No. 18-

IN THE
Supreme Court of the United States

THERESA RIFFEY, SUSAN WATTS, STEPHANIE YENCER-PRICE, AND A PUTATIVE PLAINTIFF CLASS,

Petitioners,

v.

GOVERNOR J.B. PRITZKER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ILLINOIS, AND SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS, INDIANA, MISSOURI, KANSAS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), do individuals from whom union fees were seized without their consent have to prove contemporaneous subjective opposition to that union to establish a First Amendment injury and damages?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, Plaintiffs-Appellants below, are Theresa Riffey, Susan Watts, and Stephanie Yencer-Price.

Respondents, Defendants-Appellees below, are J.B. Pritzker, in his official capacity as Governor of the State of Illinois, and Service Employees International Union, Healthcare Illinois, Indiana, Missouri, Kansas ("SEIU"). However, the Governor did not take a position on the proposed class before the district court, and did not participate in briefing before the U.S. Court of Appeals for the Seventh Circuit.

Parties to prior proceedings, who are not Petitioners or Respondents here, nor were Plaintiff-Appellants or Defendants-Appellees below in this third appeal, include plaintiffs Pamela Harris, Ellen Bronfeld, Carole Gulo, Michelle Harris, Wendy Partridge, and Patricia Withers, and Defendants Service Employees International Union Local 73 and American Federation of State, County and Municipal Employees Council 31.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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This is the third time this case has come before the Court.

The first time the Court reversed, in relevant part, a Seventh Circuit opinion, reported at 656 F.3d 692 (2011) (Pet.App. 140a), that had affirmed the district court's order dismissing the complaint (Pet.App. 157a). *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (Pet.App. 62a).

The second time the Court granted certiorari, vacated a Seventh Circuit opinion, reported at 873 F.3d 558 (2017) (Pet.App. 15a), that had affirmed the district court's denial of a motion for class certification (Pet.App. 38a), and remanded the case for further consideration in light of *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). *Riffey v. Rauner*, 138 S. Ct. 2708 (2018) (mem.) (Pet.App. 14a).

This third petition arises from the Seventh Circuit's reiteration of its second, vacated opinion, which is reported at 910 F.3d 314 (2018) (Pet.App. 1a).

JURISDICTION

The Seventh Circuit entered judgment on December 6, 2018 (Pet.App. 1a), and denied a rehearing petition on January 4, 2019 (Pet.App. 13a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The United States Constitution's First Amendment provides: "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." U.S. CONST. amend. I.

The Illinois Public Labor Relations Act's ("IPLRA") agency fee provision states:

> [w]hen a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3(g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization.

5 ILL. COMP. STAT. 315/6(e) (2018).

STATEMENT

This case is again before the Court because a Seventh Circuit panel refuses to follow this Court's holdings in *Harris*, Pet.App. 62a–139a, and *Janus*, 138 S. Ct. at 2486, that Illinois deprived individuals of their First Amendment rights when it seized union fees

from them without their consent. The lower court takes the position that only individuals who objected to supporting the union's speech suffered First Amendment injury and damages, notwithstanding this Court's repudiation of objection requirements in *Janus*, 138 S. Ct. at 2486, and *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–12 (2012).

The case concerns Illinois's and SEIU's seizure of agency or "fair-share" fees from nonconsenting "personal assistants" who provide home-based care to persons with disabilities enrolled in an Illinois Medicaid program. Pet.App. 69a. Petitioners allege, for themselves and a putative plaintiff class, the unauthorized deduction and collection of these fees violates their First Amendment rights. *Id*. at 38a–39a.

1. In its first decision in this case, the Seventh Circuit held it constitutional for Illinois to exact union agency fees from unconsenting personal assistants. Pet.App. 140a–41a. On June 30, 2014, the Court in *Harris*, in relevant part, reversed the Seventh Circuit. *Id*. at 111a. The Court held: "[t]he First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union." *Id*. at 110a.

2. On remand to the district court, Petitioners moved for certification of a "Class" of all personal assistants who "were not members of the union and who had fair-share fees deducted from payments made to them under Illinois's Home Services Pro-

gram without their prior, written authorization." *Id.* at 39a. The proposed Class consists of approximately 80,000 individuals who had roughly $32 million seized from them in violation of their First Amendment rights. *Id.* at 41a.

The district court recognized that "the heart of the parties' arguments over class certification are [*sic*] the necessary elements of an injury in the context of compelled subsidization of third-party speech." *Id.* at 42a. "Plaintiffs believe that a First Amendment injury occurs whenever an individual is compelled to subsidize the speech of another without prior authorization." *Id.* at 43a. In contrast, "[t]he union insists that an individual cannot suffer a First Amendment injury for compelled subsidization unless she also subjectively opposed the payment at the time." *Id.*

The district court adopted SEIU's position, holding that "to prove injury, and the complete constitutional tort, plaintiffs must prove contemporaneous subjective opposition to the compelled payments." *Id.* at 44a. The court denied class certification on this basis, finding "plaintiffs' claims are neither typical nor common because many class members had no objections to financially supporting the union," *id.* at 48a, and that "subjective beliefs about the fair-share fees are relevant, indeed paramount, to the availability and amount of relief here . . . ," *id.* at 56a.

In its second opinion, the Seventh Circuit affirmed denial of class, holding "whether damages are owed for many, if not most, of the proposed class members

can be resolved only after a highly individualized inquiry" that "would require exploration of not only each person's support (or lack thereof) for [SEIU], but also to what extent the non-supporters were actually injured." *Id.* at 28a. The panel majority found that "differences in opinion regarding [SEIU] and its activities go to the heart of both the question of consent to the fee collection and to the motivation to seek monetary damages against [SEIU]." *Id.* at 25a.

Judge Manion concurred in the judgment, but disagreed with the majority's rationales. *Id.* at 29a. He found it "enough to establish a compensable injury" that "[e]ach and every proposed class member had fees seized without his or her consent." *Id.* "Therefore, those who had funds unconstitutionally seized may recover their money irrespective of their feelings towards the union." *Id.* at 32a.

On January 8, 2018, Petitioners sought this Court's review for a second time, asking the Court to resolve "whether the government inflicts a First Amendment injury when it compels individuals to subsidize speech without their prior consent, or is an objection required." Pet. for Writ of Cert. i (Question Presented), *Riffey v. Rauner*, No. 17-981, 2018 WL 367513 (Jan. 8, 2018).

The Court subsequently resolved that question in another case, *Janus*, holding: "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless

the employee affirmatively consents to pay." 138 S. Ct. at 2486. The Court further held Illinois's procedure of deducting agency fees from nonmembers without their prior consent—the procedure to which personal assistants were subjected here—"violates the First Amendment." *Id.* The day after issuing *Janus*, this Court vacated the Seventh Circuit's judgment in this case and remanded it for further consideration in light of *Janus*. Pet.App. 14a.

3. On remand, in its third opinion, a divided Seventh Circuit panel declared "*Janus* simply did not affect whatever remaining claims the putative class members in *this* litigation might have." *Id.* at 6a. The majority opinion reiterated its prior conclusion almost verbatim, holding "'[w]e agree with the district court that the question whether damages are owed for many, if not most, of the proposed class members can be resolved only after a highly individualized inquiry . . . [that] would require exploration of not only each person's support (or lack thereof) for [SEIU], but also to what extent the non-supporters were actually injured.'" *Id.* at 8a–9a (quoting 1st Panel Op., *id.* at 28a). The majority also found "disharmony within the class" because personal assistants may have differing views about SEIU. *Id.* at 9a.

Notably, the majority did not explain its basis for holding that an objection to supporting the union is necessary to establish injury and damages. Nor did the Court explain how that holding can be squared with *Janus*, *Harris*, and *Knox*.

