No. 11-681

In the
Supreme Court of the United States

PAMELA HARRIS, *et al.*,

PETITIONERS,

v.

PAT QUINN, in his official capacity as Governor of the State of Illinois, *et al.*,

RESPONDENTS.

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

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BRIEF IN OPPOSITION OF RESPONDENT PAT QUINN

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's established First Amendment precedent to the particulars of Illinois' regulatory scheme to hold that personal assistants providing home-based care to Medicaid recipients are public employees and thus may be required to pay for their fair share of union representation.

2. Whether the court of appeals correctly held that other personal assistants do not have a ripe First Amendment claim because they are not represented by a union and do not, and may never, pay any fair share fees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES---Continued

Federal Statutes and Regulations

State Statutes and Regulations

TABLE OF AUTHORITIES–-Continued

TABLE OF AUTHORITIES---Continued

BRIEF IN OPPOSITION

The certiorari petition should be denied. Much of the petition retreads established First Amendment principles, but petitioners do not dispute or ask the Court to revisit its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that public employees may be required, consistent with the First Amendment, "to support legitimate, non-ideological, union activities germane to collective bargaining." Pet. App. 9a. Rather, the crux of petitioners' dispute is with the Seventh Circuit's determination that Illinois law so thoroughly regulates in-home personal assistants that these workers are legally indistinguishable from the employees in *Abood*. In the end, the first question presented is nothing more than an effort to have this Court reexamine the particulars of the many Illinois statutes and regulations governing these workers and to reevaluate whether these laws create an employment relationship that is sufficiently close to the one in *Abood*. This question implicates no split in authority. At best, it asks the Court to apply established legal principles to the specifics of this case, which—contrary to petitioners' claims—are unique to Illinois' comprehensive regulatory authority over in-home assistants.

Nor is there any reason for this Court to review the Seventh Circuit's decision on ripeness. Petitioners allege a narrow split between that decision and one other, but the Seventh Circuit properly distinguished that very case in its opinion. Accordingly, the petition should be denied on the second question presented as well.

STATEMENT

1. Medicaid is a government program designed to provide access to medical care for those unable to afford it. 42 U.S.C. § 1396-1. It is administered by each State consistent with federal limitations and criteria. 42 U.S.C. §§ 1396a–1396c. Some Medicaid-eligible individuals require continual or long-term care. 305 ILCS 5/5-1 (2010). Medicaid generally will pay the cost of caring for these individuals in institutions where their medical needs can be met. 305 ILCS 5/5-5.5 (2010). However, the federal government also allows States to provide "home or community-based [medical] services" in lieu of institutionalization, but only if the costs of these services do not exceed the costs that would have been incurred if services were provided in the traditional manner. 42 U.S.C. § 1396n(c)(1), (c)(2)(D).

2. The Illinois General Assembly created the Home Services Program ("Program") to provide medical services in a home-based setting "as a reasonable, lower-cost alternative" to institutionalization. 305 ILCS 5/5-5a (2010). The Program "enabl[es] [Medicaid-eligible individuals] to remain in their own homes or other living arrangements," thus "prevent[ing] unnecessary institutionalization." 20 ILCS 2405/3(f) (2010). The Program provides a spectrum of health care and maintenance services, ranging from "chore and housekeeping services" to "home nursing services," depending on the needs of the individual. *Ibid*. To ensure that the Program saves money, the Illinois Department of Human Services ("Department") calculates for each eligible individual "the maximum amount that may be expended for services through the

[Program] for an individual who chooses [home-care] services over institutionalization." 89 Ill. Admin. Code § 679.50(a).

