorrent to them." Br. of Appellees Robert L. Hanson, *et al.*, at 25, *Railway Employees' Dep't v. Hanson* (filed April 18, 1956).[3] *See also Machinists v. Street*, 367 U.S. 740, 747 (1961) (describing the argument in *Hanson* as challenging the constitutionality of "compelling an individual to become a member of an organization with political aspects [as] an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory

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[3] The brief goes on to specify the kinds of practices to which the employees objected:

> [U]nder the union shop the involuntary union member is compelled to contribute his money to pay for union propaganda for economic and political ideas and ideals which may be abhorrent to him. He is compelled to contribute money which the union may donate to religious organizations with whose beliefs he may be in total disagreement. And the propaganda is carried on and the donations made in the name of the union of which he forms a part, under compulsion. The union purports to speak for its membership including conscripts.

Id. at 65.

financial support of group activities outside the political process").

The Court demurred, holding only that, "*[o]n the present record*, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238 (emphasis added). This was because the case was brought before the union-shop agreement at issue went into effect, and so there could not yet be any evidence that the union had expended funds for political purposes. *See id*. at 230; *Street*, 367 U.S. at 747-48 ("the action in *Hanson* was brought before the union-shop agreement became effective"). On that basis, the Court upheld the Act on its face, while reserving the question of whether "the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement" might run afoul of the First Amendment. 351 U.S. at 238.[4]

[4] The Court also turned back a broader Fifth Amendment "substantive" due process challenge to the Act's authorization of union-shop agreements, holding that "Congress might well believe" (*i.e.*, have a rational basis to believe) that authorizing union shops would best advance the constitutional "right to work." 351 U.S. at 234-35. Notably, that challenge, unlike the employees' First Amendment claim, did ask the Court to rule on whether Congress may authorize union-shop agreements at all, irrespective of whether the union engages or may engage in political activity.

Moreover, the Court skipped past the constitutional question for a separate reason: the attenuation between Congress's action to authorize private parties to enter into union-shop agreements and any injury suffered by employees as a result of those agreements. As the Court stressed, "[t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." 351 U.S. at 231. The implication, Justice Powell later observed, was that "Congress might go further in approving private arrangements that would interfere with [employees' First Amendment] interests than it could in commanding such arrangements." *Abood*, 431 U.S. at 248 (Powell, J., concurring). As such, the *Hanson* Court had no reason to decide whether the government itself might compel association with or financial support of a union consistent with the First Amendment.

Street faced the same narrow question as *Hanson*—whether "First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes," 367 U.S. at 747—but on a developed record. Recognizing this as a question "of the utmost gravity," the Court avoided constitutional doubt by construing the Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 749-50. Such expenditures, it held, "fall[] clearly outside the reasons advanced by the unions and ac-

cepted by Congress why authority to make union-shop agreements was justified" and so should be considered to fall outside of the Act's authorization. *Id.* at 768.

Taken together, *Street* and *Hanson* stand for the proposition that Congress's authorization of agreements requiring employees to associate with or financially support a labor union raises serious constitutional concerns when the union is allowed to expend employees' money on political causes over their objection. But neither case resolved the broader question of whether such a law, irrespective of political expenditures by the union, infringes employees' First Amendment rights. The one sentence in *Hanson* that might be thought to address the issue, quoted above, refers to "the present record," indicating that it concerns the narrower question of political expenditures, not the broader question of the Railway Labor Act's facial validity under the First Amendment, which would not depend on record evidence. *Street's* description of the issue raised in *Hanson*, also quoted above, confirms the point. 367 U.S. at 747.[5] Nor do those cases resolve whether, beyond

[5] *Street's* statement that *Hanson* held the Railway Labor Act "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" is not to the contrary, taken in context. 367 U.S. at 749. As the preceding sentence describes, *Hanson* held that the Act was "within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* (quot-

authorizing private union-shop agreements, government may *directly compel* association with or support of a union. Finally, neither case so much as suggests that the government's interest in "labor peace" has the least thing to do with employees' First Amendment rights.

3. Abood's *Bait-and-Switch: Substituting a Commerce Clause Doctrine for Any Reasoned First Amendment Analysis*

Abood mangled the Court's precedents beyond all recognition to uphold a mandatory agency shop imposed by the government on public school teachers. *Hanson* and *Street*, it incorrectly assumed, had already established that any "interference" with the First Amendment rights of dissenting employees made to financially support a labor union "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Not only that, but those cases, it said, "presumptively support the impingement upon associational freedom created by the agency shop here at issue," one directly imposed on public employees by their government. *Id*. at 225.