Judge Manion, again concurring in the judgment, found the majority's reasoning inconsistent with *Janus*. *Id.* at 11a–12a. He found that, under *Janus*, "injury is suffered regardless of whether the nonmember employee opposed supporting the union through fair-share fees, so long as he or she had no opportunity to express consent to such fees." *Id.* And, he reasoned that any "disharmony within the proposed class due to potentially differing views in support of or opposition to the union . . . does not defeat the maintenance of a class because it does not affect the matter in controversy: the extraction of fair-share fees without affirmative consent." *Id.* at 12a.

This third petition for writ of certiorari follows the Seventh Circuit's denial of a petition for rehearing.

REASONS FOR GRANTING THE PETITION

The Court twice has held it violates the First Amendment for Illinois and a union to seize agency fees from unconsenting individuals. *Janus*, 138 S. Ct. at 2486; *Harris*, Pet.App. 109a–10a. That individuals subjected to these unauthorized fee seizures suffer First Amendment injury and damages as a result inexorably flows from those holdings.

The Seventh Circuit continues to resist that conclusion based on the discredited proposition that individuals must object to subsidizing union speech to establish First Amendment injury and damages. The Court criticized such objection requirements in *Knox*, 567 U.S. at 312–13, and specifically repudiated them in *Janus*, 138 S. Ct. at 2486. The Court should grant

the petition to reject the lower court's attempt to resurrect objection requirements, and firmly establish that individuals who are forced to subsidize speech without their consent suffer a First Amendment injury and are entitled to damages equal to the monies unconstitutionally taken from them.

A. The Seventh Circuit's Objection Requirement Cannot Be Reconciled With *Janus*, *Harris*, and *Knox*.

1. The Seventh Circuit's holding that an objection to an agency fee seizure is required to establish injury and damages conflicts with at least three of this Court's precedents, namely *Janus*, *Harris*, and *Knox*, for the reasons stated in Judge Manion's concurring opinions. Pet.App. 11a–12a, 29a–32a.

Harris held it unconstitutional for Illinois and SEIU to seize agency fees from personal assistants. *Id.* at 110a. *Janus* then held it unconstitutional for Illinois and a union to seize agency fees from any public employee, and explicitly clarified that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486.

Here, Illinois deducted agency fees for SEIU from the proposed class of personal assistants' wages without their affirmative consent. Pet.App. 43a. Under *Harris* and *Janus*, each unauthorized fee seizure inflicted a First Amendment injury. The victim's sub-

jective feelings about SEIU are immaterial to the First Amendment violation. As Judge Manion said, "silence, in this context, is not golden. The injury occurs in extracting fees without first obtaining affirmative consent." Pet.App. 11a.

Knox mandates the same conclusion. That case addressed the constitutionality of a union exacting a special assessment from two plaintiff classes of nonmember employees without their consent. 567 U.S. at 320. One certified plaintiff class consisted of nonmembers who did *not* express an objection to the assessment's deduction, *id.* at 305–06, just like the proposed class here. *Knox* held the union violated the nonobjecting employees' First Amendment rights by exacting the assessment from them without their consent. *Id.* at 322. As Judge Manion recognized in his first concurring opinion, "[t]he Supreme Court's *Knox* decision should have settled th[e] question" in this case. Pet.App. 30a.

The compensatory damages owed to each personal assistant in the putative class equals all fees seized from him or her, plus interest. That necessarily follows from the fact it was unconstitutional for Illinois and SEIU to seize *any* agency fees from these nonconsenting personal assistants under *Harris*, Pet.App. 110a, and *Janus*, 138 S. Ct. at 2486. A return of all such fees is required to make these individuals whole. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 309 (1986) (noting "'the basic purpose' of § 1983 damages is 'to *compensate persons for injuries* that are caused by the depriva-

tion of constitutional rights'" and "such damages must always be designed '"to *compensate injuries* caused by the [constitutional] deprivation'" (alteration in original) (quoting *Carey v. Piphus,* 435 U.S. 247, 265 (1978))).

"A potential plaintiff's support of, indifference to, or hostility toward the union has no bearing on his or her entitlement to a refund of money taken without affirmative consent." Pet.App. 12a (Judge Manion, concurring in judgment). Even if a personal assistant were enamored with SEIU, the reality remains that SEIU unlawfully took that individual's money in violation of his or her First Amendment rights.[1]

2. The Seventh Circuit's holding that the "extent the non-supporters were actually injured" by the fee seizures can '"be resolved only after a highly individualized inquiry . . . [into] each person's support (or lack thereof) for the Union,'" *Id.* at 8a, 9a (quoting 1st Panel Op., *id.* at 28a), cannot be reconciled with *Janus*, *Harris*, or *Knox*. That holding resurrects, in the context of establishing First Amendment injury and damages, the objection requirement this Court rejected in *Janus*.

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[1] At most, a prospective class member's feelings about SEIU might affect whether he or she wishes to refuse relief to which he or she is entitled. In the unlikely event such a nonmember personal assistant exists, his or her interest can be accommodated fully by Federal Rule of Civil Procedure 23(c)(2)(B)(v)'s opt-out procedure.

Prior to *Janus*, employees subject to agency fee requirements usually were required to affirmatively object to supporting a union to avoid paying nonchargeable union fees. *E.g., Knox,* 567 U.S. at 303–05, 312–13. Such requirements came about because, in 1961, the Court "stated in passing that 'dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" *Id.* at 313 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961)). Thereafter, until 2012, the Court "assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter." *Id.*

In 2012, the *Knox* Court questioned that assumption, and concluded that it "c[a]me about more as a historical accident than through the careful application of First Amendment principles." *Id.* at 312. The Court sharply criticized objection requirements for being inconsistent with the principle that "courts 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). Later, the Court put a definitive end to objection requirements by holding in *Janus* that affirmative consent—i.e., an "opt-in"—is required before any union fees can be deducted from an individual. 138 S. Ct. at 2486.

In disregard of *Knox* and *Janus*, the Seventh Circuit reinstituted objection requirements for establishing a First Amendment injury and damages. According to that court, although "'the First Amend-

ment prohibits the fair-share fee deductions in the absence of affirmative consent,'" Pet.App. 6a (quoting quoting 1st Panel Op., *id.* at 27a), only individuals who prove they objected to supporting the union are injured by such illegal deductions and are entitled to damages, *id.* at 8a–9a. That not only makes little sense, but defies the Court's holdings that a waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S. Ct. at 2486; *see Knox*, 567 U.S. at 312 (similar).

3. The Seventh Circuit's subjective opposition requirement is even worse, as to remedies, than pre-*Janus* law regarding remedies for unlawful agency fee seizures. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448, the Court rejected a holding that "as a prerequisite to any relief each [plaintiff] must indicate to the Union the specific expenditures to which he objects." *Id.* at 241. Although the *Abood* Court required a general objection to obtain relief, it found that "[t]o require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Id.*

The lower court here has imposed that very dilemma on victims of agency fee seizures by conditioning relief on a "'highly individualized inquiry'" and "'exploration'" into "'each person's support (or lack thereof) for the Union.'" Pet.App. 8a–9a (quoting 1st Panel Op., Pet.App. 28a). That is a step backwards from

even the *Abood* framework the Court found constitutionally inadequate in *Janus*.

The Court should not permit the lower court to turn back the legal clock in this manner. The Seventh Circuit's objection requirement conflicts with *Janus*, *Harris*, and *Knox*. It is imperative the Court take this case to end that conflict.