3. Those who receive services under the Program are called "customers." 89 Ill. Admin. Code § 676.30(b). A Department counselor develops and provides each customer with a Service Plan, which both sign before it is submitted to the customer's physician for approval. 89 Ill. Admin. Code §§ 676.30(c), 684.10(a), (c). The Service Plan lists "all services to be provided to [the] individual through [the Home Services Program]," including "the type of service(s) to be provided to the customer, the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the services." 89 Ill. Admin. Code §§ 676.30(u), 684.10(a), 684.50. The State will pay only for the types and number of services permitted by the Service Plan. 89 Ill. Admin. Code §§ 676.200, 684.10.

4. "Personal assistants" perform many of the services contained in the State-created Service Plan, including "household tasks, shopping or personal care," "monitoring to ensure health and safety of the customer," and other "incidental health care tasks." 89 Ill. Admin. Code § 686.20. To be eligible to work as a personal assistant, a person must satisfy criteria imposed by the Department, including age and work hour limits, pre-hire recommendations from former employers, and documented comparable experience. 89 Ill. Admin. Code §§ 677.40(d), 686.10(b)-(d), (h)(2). In addition, the Department counselor assigned to the customer must evaluate the applicant's communication skills and ability to follow directions before any

personal assistant is hired. 89 Ill. Admin. Code § 686.10(d)-(e). State law also bars certain persons related to the customer from working as that customer's personal assistant. 89 Ill. Admin. Code § 684.30. Once a personal assistant is approved for hiring, both the customer and the personal assistant then must sign a Department-drafted agreement detailing the personal assistant's job responsibilities. 89 Ill. Admin. Code § 686.10(h).

The State pays the personal assistants' wages and benefits directly, and the State withholds federal social security taxes and state and federal income taxes. 89 Ill. Admin. Code §§ 686.10(h)(10), 686.40(a)-(b). Customers neither pay their personal assistants, nor may they vary the wage rate established by the State. 89 Ill. Admin. Code § 676.200; 42 C.F.R. 447.15.

5. In 2003, the Illinois General Assembly passed Public Act 93-204 (the "Act"), which amended the Disabled Persons Rehabilitation Act, 20 ILCS 2405/3(f) (2010), to permit personal assistants to form a union. The Act allowed the personal assistants to select an exclusive representative to negotiate with the State over the many terms and conditions of employment within the State's control. 5 ILCS 315/3(f)(iv), 315/7 (2010). The Act provides that "[s]olely for the purpose of coverage under the Illinois Public Labor Relations Act, personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered public employees and the State of Illinois shall be considered to be their employer." 20 ILCS 2405/3(f) (2010).

In July 2003, the personal assistants in the Program unionized, choosing the Service Employees

International Union Healthcare Illinois & Indiana ("SEIU-HII") as their collective bargaining representative. D.Ct. Dkt. 1 ¶¶ 20-22. The State entered into a collective bargaining agreement with SEIU-HII in August 2003, D.Ct. Dkt. 32-5, and a renewed agreement in 2008, D.Ct. Dkt. 32-4. The agreement covers wages, health benefits, workplace safety, grievance procedures, subcontracting, and the respective rights of management (namely, the Department), the union, and the customers. *Ibid.* It requires the State to deduct union dues and membership fees from the wages of union members, and to deduct from the wages of non-members "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." D.Ct. Dkt. 32-4 art. X § 5-6. Illinois law authorizes the State to collect these "fair share" fees and remit them to the union. 5 ILCS 315/6(a) (2010).

6. Petitioners, who include personal assistants in the Program, sued the union and Illinois Governor Pat Quinn under 42 U.S.C. § 1983, alleging that the deduction of fair share fees from their paychecks violated the First Amendment. D.Ct. Dkt. 1 ¶ 46. The district court dismissed the complaint because the fair share fees did not "impose[ ] any burden on [petitioners] beyond supporting the collective bargaining arrangement from which they benefit." Pet. App. 35a. Petitioners did not allege that the "fair share fees * * * are used to support any political or ideological activities." *Ibid.* Nor did they assert that they were "forced to support any * * * viewpoint with which they disagree." Pet. App. 34a. The district court

thus concluded that the fair share fees are "constitutional under * * * longstanding Supreme Court precedent," which holds that the mere payment of money to a union to cover an employee's "proportionate share of the costs of the collective bargaining process" does not violate the First Amendment. Pet. App. 35a.