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ing *Hanson*, 351 U.S. at 238). But that goes only so far: *Hanson* ruled on the narrower First Amendment claim, regarding political expenditures, that was before it but did not address the waterfront of possible First Amendment claims, including the charge that, irrespective of political spending by unions, the Act infringes employees' First Amendment rights.

Abood also incorrectly characterized those cases' First Amendment holdings as resting upon the government's interest in maintaining "labor peace." Mixing and matching from different parts of the Court's opinion in *Hanson*, and paraphrasing when even that was insufficient to its ends, *Abood* cobbled together an entirely new doctrine of First Amendment law:

> Acknowledging that "(m)uch might be said pro and con" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "(t)he ingredients of industrial peace and stabilized labor-management relations." Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.

Id. at 219 (quoting *Hanson*, 351 U.S. at 233-34).

And this new doctrine, it held, recognized no distinction between Congress's authorization of private-sector union-shop agreements, as at issue in *Hanson* and *Street*, and the government compelling its own employees to associate with and support a union. Finding no actual support for this proposition in either precedent, it could only cite Justice Douglas's attempt to refashion *Street's* narrow holding into a broad principle that collective action overrides the

individual rights expressly guaranteed by the First Amendment: "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id*. at 222-23 (quoting *Street*, 267 U.S. at 778 (Douglas, J., concurring)). At the time, Justice Douglas's dismissive approach to the First Amendment had garnered the support of no other justice; in *Abood*, the Court accepted it as *Hanson's* central holding and therefore settled law.

B. *Abood's* Reliance on "Labor Peace" Conflicts with First Amendment Principles Prohibiting Compelled Speech and Association Absent a Substantial Non-Expressive Government Interest

In so doing, *Abood* departed spectacularly from settled First Amendment principles.

Abood's chief error in law mirrors its misunderstanding of the Court's labor-law precedents. *Hanson* and *Street* held that the effects of "labor peace," or the lack thereof, on interstate commerce were sufficient to support the exercise of Congress's Commerce Clause power—an exceedingly low bar. To uphold such an exercise, the Court considers only "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Essentially the same standard applies to due

process claims concerning the regulation of economic activity. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955). That Congress could authorize union-shop agreements under its Commerce Clause power, and that its doing so was not barred by the Fifth Amendment's Due Process Clause, *see supra* n.4, are logically irrelevant to whether its action clears the higher bar of First Amendment exacting scrutiny. *Abood's* bait-and-switch on this point—substituting a Commerce Clause doctrine for any kind of reasoned First Amendment analysis—is unsupportable.

So is its bottom-line holding that government's interest in promoting "labor peace" is substantial or compelling. The whole point of a labor union is to express certain views through both speech and association. Under an agency-shop agreement, a union "is designated the exclusive representative of those employees" that are compelled to support it. *Abood*, 431 U.S. at 224. It that capacity, it speaks on their behalf, and through their association with it, employees are bound by that speech, whether or not they agree with it. *Abood* recognized, with respect to a teachers' union, that this association serves specifically to suppress the speech of dissenting employees who may hold "quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures." *Id.* *Abood* regarded this as a *virtue* of compelled association with a union.

The First Amendment does not. Instead, as in nearly all other areas, "[t]he First Amendment man-

dates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). The government "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor does the First Amendment permit it to "sacrifice speech for efficiency." *Id.* at 795. Straightforward application of these basic principles disposes of any argument that the government has a compelling interest in furthering "peace" between employers and their employees.

In particular, the Court has long adhered to Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 12 (1947); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990). Accordingly, it has recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,"

schemes that compel such subsidies "must pass First Amendment scrutiny." *Id.* at 411. At the very least, the government's interest must be substantial, and the compulsion tailored to achieve that interest. *See id.* at 409-10 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

Similarly, the Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234-35). That freedom may be impinged only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Knox*, 132 S. Ct. at 2289 (same); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658-59.

And, consistently, even indisputably important state interests—eradicating discrimination, assuring equal access to places of public accommodation—have been found to be outweighed by the burden of government intrusion on associations that are, themselves, expressive. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995); *Boy Scouts*, 530 U.S. at 559.

With equal consistency, the Court has upheld those laws that impose no "serious burden" on expressive association. *See Boy Scouts*, 530 U.S. at 658-59 (discussing cases); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire'").