B. Reversal of the Seventh Circuit's Holding Is Important Because of Its Impact, Both in Illinois and Nationally.

1. The stakes in this case are considerable when viewed both in isolation and beyond. Directly at issue is whether over 80,000 individuals who were deprived of their fundamental First Amendment rights will receive any relief for that deprivation. The Seventh Circuit's opinion, however, affects more than just these 80,000 persons. It sets a precedent applicable to what the lower court calls "the clean-up proceedings that are necessary in the wake of *Harris* and *Janus*." Pet.App. 10a.

These "clean-up proceedings" are class action lawsuits that seek to compensate hundreds of thousands of public employees for compulsory fees unions unconstitutionally seized from them prior to *Janus*. As this Court recognized in *Janus*, agency fee requirements provided unions with a "considerable windfall" for over forty years. 138 S. Ct. at 2486. "It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id*. At

the time of this writing, there are at least thirty-five (35) class action lawsuits pending in eighteen (18) federal district courts that seek to require unions to return just a small portion of those billions of dollars in unlawfully seized union fees.[2]

The Seventh Circuit's holding, in that circuit and in any other that mistakenly adopts it, precludes the certification of a class of nonobjecting agency-fee

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[2] *See, e.g.*, *Casanova v. Int'l Ass'n of Machinists, Local 701*, No. 1:19-cv-428 (N.D. Ill. filed Jan. 22, 2019); *McCutcheon v. Commc'n Workers of Am., Local 7076*, No. 1:18-cv-1202 (D.N.M. filed Dec. 20, 2018); *Brice v. Cal. Faculty Ass'n*, No. 2:18-cv-1792 (E.D. Cal. filed Nov. 30, 2018) (renumbered No. 2:18-cv-3106); *Seidemann v. Prof'l Staff Cong. Local 2334*, No. 1:18-cv-9778 (S.D.N.Y. filed Oct. 24, 2018); *LaSpina v. Serv. Emps. Int'l Union Pa. State Council*, No. 3:18-cv-2018 (M.D. Pa. filed Oct. 18, 2018); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, No. 2:18-cv-1227 (S.D. Ohio filed Oct. 15, 2018); *Chambers v. Am. Fed'n of State, Cty. & Mun. Emps., Local 3336*, No. 3:18-cv-1685 (D. Or. filed Sept. 20, 2018); *Wholean v. CSEA SEIU Local 2001*, No. 3:18-cv-1008 (D. Conn. Am. Compl. filed Aug. 31, 2018); *Hough v. Serv. Emps. Int'l Union Local 521*, No. 5:18-cv-4902 (N.D. Cal. filed Aug. 13, 2018); *Crockett v. NEA-Alaska*, No. 3:18-cv-179 (D. Alaska filed Aug. 2, 2018); *Belgau v. Inslee*, No. 3:18-cv-5620 (W.D. Wash. filed Aug. 2, 2018); *Wilford v. Nat'l Educ. Ass'n*, No. 8:18-cv-1169 (C.D. Cal. filed July 2, 2018); *Lee v. Ohio Educ. Ass'n*, No. 1:18-cv-1420 (N.D. Ohio filed June 25, 2018); *Akers v. Md. State Educ. Ass'n*, No. 1:18-cv-1797 (D. Md. filed June 18, 2018); *Hoekman v. Educ. Minn.*, No. 18-cv-1686 (D. Minn. filed June 18, 2018); *Diamond v. Pa. State Educ. Ass'n*, No. 3:18-cv-128 (W.D. Pa. filed June 18, 2018); *Pellegrino v. N.Y. State United Teachers*, No. 2:18-cv-3439 (E.D.N.Y. filed June 13, 2018); *Smith v. N.J. Educ. Ass'n*, No. 1:18-cv-10381 (D.N.J. filed June 11, 2018).

payers. Yet, a class action is the only way the vast majority of agency-fee seizure victims will receive some recompense for the violations of their First Amendment rights, because many will not timely learn of their rights and many others will be unable to afford the significant costs of individual litigation. The Court should not tolerate an opinion that not only conflicts with *Janus*, *Harris*, and *Knox*, but that also denies relief to large numbers of persons whose constitutional rights were violated for years, if not decades.

2. The Seventh Circuit's holding is a formidable barrier to even individual relief. The district court required that "to prove injury, and the complete constitutional tort, plaintiffs must prove *contemporaneous* subjective opposition to the compelled payments." Pet.App. 44a (emphasis added). This is an onerous burden, as each individual plaintiff will have to somehow prove how he or she felt about the union and its speech for each pay period compulsory fees were unlawfully seized from him or her.

Moreover, each individual will have to subject himself or herself to a "'highly individualized'" government and union "'exploration'" into his or her personal beliefs about the union and its agenda. *Id.* at 9a (quoting 1st Panel Op., *id.* at 28a). Individuals should not have to endure such interrogations, nor should they have to disclose their personal beliefs to obtain relief for violations of their First Amendment rights. Even the *Abood* Court recognized that. 431 U.S. at 241. "[C]ompelled disclosure, in itself, can se-

riously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

3. The Seventh Circuit's opinion also has detrimental prospective implications: it provides unions with a perverse incentive to seize monies unlawfully from employees, for the opinion permits unions to retain almost all of their unconstitutional gains. For example, here the Seventh Circuit's decision allows SEIU to keep $32 million it unconstitutionally seized from more than 80,000 personal assistants. To allow unions to profit from unconstitutional dues or fee seizures will beget more unconstitutional seizures.

"Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." *Memphis Cmty. Sch. Dist.*, 477 U.S. at 310. The Court should make it clear that unions are not free to keep monies they unconstitutionally seize from individuals without consent, but must return to its rightful owner all monies they wrongfully extract.

C. This Case Is a Suitable Vehicle to Resolve the Question Presented.

1. This case squarely presents the question whether objection to subsidizing union speech is required to prove that a nonconsensual fee seizure inflicts First Amendment injury and damages. The lower courts' class certification decisions are based on the proposition that such an objection is required. *See supra* pp. 4–7. As the district court stated: the "sub-

jective support of the union, or lack thereof, for each absent class member is central to this case." Pet.App. 54a.

That the issue arises in the class certification context is no impediment to review. A district court necessarily abuses its discretion if class certification denial is based on an error of law. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011) ("Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality."). Here, the lower courts based their decisions on an unequivocal error of law under *Janus*, *Harris*, and *Knox*—i.e., that an individual's objection to union fee seizures, as opposed to a lack of consent, is required to prove First Amendment injury. *See supra* p. 2. Deprived of that false legal predicate, the lower courts' grounds for denying class certification collapse.

2. A summary reversal may be appropriate given the Seventh Circuit reiterated its objection requirement, without any additional analysis, after this Court vacated its second opinion in light of *Janus*. Pet.App. 14a. The Court recently summarily reversed a lower court that, after its first opinion was vacated, issued a second opinion that "with small variations . . . repeats the analysis [the Court] previously found wanting" and "rests upon analysis too much of which too closely resembles what [the Court] previously found improper." *Moore v. Texas*, ___ U.S. , 2019 WL 659798, at **3, 5 (Feb. 19, 2019) (per curiam). The same can be said of the Seventh Circuit's

reiteration of its second vacated opinion requiring objections to union fee seizures. It should be summarily reversed.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2019

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-3487

THERESA RIFFEY, *et al*.,

Plaintiffs-Appellants,

v.