7. The Seventh Circuit affirmed in a unanimous opinion. Pet. App. 1a-17a. To begin, the court "set out the controlling precedent"—*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Abood* —which hold that, "as a general matter, employees may be compelled [through compulsory fair share fees] to support legitimate, non-ideological, union activities germane to collective bargaining representation." Pet. App. 7a, 9a. The Seventh Circuit next "consider[ed] whether the personal assistants are, as the defendants contend, State employees" because, "[i]f so, this case is controlled by *Abood* and the plaintiffs' claims fail." Pet. App. 9a. To determine whether the State is the personal assistants' employer, the court looked to the degree to which the State "exercise[s] control over the" personal assistants. Pet. App. 10a.

Based on its review of Illinois' regulations governing the Program, the Court concluded that "the State does have significant control over virtually every aspect of a personal assistant's job." *Ibid.* Specifically, the court found that:

> While [Illinois'] home-care regulations leave the actual hiring selection up to the home-care patient, the State sets the qualifications and evaluates the patient's choice. And while only the patient may

> technically be able to fire a personal assistant, the State may effectively do so by refusing payment for services provided by personal assistants who do not meet the State's standards. When it comes to controlling the day-to-day work of a personal assistant, the State exercises its 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. Finally, the State controls all of the economic aspects of employment: it sets salaries and work hours, pays for training, and pays all wages—twice a month, directly to the personal assistants after withholding federal and state taxes.

Pet. App. 10a-11a (citations to Illinois Administrative Code omitted). "In light of this extensive control," the court had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." Pet. App. 11a. Because the State was the personal assistants' employer, "the interests identified by the Court in *Abood* are identical to those advanced by the State in this case." Pet. App. 13a. *Abood* thus required dismissal of petitioners' claim. *Ibid.*

The Seventh Circuit "stress[ed] the narrowness of [its] decision," which turned on the court's finding that personal assistants qualify as state employees "for purposes of applying *Abood*" because of the significant control Illinois exercises over their employment. *Ibid.* Given this finding, the Seventh Circuit had "no reason to consider whether the State's interests in labor relations justify mandatory fees outside the

employment context," including "whether *Abood* would still control if the personal assistants were properly labeled independent contractors" and "whether and how a state might force union representation for other health care providers who are not state employees." *Ibid.*

8. Illinois also hires personal assistants to care for disabled adults under the Home-Based Support Services Program ("Support Services Program"), which is administered by the Department's Division of Developmental Disabilities. 405 ILCS 80/2-1 *et seq.* (2010); see also 59 Ill. Admin. Code §§117.100–117.240. In 2009, Governor Quinn issued an executive order authorizing the State to bargain with a collective bargaining representative chosen by a majority of the personal assistants in the Support Services Program. D.Ct. Dkt. 32-3. In October 2009, the Illinois State Labor Relations Board supervised a mail-ballot election in which the personal assistants voted against union representation. D.Ct. Dkt. 1 ¶¶ 18, 32. Thus, personal assistants in the Support Services Program are not represented by a union nor covered by a collective bargaining agreement.

Petitioners' complaint alleged that these personal assistants' First Amendment rights were violated because the State had threatened to enter into an agreement that might require them to pay fair share fees. D.Ct. Dkt. 1 ¶¶ 48-49. Because the Support Services Program petitioners have never paid fair share fees, however, the district court held that they had not suffered an injury sufficient to confer standing. Pet. App. 38a-39a. The Seventh Circuit agreed and affirmed, noting that these petitioners had alleged no specific injury, but merely that the existence of the

executive order committing the State to bargain with a majority representative (if one were ever elected) increased the likelihood that they would suffer a future violation of their rights. Pet. App. 15a. The court held that this claim was not ripe for adjudication because "courts cannot judge a hypothetical future violation * * * any more than they can judge the validity of a not-yet-enacted law." Pet. App. 16a.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Seeks Mere Error Correction On An Issue Arising Under Illinois Law And Is Otherwise Unworthy Of Certiorari Review.