Merely invoking "labor peace" cannot justify compelling employees to financially support a union. While the government may compel the subsidization of speech when necessary to carry out "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy," *Knox*, 132 S. Ct. at 2289 (citing *United Foods*, 433 U.S. at 414), it must have some object in mandating the association beyond the speech itself, lest the exception swallow the general rule. In other words, compelled association must be incidental to some legitimate government interest. *United Foods*, 533 U.S. at 413-15 (rejecting "compelled subsidies for speech in the context of a program where the principal object is speech itself"). Yet, as *Abood* recognized, the very purpose of forcing employees to associate with a labor union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve "labor peace." 431 U.S. at 224.

This circular logic admits no legitimate government interest, much less a compelling one.

The "labor peace" rational also pales in comparison to other government interests. The government's interest in promoting public safety—that is, domestic peace—is no doubt compelling, but only extends so far as the regulation of speech that presents a "clear and present danger." *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Cf. Virginia v. Black*, 538 U.S. 343 (2003). Likewise, the federal government's interest in the "common defense" reflects its constitutional responsibility, U.S. Const. art. I, § 8, cl. 1, but does not extend to the regulation of expressive association. *United States v. Robel*, 389 U.S. 258, 265-66 (1967). And government has no compelling interest in coercing citizens' allegiance to the principles of our Constitution or their respect of the symbols of our nation. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Texas v. Johnson*, 491 U.S. 397 (1989). By comparison, government's interest in forcing workers to support and adhere to certain opinions regarding their wages, working conditions, and the like is trifling.

Finally, these errors are compounded by *Abood's* failure to recognize the distinction between government authorization of private agreements that require employees to support a labor union and the government itself forcing its employees to support a union and to channel their speech through it, to the extent that they are able. As Justice Powell observed, "[t]he State in this case has not merely au-

thorized union-shop agreements between willing parties; it has negotiated and adopted such an agreement itself." *Id.* at 253 (Powell, J., concurring). Accordingly, that "agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation." *Id.*

Indeed, the Court has subsequently recognized what recent political turmoil over state spending on public-employee benefits has made plain: "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. For that reason, "compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Id.* Yet *Abood* allows a state to compel its employees to support a labor union's speech on these civic issues and to suppress the expression of their dissenting views, on the ground that it is convenient that workers speak with one voice. 431 U.S. at 224. But government's convenience is no basis to suppress dissent. *Riley*, 487 U.S. at 795.

"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, 501 (2007)). *Abood's* "labor peace" rationale misapplied the Court's labor-law precedents in the service of circumventing employees' fundamental First Amendment rights to be free of coerced speech and association, to exercise the

freedom of speech, and to petition the government. Aberrant and offensive, it should be overruled.

II. Even if "Labor Peace" Could Support Compulsory Unionization, the State of Illinois Has No Compelling Interest Here

Even if the Court is unwilling to recognize at this time that "labor peace" was never a persuasive justification to countenance the violation of public workers' First Amendment rights, it should still reject the programs at issue here. The State of Illinois has no cognizable interest in maintaining "labor peace" among household workers or family members merely because they provide services to individuals who participate in a State program or because they are subject to State regulation.

"Labor peace" is not an empty semantic vessel that the State may fill up merely by asserting employer status. Instead, as described above, its contents were set at a time when Congress's Commerce Clause power was seen as less robust than today, and the "labor peace" doctrine reflects its roots, referring to the pacification of those types of industrial discord that pose a threat to interstate commerce. *Maryland v. Wirtz*, 392 U.S. 183, 191 (1968) (explaining that the National Labor Relations Act was passed to address "substandard labor conditions" that could lead to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"). *See also N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937); *Ry. Emp. Dep't v. Hanson*, 351 U.S.

225, 233 (1956); *Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

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

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-21.

Ellis, following *Abood*, explained that a union could charge a non-member only for union "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v.*

Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435, 448, 455-56 (1984). *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (adopting *Ellis's* holding as a matter of First Amendment law). Those kinds of activities define the absolute outer limits of *Abood's* "labor peace" rationale.