BRUCE V. RAUNER, in his official capacity as Governor of the State of Illinois, and SEIU HEALTHCARE ILLINOIS & INDIANA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
On Remand from the Supreme Court of the United States. No. 10 C 2477 – Manish S. Shah, *Judge*

SUBMITTED JULY 30, 2018 –
DECIDED DATE DECEMBER 6, 2018

Before WOOD, *Chief Judge*, and MANION and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. When this case was last before our court, we upheld the district court's decision declining to certify a class of home health care assistants ("the Assistants") who were seeking a refund of the fair-share fees they had paid to a union for

collective-bargaining representation. We agreed with the putative class that no one could be compelled to pay fair-share fees, pursuant to the Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and that any such objector would be entitled to have his or her payments refunded. The only question on the table was whether, with that common issue resolved, the district court abused its discretion when it determined that for purposes of Federal Rule of Civil Procedure 23(b)(3), issues common to the class would not predominate over individual issues and a class action would not be a superior vehicle for resolving the claims. Any person who wished to pursue an individual claim for a refund remained free to do so.

Seeking review of our decision, the putative class representatives filed a petition for a writ of certiorari in the Supreme Court. On June 28, 2018, the Court granted that petition and remanded the case to this court for further consideration in light of *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). See 138 S. Ct. 2708 (2018) (remand order). In accordance with Circuit Rule 54, we invited and have received statements from the Assistants and from one of the appellees, SEIU Healthcare Illinois & Indiana, discussing the proper course for us now to take. Governor Rauner elected not to file a statement.

We conclude that *Janus* does not require a different result on the narrow question presented in our appeal, namely, whether the class-action device is the proper one for the Assistants to use in seeking refunds of fair-share fees. We therefore once again affirm the decision of the district court declining to certify the requested class.

I

A brief review of the history of this lengthy litigation will set the stage for our discussion of *Janus*. Around 2008, a majority of the Assistants in the state's Rehabilitation Program voted to designate SEIU as their collective bargaining representative; those who did not wish to be Union members were entitled to pay a "fair share" or "agency" fee—that is, a reduced payment to the Union that represents only the costs of collective bargaining, grievance processing, and the like, and excludes political activities with which the person may not agree. In 2009, Governor Pat Quinn of Illinois issued an executive order directing the state to recognize an exclusive bargaining representative for assistants in the state's Disabilities Program, if a majority of those assistants voted in favor of a union. A mail-ballot election ensued, in which a majority of the Disabilities assistants voting rejected representation by either SEIU Local 713 or by its rival, AFSCME Council 31. *Harris v. Quinn*, 656 F.3d 692, 695 (7th Cir. 2011). This action against the Governor and the Unions followed: the Rehabilitation Assistants argued that the fair-share fees violated their First Amendment rights, and the Disabilities Assistants (who were not yet subject either to a union or fees) lodged a facial challenge against the law. The district court dismissed both groups' claims: it held that the Rehabilitation Assistants had failed to state a claim on which relief could be granted, and that the Disabilities Assistants' claims were not ripe. We affirmed, clarifying that the dismissal of the Disabilities Assistants' claims had to be without prejudice. *Id.* at 701.

Our opinion, however, was not the last word on the matter. The Supreme Court granted certiorari and reversed with respect to the Rehabilitation Assistants'

claims. It held that the First Amendment does not permit a state "to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support." *Harris,* 134 S. Ct. at 2623. The *Harris* decision sharply questioned the continuing vitality of the Supreme Court's ruling in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), but the Court did not feel compelled at that juncture formally to overrule *Abood.* Instead, it held that the Assistants were not state workers at all and thus the state could not compel them to pay even a fair-share (or agency) fee. 134 S. Ct. at 2639–41, 2644. Upon receiving the Court's mandate to this effect, we remanded the case to the district court for further proceedings in accordance with the Supreme Court's decision.

On remand, the Assistants amended their complaint to substitute new named plaintiffs for the class, and to substitute Governor Bruce V. Rauner for his predecessor, Governor Quinn. They sought certification of a class of "all non-union member assistants from whom fair-share fees were collected from April 2008 until June 30, 2014 (the date of the Supreme Court's *Harris* decision), when the state stopped the fair-share deductions." *Riffey v. Rauner*, 873 F.3d 558, 561 (7th Cir. 2017). The proposed class included some 80,000 members; the class representatives asserted that the total amount that needed to be refunded was approximately $32 million. *Id.*

As we explained in our 2017 opinion, the district court denied certification for several reasons:

> [T]he class definition was overly broad in light of evidence (detailed by the court) that a substantial number of class members did not object to the fee and could not have suffered

> an injury; the named plaintiffs were not adequate representatives; individual questions regarding damages predominated over common ones; the class faced serious manageability issues; and a class action was not a superior method of resolving the issue.

Id. Although there once had been a class-wide question whether the fair-share fees were compatible with the First Amendment, that question had been resolved definitively by the Supreme Court's *Harris* decision. Left with only the more individualized issues, all three members of the panel agreed that the proposed class failed to meet the requirements under Rule 23(b)(3) that issues common to the class would predominate and that a class action be a superior mechanism for resolving the dispute. *Id.* at 565–66 (majority); *id.* at 566–67 (concurrence).

That was the posture of the case at the time the Assistants fled their petition for certiorari. The Supreme Court held the *Riffey* petition in abeyance while it decided *Janus*, and then, as we noted earlier, it returned *Riffey* to this court for further consideration in light of *Janus*.

II

Janus was an individual action brought by Mark Janus, an employee of the Illinois Department of Healthcare and Family Services. Unlike the assistants in the *Harris* litigation, Janus was indisputably a state employee. The people in his unit were represented by the American Federation of State, County, and Municipal Employees (AFSCME) Council 31, but Janus elected not to join the Union because he disagreed with its positions on a variety of public policy matters. Although he was required to pay only

a fair-share fee, he objected to that as a matter of principle. His fees amounted to about $535 a year.

Two important facts distinguish *Janus* from *Harris*: first, in *Janus* there was no way to avoid confronting the continuing validity of *Abood*, because Janus was a state employee; and second, Janus did not seek to represent a class. With respect to the first point, the Court concluded that the time had come to overrule *Abood*. 138 S. Ct. at 2460. The entire majority opinion is devoted to the explanation for the decision that "public-sector agency-shop agreements violate the First Amendment." *Id.* at 2478. In light of that ruling, the Court said, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486.

The Court recognized that its holding would have a significant impact on public-sector unions over the short run. *Id.* at 2485–86. And that is undoubtedly true. But the parties involved in *Harris*—who are identical to the group that Riffey seeks to represent—had *already* persuaded the Court to outlaw their agency fees. *Janus* simply did not affect whatever remaining claims the putative class members in *this* litigation might have. The Court's language in *Harris* is unambiguous: "The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union." 134 S. Ct. at 2644. We followed that rule to the letter in our decision on remand from *Harris*, where we wrote that "the Supreme Court has resolved the overarching common issue in this case: whether the First Amendment prohibits the fair-share fee deductions in the absence of affirmative consent (yes)." 873 F.3d at 566.

The Court's resolution of the agency-fee issue meant that only one further point needed to be resolved on the *Harris* remand: whether the remaining issues concerning refunds of agency fees that were paid by nonconsenting employees could be resolved in a class action. If this was to be a class at all, we recognized, it was one for money damages for each individual class member, and it would accordingly have to satisfy the requirements of Rule 23(b)(3). See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–67 (2011). (Any proposed class would also have to satisfy the requirements of Rule 23(a), which we discussed in our earlier *Riffey* opinion. We have no need to reach the Rule 23(a) factors, however, if Rule 23(b)(3)'s criteria are not met.)

Although Rule 23(b)(3)'s language is familiar, we set it forth here for convenience:

> (b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3).