Abood rejected a First Amendment challenge to a "fair-share" provision in a collective bargaining agreement between a public employer and a union requiring non-member employees to pay a fee to the union to cover the "benefits of union representation that necessarily accrue to all employees." 431 U.S. at 222. The Court reasoned that a public employer has an "important" interest in achieving "labor peace" and that the "designation of a single representative" on workplace matters furthers this interest. *Id.* at 220-221, 224. But free riders—employees who "refuse to contribute to the union while obtaining benefits of union representation"—undermine the authority and power of the exclusive representative, thereby interfering with the government's effort to establish stable and peaceful labor relations. *Id.* at 220-222. Thus, "*Abood* determined that * * * compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public

employees." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517 (1992); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) (under *Abood*, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association").

Petitioners do not challenge *Abood*'s First Amendment holding or ask this Court to reconsider it. Rather, they contend that the Seventh Circuit misapplied that holding to the facts of this case, and that—although the decision below implicates no split in authority—it announces a broad rule with nationwide implications. But petitioners make these claims only by mischaracterizing the Seventh Circuit's holding and ignoring portions of the Illinois law on which it relied. In fact, the holding below is a narrow one that turns on facts specific to Illinois' regulatory regime. Petitioners' request for error correction in the application of *Abood* to the particulars of this regime is not worthy of certiorari review. Nor was there error here in any event, for the Seventh Circuit faithfully applied this Court's precedent.

A. The Decision Below Is Limited To Illinois' Regulatory Regime For Personal Assistants Working In The Program.

Petitioners proceed from the premise that the decision below gives "dispositive" weight to the fact that "the State controls how much [the personal assistants] are paid," Pet. 20; see also *id.* at 11 (arguing that Seventh Circuit has stretched *Abood* rule, "previously applicable only to actual government

employees, * * * to individuals whose services are merely subsidized by a government program"); *id.* at 21 ("whose services are merely paid for by the government"); *id.* at 23-24 (characterizing Seventh Circuit's holding as "expansive" because court purportedly held that "a state is a joint employer if it pays for the provision of defined services"). But this misrepresents the Seventh Circuit's opinion, which explained that the personal assistants are state employees only because Illinois exerts "significant control over virtually every aspect of [their] job"—not merely because the State pays them. Pet. App. 10a; see also *id.* at 11a ("In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*.").

Indeed, as explained above, see *supra* pp. 6-7, the Seventh Circuit reached this conclusion after considering the many ways in which the State controls the workplace for personal assistants in the Program. "[T]he State sets the qualifications and evaluates the patient's choice" in hiring assistants and may "effectively" fire those who fall short of State-set standards, and the State also "approv[es] a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions," "annually reviews each personal assistant's performance," and "controls all of the economic aspects of employment." Pet. App. 10a-11a. The Seventh Circuit went out of its way to limit its holding to this combination of Illinois-law factors. The court emphasized "the narrowness of [its] decision" and thus specifically declined to address issues such as "whether the States' interests in labor relations justify mandatory fees outside the employment context," "whether *Abood* would still

control if the personal assistants were properly labeled independent contractors," and "whether and how a state might force union representation for other health care providers who are not state employees." Pet. App. 13a.

Accordingly, there is nothing to petitioners' claim that the decision below opens the door for States to impose "compulsory advocates" on "medicaid providers and other recipients of government monies" (purportedly including doctors, nurses, hospitals, nursing homes, and foster care providers), Pet. 21-22, for the Seventh Circuit expressly disclaimed this broad reading.