But labor-management issues are necessarily absent here because Illinois does not manage the personal assistants who provide services to participants in its Rehabilitation Program and exercises no control over labor conditions. Federal law specifies the basic requirements for a Medicaid waiver program, such as Illinois's Rehabilitation Program, including that the State provide "payment for part or all of the cost of home or community-based services . . . which are provided pursuant to a written plan of care." 42 U.S.C. § 1396n(c)(1).[6] State law, in turn, lays out specific and objective requirements for personal assistants, 89 Ill. Admin. Code § 686.10, and their duties, which are limited to household tasks and contained in "service plans" approved by the customer's physician, §§ 686.20, 684.10.

Crucially, Illinois law is explicit that the homecare patient, or "customer"—not the State or any other party—"is responsible for controlling all aspects of the employment relationship between the customer

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

and the PA," from hiring to evaluation and termination. § 676.30(b). It is therefore the customer alone—and not the State—who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation. The State has obliged itself to pay for care provided by personal assistants to Rehabilitation Program participants "at the hourly rate set by law." § 686.40. Although the collective-bargaining agreement provides for a union-administered "grievance procedure," that procedure does not apply to "any action taken by the Customer" or, for that matter, the hiring, firing, or reduction in hours of a personal assistant. CBA, art. XI.

Further, the confusion, rivalries, and dissension that may arise in a workplace absent an exclusive representative are inapplicable where, as here, there is no common or state-provided workplace at all and personal assistants carry out their duties in customers' homes. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace *within the schools*.") (emphasis added). Because the State does not manage personal assistants and takes no responsibility for their labor conditions, it lacks the power to bargain with SEIU over the terms of employment that implicate "labor peace."

Moreover, because the union is limited to the role of petitioning the State for greater pay and benefits, there can be no serious claim that its exclusive rep-

resentation of workers in this activity has freed the State from any great burden due to "conflicting demands" by personal assistants. Surely the State faces more numerous and diverse demands by Rehabilitation Program customers seeking additional benefits—a group that it has yet to attempt to organize coercively—and other recipients and would-be recipients of State benefits. Petitioners here have no greater or qualitatively different a relationship with the State than do other indirect recipients of State benefits, such as doctors serving Medicaid beneficiaries. They are, if anything, further attenuated from the State's actions than direct beneficiaries, such as the Rehabilitation Program customers whom they serve.

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

coverage under their collective-bargaining statutes. *See* Peggie Smith, *Organizing the Unorganizable*, 79 N.C. L. Rev. 45, 61 n.71 (2000) (listing statutes).

Nor may Illinois rely on its interest in preventing "free riders" from taking advantage of the benefits of union representation, which this Court has in every instance recognized only as subsidiary to maintaining labor peace or some other legitimate interest, and never as a standalone interest. *See, e.g., Hanson*, 351 U.S. at 233; *Street*, 367 U.S. 760-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Hanson*); *Abood*, 431 U.S. at 220-21, 224; *id.* at 229 (for constitutional analysis, overriding purpose of exclusive representation is "labor stability"); *Ellis*, 466 U.S. at 448; *United Foods*, 533 U.S. at 415-16; *Knox*, 132 S. Ct. at 2290.

Indeed, this Court has expressly allowed nonmembers to "free ride" on union political expenditures that may accrue to their benefit, because such expenditures are not, themselves, justified by any interest in "labor peace." *See Street*, 367 U.S. at 770; *Abood*, 431 U.S. at 235-36; *Ellis*, 466 U.S. at 448 (nonmembers may be made to pay only for "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"); *Lehnert*, 500 U.S. at 521; *id.* at 556-57 (Scalia, J., concurring and dissenting).

If avoiding free riders could stand alone as a justification for compelled association and subsidization

of speech, First Amendment rights would be powerless to resist government paternalism regarding speech in any instance. That is not the law. *Riley*, 487 U.S. at 790 (rejecting "the paternalistic premise that charities' speech must be regulated for their own benefit"). The Court should not expand what it has already recognized to be "something of an anomaly" under ordinary First Amendment principles. *Knox*, 132 S. Ct. at 2290.

In sum, whatever the vitality of *Abood*, it provides no support for the State of Illinois' scheme to compel workers whom it does not directly manage to fund and associate with a labor union.

CONCLUSION

Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977), was wrong when it was decided and still cannot be reconciled with the Court's cases recognizing "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 132 S. Ct. at 2288 (citing cases). It should be overruled.

But even if the Court chooses to leave *Abood* for another day—and thereby to prolong the wholesale violation of employees' First Amendment rights that *Abood* sanctions—it should reject the coercive programs at issue here as unsupported by any compelling state interest. In either instance, the decision of the Seventh Circuit should be reversed.

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