The decision whether to certify a class is one that depends on a careful assessment of the facts, of potential differences among class members, of management challenges, and of the overall importance of the common issues of law or fact to the ultimate outcome. As we noted in *Arreola v. Godinez*, 546 F.3d 788 (7th Cir. 2008), "Rule 23 gives the district courts broad discretion to determine whether certification of a class-action lawsuit is appropriate," and thus "this court reviews such decisions deferentially." *Id.* at 794 (internal quotation marks omitted). We see nothing approaching an abuse of discretion in the district court's decisions here that whatever common questions remain among the proposed class members do not predominate, and that "a class action is [not] superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

We set forth many of the district court's reasons for coming to this conclusion in our 2017 decision in this case. We reproduce that analysis for ease of reference:

> We agree with the district court that the question whether damages are owed for many, if not most, of the proposed class

> members can be resolved only after a highly individualized inquiry. It would require exploration of not only each person's support (or lack thereof) for the Union, but also to what extent the non-supporters were actually injured. The Union would be entitled to litigate individual defenses against each member. This suggests not only that individual questions predominate at this stage of the litigation, but also that it would be difficult to manage the litigation as a class. The plaintiffs offered no plan to make class-wide determinations about support for the collective bargaining representation. The district court was well within the bounds of its discretion to reject class treatment on these bases as well.

873 F.3d at 566. And this is not all that supports the district court's determination. The Union presented evidence of disharmony within the class: some of the Assistants supported the Union and have no desire to collect a refund, while others are eager to get their money back; and once they no longer had the intermediate option of paying an agency fee, some moved in one direction to join the Union, while others moved in the opposite direction and severed all ties with the Union. The court also noted that the answer to the central question that remains—how much money each individual class member is entitled to recoup—is particularly ill-suited for class treatment, because it depends on a myriad of factors particular to each individual worker.

Last, the district court made it clear that it was not averse to considering a more targeted class. It denied the Assistants' class certification motion without

prejudice to a revised class definition. It also left the door open to a potential class for injunctive relief, even though such relief is hard to envision after the two definitive Supreme Court decisions. And the named plaintiffs stipulated to a final judgment that granted them all the individual monetary relief they were seeking and permanently enjoined the state and the Union from applying any fair-share or agency-fee requirement to personal assistants. The latter is precisely the relief that *Janus* contemplated.

Despite this apparent success, the Assistants spurned the opportunity to suggest a narrower class in favor of a "go-for-broke" strategy. In doing so, however, they overlooked the substantial deference we give to the district court's decisions about predominance and manageability. The judge here came to a defensible—indeed, sensible—decision on these points. Nothing in *Janus* speaks to the suitability of class treatment of these issues under the unusual circumstances of this case, which already had been decided under *Harris*, which for these parties established a rule practically identical to that in *Janus*.

III

We therefore conclude, as we did before, that the district court acted well within its authority when it declined to certify a class action for the clean-up proceedings that are necessary in the wake of *Harris* and *Janus*. Individual assistants who wish to pursue refunds are free to seek to do so; we make no comment on such cases or the defenses the Union may endeavor to raise in them. The decision of the district court is AFFIRMED.

MANION, *Circuit Judge*, concurring in the judgment. I write separately to emphasize that a union's expropriation of fees from a non-member without his or her consent amounts to a First Amendment injury on that basis alone, regardless of whether the employee subjectively opposed the fees.

As the court rightly states, *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018), does not affect the narrow grounds on which I agreed with the court's previous judgment affirming the district court's denial of class certification. Those grounds were that the plaintiffs failed to show common issues would predominate over individual questions, or that a class action would be superior to individual litigation. *Riffey v. Rauner*, 873 F.3d 558, 569 (7th Cir. 2017) (Manion, J., concurring), *vacated and remanded for further consideration*, 138 S. Ct. 2708 (2018); Fed. R. Civ. P. 23(b)(3).

Nevertheless, I continue to disagree with two of the district court's other bases for denying certification. First, the district court concluded that not all the potential class members suffered a First Amendment injury when their money was seized without their affirmative consent, because some might not have been opposed to the fair-share fees. But silence, in this context, is not golden. The injury occurs in extracting fees without first obtaining affirmative consent. *C.f. Janus*, 138 S. Ct. at 2486 (holding that waiver of the First Amendment rights at stake when a state or union extracts agency fees from nonmember employees "cannot be presumed," and such waiver is not effective "[u]nless employees clearly and affirmatively consent *before* any money is taken from them") (emphasis added). Thus, this injury is suffered regardless of whether the non-member employee opposed

supporting the union through fair-share fees, so long as he or she had no opportunity to express consent to such fees.

Second, the district court concluded that the named plaintiffs were not adequate representatives because there exists disharmony within the proposed class due to potentially differing views in support of or opposition to the union. Any such disharmony, however, does not defeat the maintenance of a class because it does not affect the matter in controversy: the extraction of fair-share fees without affirmative consent. A potential plaintiff's support of, indifference to, or hostility toward the union has no bearing on his or her entitlement to a refund of money taken without affirmative consent.

For these reasons and the reasons stated in my original concurrence, I believe the district court was incorrect in reaching its conclusions on these two issues. *See Riffey*, 873 F.3d at 566–70 (Manion, J., concurring).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 16-3487

THERESA RIFFEY, *et al*.,

Plaintiffs-Appellants,

v.

BRUCE V. RAUNER, in his Official Capacity as Governor of the State of Illinois, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:10-cv-02477
Manish S. Shah, *Judge*.

January 4, 2019

ORDER

Before DIANE P. WOOD, *Chief Judge*, DANIEL A. MANION, *Circuit Judge*, DAVID F. HAMILTON, *Circuit Judge*

Plaintiffs-appellants filed a petition for rehearing *en banc* on December 20, 2018. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 17-981

THERESA RIFFEY, *et al*.,

Petitioners

v.

BRUCE RAUNER, Governor of Illinois, *et al*.

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

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees,* 585 U.S. ___ (2018).

IT IS FURTHER ORDERED that the petitioners Theresa Riffey, et al. recover from Bruce Rauner, Governor of Illinois, et al., Three Hundred Dollars ($300.00) for costs herein expended. June 28, 2018

Clerk's Costs: $300.00
[SEAL] A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States
/s/ Scott S. Harris

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed 10/11/2017]

No. 16-3487

THERESA RIFFEY, *et al.*,

Plaintiffs-Appellants,

v.

BRUCE V. RAUNER, in his official capacity as Governor of the State of Illinois, and SEIU HEALTHCARE ILLINOIS & INDIANA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10 C 02477 – Manish S. Shah, *Judge*.

ARGUED MAY 17, 2017 –
DECIDED OCTOBER 11, 2017

Before WOOD, *Chief Judge*, and MANION and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. Class and collective actions are designed to provide an efficient vehicle to resolve the claims of a large number of plaintiffs in one fell swoop. They can offer benefits to both sides in a case: plaintiffs are able to aggregate resources in order to

litigate small claims, and defendants can achieve a global resolution of the dispute. But class actions are not always the best vehicle for delivering relief. This is why Federal Rule of Civil Procedure 23 establishes a number of criteria that parties (usually plaintiffs) must meet in order to maintain a class action, and why district courts have considerable discretion in determining whether and how to manage such actions.

The appellants in this case are home health care assistants who wanted the district court to certify a class of their fellow assistants for purposes of securing a class-wide refund of the fair-share fees they paid to a union for collective bargaining representation. For a number of reasons, the district court found that the class should not be certified. It awarded injunctive relief in favor of the plaintiffs, as well as individual damages, and this appeal followed. Because we find no abuse of discretion in the court's refusal to certify the class, we affirm.

I

The State of Illinois, through its Department of Human Services Home Services Program, pays personal home health care assistants to deliver care to elderly and disabled persons in the state. Under Illinois law, the assistants are considered public employees for purposes of collective bargaining. See Illinois Public Labor Relations Act (IPLRA), 20 ILCS 2405/3(f). The same law authorizes the state to engage in collective bargaining with an exclusive representative of home care and health workers. See *id.* Since 2003, SEIU Healthcare Illinois & Indiana (the "Union") has been the exclusive representative. The exclusive representative is required to represent all public employees, whether or not they are members of the Union. Under the terms of its collective bargaining

agreement with the state, the Union was entitled to collect limited fees from workers who chose not to join the Union in order to help cover the cost of certain activities, principally the collective bargaining representation it furnished to everyone. These fees were known as "fair-share fees," and until recently they were automatically deducted from the pay of assistants who were not Union members.