Nor is there anything to the claim that the Seventh Circuit announced a rule affecting workers in other States who provide home care to beneficiaries of government aid programs. See Pet. 22-23. Petitioners identify only eight States (other than Illinois) that have permitted workers who provide home care to Medicaid recipients to organize. See Pet. 22 & nn. 10-11 (of twelve States that at one point authorized collectivization, three have rescinded authorization). And one of those eight (Connecticut) does not allow for the collection of fair share fees. Conn. Exec. Order 10 § 10.

Each of the remaining States has its own unique statutes and regulations governing home care programs, precluding ready application of the Seventh Circuit's holding to those regimes. Missouri, for example, permits collective bargaining by "personal care attendants," Mo. Rev. Stat. § 208.862(3), but the structure of the employment relationship is materially different from Illinois'. In Missouri, the personal care

attendants are employed by third-party "vendors" that enter into contracts with both the State and the consumer. 19 Mo. Code Regs. § 15-8.100(1)(S) (vendor provides "monitoring and oversight of the attendant" pursuant to "written agreement with" state agency); 19 Mo. Code Regs. § 15-8.400 (explaining responsibilities of private vendor to train, pay, supervise, and monitor personal care attendants). Contrary to petitioners' suggestion, the Seventh Circuit's finding of a public employment relationship under Illinois law could hardly be extended to States, like Missouri, with vastly different laws.

In short, petitioners seek mere error correction, on a question that implicates no split in authority and that turns on a particular combination of Illinois statutes and regulations. Accordingly, as the Seventh Circuit's opinion makes clear, any resolution of the first question presented would have little effect beyond the specific facts of this case, and for this reason alone the question does not warrant certiorari review.

B. The Seventh Circuit Did Not Err In Any Event, And Petitioners' Claim That The Seventh Circuit's Decision Conflicts With *Abood* Or Other Decisions Of This Court Is Misplaced.

That petitioners ask this Court to engage in error correction on a narrow ruling specific to Illinois' regulatory regime is reason enough to deny certiorari review on the first question presented. But petitioners are wrong to claim that the Seventh Circuit misapplied *Abood* to the facts of this case, nor does the decision below conflict with this Court's precedent.

There are no personal assistants providing services under the Program except to the extent allowed by the Illinois General Assembly. See 20 ILCS 2405/3(f) (2010) (authorizing creation of "program of services to prevent unnecessary institutionalization of * * * persons in need of long term care * * * thereby enabling them to remain in their own homes"). Having created both the program and the job, Illinois chose to promulgate extensive regulations governing the job qualifications, job duties, hours of work, and wages of the personal assistants who carry out this government program. See *supra* pp. 2-4. These regulations do, as the Seventh Circuit found, give the State "significant control over virtually every aspect of the personal assistants' job." Pet. App. 10a.

And because the relationship between the personal assistants and their public employer is indistinguishable in relevant part from that between the school district and the teachers in *Abood*, the court below correctly determined that "the interests identified by the Court in *Abood* [as sufficient to

support the fair share provision] are identical to those advanced by the State in this case." Pet. App. 13a. Consequently, *Abood* foreclosed the personal assistants' First Amendment claim. See *ibid.* Petitioners' contrary arguments fall short.

1. Petitioners contend that, for First Amendment purposes, the personal assistants should be treated as "*citizens* petitioning their State as sovereign" in public forums rather than public employees negotiating with their government employer. Pet. 16 (emphasis in original). This follows from petitioners' repeated assertion that personal assistants are not managed by the State. See Pet. 16, 19, 24. But this argument assumes away the Seventh Circuit's conclusion that personal assistants are state employees. See Pet. App. 13a. Because the Seventh Circuit did conclude that personal assistants are public employees, their unionization and subsequent negotiation was not, as petitioners claim, for the purpose of "petitioning the State over its Medicaid policies." Pet. 26. Rather, it was for the purpose of negotiating an agreement governing those terms and conditions of their employment that the State controlled. Indeed, the current contract between the State and the union shows that personal assistants secured a 20% increase in pay, $37,000,000 for health benefits, and $18,000,000 for wages and other benefits following their decision to unionize. Doc. 32-3 (collective bargaining agreement). As citizens, petitioners remain free to speak and petition government with their views on Illinois' Medicaid policies; as *Abood* recognized,

however, fair share fees from state employees may be used for matters pertaining to collective bargaining.[*]