Some workers objected to this fair-share arrangement. In April 2010, they filed this suit, in which they contend that the involuntary deduction and collection of the fair-share fees violates their First Amendment rights and entitles them to relief pursuant to 42 U.S.C. § 1983. For convenience, we refer to them as the Objectors. The district court dismissed their claim and we affirmed, see *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011) (detailing the plaintiffs' First Amendment claims). But the Supreme Court agreed with the Objectors and reversed in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). In accordance with the Court's decision in *Harris*, we remanded the case to the district court for further proceedings.

Once back in the district court, the Objectors amended their complaint to substitute new named plaintiffs for their proposed class and to reflect the fact that the Governor of Illinois is now Bruce V. Rauner. They then sought certification of a class of all non-union member assistants from whom fair-share fees were collected from April 2008 until June 30, 2014 (the date of the Supreme Court's *Harris* decision), when the state stopped the fair-share deductions. The Objectors contend that their proposed class, which numbers around 80,000 members, is entitled to a refund of the total of the fair-share fees paid by its members—approximately $32 million.

The Union opposed the motion for class certification; the Governor took no position on the class issue and is not participating in this appeal. The district court decided that class certification was inappropriate for several reasons: the class definition was overly broad in light of evidence (detailed by the court) that a substantial number of class members did not object to the fee and could not have suffered an injury; the named plaintiffs were not adequate representatives; individual questions regarding damages predominated over common ones; the class faced serious manageability issues; and a class action was not a superior method of resolving the issue. The parties then stipulated to a judgment permanently enjoining the future collection of fair-share fees and awarding money damages to the named plaintiffs. The district court entered final judgment, and this appeal followed.

II

The Objectors have placed most of their reliance on appeal on the argument that the district court's refusal to certify rested on an error of law: specifically, the proposition that deducting the fair-share fees could have caused a First Amendment injury to a worker only if she subjectively opposed the Union or the fee at the time it was paid. We review the district court's denial of class certification for abuse of discretion. *Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016). "A district court abuses its discretion when it commits an error of law or makes a clearly erroneous finding of fact." *Kress v. CCA of Tenn., LLC*, 694 F.3d 890, 892 (7th Cir. 2012).

In order to have a case in a federal court, a plaintiff must plead that she has been injured in a concrete and particularized way by a defendant's actions. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). And

in order to state a claim under 42 U.S.C. § 1983, that injury must include a violation of the plaintiff's constitutional or statutory rights. The named plaintiffs here alleged that collecting fair-share fees without consent ran afoul of the First Amendment, and the Supreme Court agreed with them. The named plaintiffs then settled with the Union; the nature of their injuries is thus not before us.

The proposed class, however, presents interesting aspects of the nature of injury in First Amendment compelled subsidization cases. Whereas we understand that the named plaintiffs objected to the collection of the fair-share fees and to collective bargaining representation, we have no way of knowing whether or how many of the remaining class members shared that opposition. Nothing in *Harris* said that people could not *voluntarily* join a union, or *voluntarily* pay a fair-share fee. Its focus was exclusively on compelled participation. See, *e.g.*, 134 S. Ct. at 2644 ("The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program *who do not want to join or support the union*.") (emphasis added). The district court highlighted the Union's evidence that many of the would-be class members had submitted affidavits contending that they did not object to the fair-share fees and would have consented if given the chance (a step that was unnecessary during the pre-*Harris* regime, when fair-share fees were automatically collected). It concluded that there were likely a significant number of workers in the proposed class whose First Amendment rights had not been injured by the fee collection.

The Objectors urge that the question whether any given worker in the proposed class was subjectively opposed to paying the fees is extraneous to whether or

not their First Amendment rights were violated. They characterize the injury as the denial of the choice to pay or not pay. In their view, it is enough that the money was taken without their affirmative consent and used for purposes of collective bargaining representation.

But we cannot accept that characterization in the face of direct evidence from the supposedly injured class members that they did not feel injured at all, and that they would have happily paid the fair-share fee without complaint. The premise of the Objectors' argument—that these funds were taken without consent—stands on shaky ground. They presume that silence was equivalent to non-consent, while the Union argues that silence against the backdrop of the earlier legal regime in which there was no obligation to signify consent is at worst uninformative, and if anything suggests consent.

We can assume that the taking of money without consent or legal justification is enough to give rise to some kind of a tort, but it is less clear that such a taking implicates the First Amendment. Compelled subsidization can violate the First Amendment because it impinges on First Amendment rights. See *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 321 (2012) ("[B]y allowing unions to collect any fees from nonmembers . . . our cases have substantially impinged upon the First Amendment rights of non-members. . . . [W]e see no justification for any further impingement. The general rule-individuals should not be compelled to subsidize private groups or private speech—should prevail."). Nonetheless, a course of conduct or a rule that impinges upon the exercise of a legal right does not always injure the people it affects, certainly not if they consent or voluntarily accept the

rule. In the compelled speech context, for instance, although a requirement to recite the Pledge of Allegiance every morning might impermissibly impinge upon all students' rights to choose whether to do so, see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), it seems fair to say that many of them would happily have recited the Pledge anyway and thus suffered no First Amendment injury from the rule. Or, to take another example, most Granite Staters evidently had no objection to the motto "Live Free or Die" on their license plates, and so would not have had standing to object to it, even though George Maynard found it repugnant to his beliefs. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

The Objectors urge that even if some measure of subjective opposition is required to show a First Amendment injury, the choice not to join the Union ought to be sufficient to demonstrate that opposition and hence to show a First Amendment injury. But a choice not to join the Union is not the relevant one for our purposes. This case has always been about the decision whether to support collective bargaining representation and pay the fair-share fee, and the personal assistants were never asked to express a preference on that point. At most, we know that the proposed class members did not become full union members during the period when the fees were collected. We have no way of knowing which of three choices they might have made, had *Harris* been on the books during the entire time: join the Union; voluntarily pay fair-share fees; or pay nothing. The Objectors scoff at the idea that anything but "pay nothing" would be selected, but the district court had before it evidence that the majority of personal assistants in 2003 voted for union representation, that a majority ratified the collective bargaining agreement in 2008 and 2012,

and that 65% of the proposed class members who are still personal assistants have since joined the union. It was a reasonable inference from those facts that a significant number of class members would indeed have chosen the first or second option, had they realized the need to do so.

The question whether it is permissible to take subjective factors into account in a First Amendment case has interesting implications in the class action context. In order to be ascertainable, a class must be defined based on objective criteria. Classes "defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659–60 (7th Cir. 2015) (citations omitted). The result may be that class treatment is more difficult to secure in such a personal area as First Amendment rights, once the principle prohibiting coerced speech is in place.

We need not pursue this possibility further for present purposes, because the district court offered additional, independent, reasons for declining to certify the class. It found that Rule 23's requirements were not met because (1) the intra-class conflicts of interest rendered the named plaintiffs inadequate as class representatives, and (2) common questions did not predominate so as to make a class action superior to individual actions.

Looking first at adequacy of representation, we recall that this is one of the four essential criteria established by Rule 23(a) for all class actions: numerosity, adequacy of representation, commonality, and typicality. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). The district court did not abuse its discretion in finding that there are serious intra-class conflicts of interest in the Objectors' proposed class,

and that the proposed representatives cannot fairly and adequately protect all prospective members. FED. R. CIV. P. 23(a)(4). "Because a class action is an exception to the usual rule that only a named party before the court can have her claims adjudicated, the class representative must be part of the class and possess the same interest and suffer the same injury." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015). "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

We addressed intra-class conflicts of interest in a case involving people who declined to join a union nearly two decades ago in *Gilpin v. American Federation of State, Cnty., & Mun. Employees, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989). There we affirmed a district court's refusal to certify a class of 10,000 non-union members in a suit seeking restitution for fair-share fees deducted following defective notice. We held that the judge was right not to certify the class in that case because of a potentially serious conflict of interest:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the

> cost of representation as possible to other workers, *i.e.*, union members.

Id. at 1313. In so doing, we noted that seeking a restitution remedy was suitable only for the type of plaintiff who is hostile to the unions, and that the windfall of restitution might embarrass or ruin the union—an outcome that the second type of employees would not want. *Id.*

In a more recent case, *Schlaud v. Snyder*, 785 F.3d 1119 (6th Cir. 2015), our sister circuit affirmed a denial of class certification in similar circumstances, where the plaintiffs challenged fair-share fees and sought to certify a class and a subclass of home child-care workers. The class included workers who were members of the union or voted in favor of the collective bargaining agreement, while the subclass included those who did not have the chance to vote in the union election. *Id.* at 1125–28. The Sixth Circuit emphasized that the plaintiff representatives would have a clear conflict of interest with class members who were union members. *Id.* at 1127. Further, the court noted that when given an opportunity to vote, a significant percentage voted in favor of union representation. *Id.* It was therefore fair to presume that some members of the subclass would have wanted to be members of the union. The Sixth Circuit held that it was not an abuse of discretion to find that the named plaintiffs could not adequately represent the proposed classes or subclasses, as both would have "include[d] members whose 'probable preferences' would have been in conflict . . . ." *Id.* at 1128.

The situations in both *Gilpin* and *Schlaud* may not be identical to the one before us. But, as the district court rightly noted, "in the end, both *Schlaud* and *Gilpin* point out that a class representative who wants

to undermine the union is not likely to be a suitable representative for a group that includes people who have no such hostility." *Riffey v. Rauner*, No. 10 CV 02477, 2016 WL 3165725, at *7 (N.D. Ill. June 7, 2016). As we noted earlier, the Union presented evidence showing that 65% of the potential class members who are still personal assistants have since voted to join SEIU. It also submitted numerous affidavits from would-be class members stating that they supported the union and the fees. This evidence supports the district court's finding of a serious intra-class conflict of interest.

According to the Objectors, there is no conflict of interest, and they are therefore adequate representatives because differences in opinion about the Union have no bearing on the merits of the claim. For this, they cite Eighth Circuit precedent for the notion that "[t]he antagonism which will defeat the maintenance of a class action must relate to the subject matter in controversy, as when the representative's claim conflicts with the economic interests of the class . . . ." *Reynolds v. Nat'l Football League*, 584 F.2d 280, 286 (8th Cir. 1978) (citation omitted). But in *Reynolds*, the Eighth Circuit was examining the alleged conflict between active and retired football players. It decided that the differences were insufficient to preclude class treatment where "all class members were interested in damages [but] only some were economically interested in future player movement restrictions." *Id.* Here, however, differences in opinion regarding the Union and its activities go to the heart of both the question of consent to the fee collection and to the motivation to seek monetary damages against the Union.

To this concern, the Objectors propose what they see as a simple solution: certify the class that they have

proposed and allow members with competing interests (*i.e.*, those who would have supported the Union willingly, or who have since become full Union members) to opt out of the action. The problem with this suggestion is that Rule 23(b)(3)'s opt-out provisions may operate as a safety valve only for an otherwise properly certified class. In other words, the opt-out procedures are no substitute for adherence to Rule 23; a class must meet Rule 23's requirements *before* class members are allowed to opt out of the action. The plaintiffs' suggestion attempts to foist the burden of fashioning an appropriate class on those who would be required to opt-out. This we cannot allow. It is worth noting, too, that the district court repeatedly invited the Objectors to suggest a more tailored class, but they let that opportunity pass. We therefore have no trouble finding that the district court did not abuse its discretion in finding that the proposed class representatives failed the adequacy requirement of Rule 23(a)(4).

Even if the Objectors had not run into problems with adequacy of representation under Rule 23(a), they would still not clear the class certification hurdles. Because they seek to certify a class for monetary damages, they need to show that the common questions predominate over questions affecting individual members, and that a class action is a superior method to adjudicate the controversy. FED. R. CIV. P. 23(b)(3). The predominance requirement is met when common questions represent a significant aspect of a case and can be resolved for all members of the class in a single adjudication. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1059 (7th Cir. 2016). As we said in *Messner v.*

Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012):

> If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Id. at 815 (quoting *Blades v. Monsanto Co.,* 400 F.3d 562, 566 (8th Cir. 2005)). This does not mean that a hint of an individual question—especially questions regarding damages—is fatal to class treatment, but common questions must predominate. *Id.* A district court should review the evidence pragmatically in order to decide whether class-wide resolution "would substantially advance the case." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761 (7th Cir. 2014).

The district court reasoned that the main issue remaining—compensatory damages—could not be resolved in a single adjudication, and that the individual questions for the over 80,000 potential class members would predominate over other questions. It acknowledged that this might not be the issue "if a class were certified solely to adjudicate the affirmative defense of good faith before determining liability," but the Objectors did not request such a limited class nor did they brief that possibility. *Riffey*, 2016 WL 3165725, at *8.

As the district court noted, the Supreme Court has resolved the overarching common issue in this case: whether the First Amendment prohibits the fair-share fee deductions in the absence of affirmative consent (yes). The issue that remains—compensatory

damages—requires a showing of actual injury *caused by* the constitutional deprivation. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986). In order to recover damages for any monetary loss or emotional suffering, each class member must have suffered a loss, and that loss must have been caused by the Union's violation of her First Amendment rights.

We agree with the district court that the question whether damages are owed for many, if not most, of the proposed class members can be resolved only after a highly individualized inquiry. It would require exploration of not only each person's support (or lack thereof) for the Union, but also to what extent the non-supporters were actually injured. The Union would be entitled to litigate individual defenses against each member. This suggests not only that individual questions predominate at this stage of the litigation, but also that it would be difficult to manage the litigation as a class. The plaintiffs offered no plan to make class-wide determinations about support for the collective bargaining representation. The district court was well within the bounds of its discretion to reject class treatment on these bases as well.

Our review of both the facts and the legal arguments the Objectors have presented leaves us satisfied that the district court's decision not to certify their proposed class was a sound one. We therefore AFFIRM the judgment.

MANION, *Circuit Judge*, concurring in the judgment. The Supreme Court's decisions in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), at the very least mean that public employees who choose not to join a union can't be required to contribute to the union without their affirmative consent. The district court concluded that since many of the home care providers supported the union and didn't oppose the "fair-share" fees, those providers did not accrue a compensable First Amendment injury. The problem, however, is that the care providers, now belatedly called the objectors, were not first given the choice whether or not to pay the fee before the union seized their money. Depriving nonmembers of the choice whether to pay the fee in the first place is a major fault in the union's collection process. Each and every proposed class member had fees seized without his or her consent. That is enough to establish a compensable injury.

Nevertheless, I concur in the court's judgment. The district court's mistakes led to its erroneous conclusions that the proposed class failed to satisfy two of the four prerequisites for certification under Rule 23(a). However, the district court also concluded under Rule 23(b)(3) that: (1) issues common to class members would not predominate over individual issues; and (2) a class action would not be superior to individual actions. These findings were probably not an abuse of discretion. Therefore, I would affirm the denial of certification on those grounds alone.