2. Petitioners do not quarrel with this rule from *Abood*, but they seek to distinguish that case on its facts. Petitioners contend that the state interest *Abood* recognized in maintaining a peaceful and harmonious employment relationship does not apply here because personal assistants work "in the private homes of persons with disabilities" and thus cannot "disrupt the harmony of a government workplace." Pet. 15-19. Petitioners' argument—without support in the decisions of this or any lower court—rests on two premises, neither of which withstands scrutiny.

Petitioner's first premise—that the State's labor peace interest depends on whether its employees work in government-owned buildings or on private property—fails for the simple reason that the government interest in facilitating a stable employer-employee relationship does not change merely because its employees' location does. The State has an interest in avoiding disruptions to its social service programs and maintaining a well-trained and reliable workforce regardless of whether the personal assistants work at a single, government-owned site or are dispersed throughout the State. Indeed, petitioners' argument proves far too much, for, it would eliminate collective bargaining agreements for a wide variety of public employees who regularly work outside

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[*] *Abood* and *Lehnert* held that a union may not use fair share fees to support causes unrelated to collective bargaining, see *Abood*, 431 U.S. at 235; *Lehnert*, 500 U.S. at 519, but petitioners have not alleged that the fair share fees at issue here were so used, see Pet. App. 7a.

a centralized government workplace, including bus drivers, police officers, and sanitation workers.

Petitioners' second premise—that the government interest identified in *Abood* is limited to "avoiding workplace disruptions caused by employee attempts to petition their employer through multiple organizations," Pet. 12—is equally flawed. The Seventh Circuit correctly declined to "accept [this] narrow characterization of the labor peace interest." Pet. App. 12a. The court noted this Court's pre-*Abood* holding that "'[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex' and a question of policy outside of the judiciary's concern." *Ibid.* (quoting *Hanson*, 351 U.S. at 234). Relying on *Hanson*, the court reasoned that *Abood* used the shorthand "labor peace" "to include 'stabilized labor management relations,' which are at issue in any employer-employee relationship." *Ibid.*

Indeed, the State's interest in ensuring stable labor relations is particularly acute here because the Illinois General Assembly established the Home Services Program to provide critical services to the State's most vulnerable citizens in a cost-effective manner. See *supra* p. 2. The personal assistants, who interact directly with program beneficiaries, are crucial to its success. Consequently, high turnover, low morale, excessive absenteeism, poor training, lack of productivity, or any combination thereof among personal assistants would make it difficult for the State to maintain people in their homes, undercutting the social and financial benefits of the Program. Thus, the State has a legitimate interest in coordinating and cooperating with the personal assistants to further the Program's goals. And it was reasonable for the Illinois

General Assembly to conclude that this interest would be well served through collective bargaining. This Court consistently has "accorded great weight to the [legislative] judgment" regarding when collective bargaining is appropriate. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 n.8 (1986); see also *Abood,* 431 U.S. at 229 (deferring to Michigan legislature's conclusion "that labor stability will be served by a system of exclusive representation and permissible use of an agency shop in public employment."

3. In the alternative, Petitioners, relying on *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), argue that the personal assistants' employment status is constitutionally irrelevant. See Pet. 19-21. At the threshold, petitioners misstate the Seventh Circuit opinion, which relied, not on the label given to the personal assistants or the fact that the State pays their salaries, but on the fact that the State functions as the personal assistants' employer by exercising authority over every aspect of their jobs.

In any event, Petitioners are wrong to suggest that *O'Hare* supports their view that the personal assistants' status as state employees is immaterial. In *O'Hare*, this Court permitted a government contractor's claim that a municipality and its mayor violated the First Amendment by depriving the contractor of city business in retaliation for the contractor's having supported the mayor's political rival. See 518 U.S. at 715-716, 725-726. To reach this holding, the Court extended *Elrod v. Burns*, 427 U.S. 347 (1976), and *Perry v. Sindermann*, 408 U.S. 593 (1972), which bar a government employer from retaliating against public employees who express disfavored political views, to

hold that the government may not condition other forms of state largesse on the recipient's agreement to "express[ ], or not express[ ], specific political views." 518 U.S. at 725-726.

But *Abood* specifically rejected the argument that "fair-share" provisions are "governed by * * * decisions" (including *Elrod* and *Perry*) "holding that public employment cannot be conditioned upon the surrender of First Amendment rights." 431 U.S. at 226. This Court recognized the meaningful difference between requiring employees to contribute to the costs of collective bargaining and requiring them to espouse or suppress particular views. See *id.* at 229-230. And the Court held that because "[a] public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint," *id.* at 230, compulsory contribution cases do not present the same First Amendment issues as *Elrod* and *Perry*. These cases (like *O'Hare*, but unlike *Abood*) involve "the direct and specific abridgment of First Amendment rights." *O'Hare*, 518 U.S. at 720.

The Seventh Circuit thus correctly distinguished *O'Hare*, explaining that "[e]mployee speech jurisprudence is entirely distinct from that of compelled association, as are the interests that justify (or not) each respective intrusion into employees' freedom of speech." Pet. App. 12a n.5.

* * *

In sum, petitioners ask this Court to engage in mere error correction on the Seventh Circuit's conclusion that personal assistants are state employees under Illinois' regulatory regime. Nor was there error in any event, for the decision below properly construed Illinois law and faithfully applied this Court's precedent.

II. The Seventh Circuit's Holding That Certain Petitioners' Claims Are Not Ripe Implicates No Conflict With Decisions Of This Court Or Lower Court Authority, And The Holding Is Correct On The Merits.

The second question presented is equally unworthy of certiorari review, for the Seventh Circuit's holding that the Support Services Program petitioners' claims are not ripe—because these personal assistants rejected union representation and thus have not paid (and may never pay) any fair share fees—implicates no split in authority and, in any event, is correct. The decision below properly held that petitioners' "hypothetical future violation" would become ripe only if and when the personal assistants "vote to unionize and enter an agreement with the State mandating fair share fees." Pet. App. 16a-17a. At the present time, however, petitioners' alleged violation is neither imminent nor even likely, as it depends on numerous "'contingent future events that may not occur as anticipated or, indeed may not occur at all.'" Pet. App. 14a (quoting *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008) (in turn quoting *Texas v. United States*, 523 U.S. 296, 300 (1998))).

The Seventh Circuit thus properly distinguished *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) (the only case on which petitioners rely for their alleged circuit split, see Pet. 27-28) on its facts. See Pet. App. 16a. In *Mulhall*, the plaintiff sued to enjoin enforcement of an agreement between his employer and a local labor union pursuant to which the union agreed to lobby on behalf of the employer, and the employer, in return, agreed to aid the union in organizing its employees. See 618 F.3d at 1284. Because the terms of the agreement put the plaintiff's constitutional rights at "imminent risk of invasion," the Eleventh Circuit held that the plaintiff had standing to sue. 618 F.3d at 1288; see also *id.* at 1292 (deeming it "extremely unlikely" that constitutional injury to plaintiff would be avoided). Here, by contrast, the alleged First Amendment injury "may never occur," making *Mulhall* inapposite. Pet. App. 16a. Thus, certiorari should be denied on the second question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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