The district court first reasoned that because each proposed class member would have to prove that he or she opposed the fair-share fees in order to recover, the

proposed class could not meet Rule 23(a)'s commonality requirement. *Riffey v. Rauner*, No. 10-CV-02477, 2016 WL 3165725, at *6 (N.D. Ill. June 7, 2016). According to the court, an unwilling non-union member is injured by the seizure of his or her money only if the non-member subjectively didn't want to support the union. See *id.* at *3. So in the district court's view, the proposed class action really amounts to about 80,000 individual cases wherein home care providers will have to prove that they didn't want their money transferred to the union. That is not so.

The Supreme Court's *Knox* decision should have settled this question. There, two groups of employees filed a class-action suit against SEIU, alleging that the union unconstitutionally required them to contribute money to SEIU's political activism. *Knox*, 567 U.S. at 305–06. One group of employees had objected to the forced contributions, but the second group had not been given the opportunity to do so. Those in the latter group argued that they should have received a new opportunity to object after SEIU levied a new special assessment. *Id.* The Supreme Court agreed, holding that there was no justification for forcing non-members to opt out of, rather than opt into, the assessment. See *id.* at 312. Significantly, the Court observed that "[a]n opt-out system *creates a risk* that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* (emphasis added). The same risk—that non-members may be forced to support the union when they don't wish to do so—is present here as well.

As the *Knox* Court rhetorically asked, "isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?" *Id.* Of course, the

answer is yes, both for the plaintiffs in *Knox* and the home care providers in this case. It is not controversial to say that most people would prefer not to pay an assessment that isn't required. And even if that weren't so obvious, "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 526 U.S. 666, 682 (1999)). *Harris* held that the seizure of fair-share fees from objecting home care providers violates the First Amendment. Thus, judges cannot assume that home care providers who declined to join SEIU wanted to give up their right not to pay the fair-share fees when those providers were not given an opportunity to object. That is true even if many non-members were not hostile to the union.

The court's citations to compelled-speech cases like *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), are inapposite. With respect to injury, these cases present a sort of catch-22. Someone who is not bothered by the compelled speech at issue (e.g., the Pledge of Allegiance in *Barnette* and "Live Free or Die" on a license plate in *Wooley*) is very unlikely to sue. The same is true in Establishment Clause cases, which "are invariably mounted by people offended by the government's association with religion." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 876–77 (7th Cir. 2012) (en banc) (Posner, J., dissenting). In other words, anyone who challenges the government's actions in such cases by definition has an injury, otherwise they wouldn't have sued. But it doesn't follow that those who choose not to sue have not been harmed. As the court acknowledges, "a requirement to recite the Pledge of Allegiance every morning might impermissibly impinge upon all students' rights to choose whether to do so. . . ." Maj. Op. at 6–7. I would

add that those who choose not to sue are still compelled to speak; they simply don't care enough to seek redress, either because they support the speech or it is not worth their time to complain about it. That doesn't mean that the non-objectors don't have a First Amendment injury, only that they have chosen not to assert one. Their damages might be nominal, but their First Amendment injury exists all the same.

Fortunately, we don't have to deal with that problem in this case because the proposed class members all have tangible monetary injuries. And as the Supreme Court explained, those injuries derive from the exaction of "funds from nonmembers without their affirmative consent." *Knox*, 567 U.S. at 322. Each and every SEIU non-member had fees exacted without his or her affirmative consent. Some might not care enough to seek redress, but like the students required to recite the Pledge, they have been compelled to speak nonetheless. That is their injury. If (as the union contends) some of the proposed class members really wanted to support SEIU, those individuals are free to not claim their refunds or to donate to the union on their own. That is their prerogative. But after *Knox* and *Harris*, public-sector unions can no longer seize money from non-members without their consent. Therefore, those who had funds unconstitutionally seized may recover their money irrespective of their feelings towards the union.

Next, the district court concluded (and the court apparently agrees) that the representative plaintiffs can't adequately represent the class as required by Rule 23(a)(4) because class members may have differing views about SEIU. The district court reasoned that "a class representative who wants to undermine the union is not likely to be a suitable representative for a

group that includes people who have no such hostility." *Riffey*, 2016 WL 3165725, at *7. That analysis is too broad. A class member who wants to recover his money doesn't necessarily want to undermine the union. He may just not want to pay for what the union labels "fair share," but what the employee thinks is a waste of money.

Moreover, the assumed disagreements between proposed class members have nothing to do with the injury each suffered and the compensation sought. Instead, as the Eighth Circuit explained, "the antagonism which will defeat maintenance of a class action must relate to the subject matter in controversy." *Reynolds v. Nat'l Football League*, 584 F.2d 280, 286 (8th Cir. 1978) (quoting *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 874 (8th Cir. 1977)). Here, the matter in controversy is the refund of seized fair-share fees. Even if some members of the proposed class want to destroy SEIJ while others don't, each class member has an identical interest in the return of his or her money. That is to say, none of the representative plaintiffs' claims "conflict[] with the economic interests of the class." *Id.* And unlike in *Gilpin v. American Federation of State, County, & Municipal Employees, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989), the putative class representatives seek only compensatory damages, not punitive damages that might cause the union severe economic hardship. See *Riffey*, 2016 WL 3165725, at *7. Differences in ideology among putative class members shouldn't doom an attempt to recover unconstitutionally taken fees in which each member has an equal stake. Cf. *Reynolds*, 584 F.2d at 874 ("the mere existence of political divisions or factionalism within a union does not require class decertification" (quoting *Sperry Rand Corp.*, 554 F.2d at 874)).

However, while I disagree with the district court's conclusions on the issues of commonality and adequacy of representation, I would still affirm its decision not to certify the class. That is because the proposed class still must satisfy Rule 23(b)(3)'s requirement that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Yet as the district court noted, now that the "central First Amendment question" in this case was resolved in *Harris*, "plaintiffs' pursuit of class-wide refunds is the most significant issue remaining in the case." *Riffey*, 2016 WL 3165725, at *8. That's a problem for the plaintiffs. Even though the need for individualized damages calculations won't usually preclude certification, see *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 815 (7th Cir. 2012), in this case damages are the *main*, if not the only, remaining issue. Therefore, the district court likely did not abuse its discretion by concluding that issues common to the class wouldn't predominate over individual issues.

On superiority, the district court was mostly correct that "there is no longer any reason to concentrate each proposed class member's claim for damages into a single forum, because, armed with *Harris*, any individual who did not want to join or support the union can pursue individual relief (with the potential benefit of 42 U.S.C. § 1988 fee-shifting)." *Riffey*, 2016 WL 3165725, at *8 (citation omitted).[1] In other words,

[1] Of course, as I explained above, any non-member who had his or her fees seized without affirmative consent can recover. Therefore, the class of people who may seek relief should not be limited to those "who did not want to join or support the union."

especially with prevailing-party attorneys' fees available, it is not at all obvious that a class action is superior to other available methods for adjudicating this controversy. The individual non-union members might prefer a class action, but they have all the incentive in the world to pursue their individual claims and should not have any trouble finding attorneys to help them in a case where the merits have mostly been decided and fees are recoverable. With that in mind, I would hold that the district court didn't abuse its discretion when it concluded that a class action wouldn't be superior in this case.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). So while I am particularly troubled by the district court's conclusion that subjective support for the union would extinguish a potential class member's First Amendment injury, I nonetheless agree that we should affirm the denial of certification. Under Rule 23(b)(3), the plaintiffs bear the burden of showing that common issues would predominate over individual ones and that a class action would be superior to individual actions. While the district court's conclusions on these questions are subject to debate, they do not amount to an abuse of discretion. Therefore, I concur only in the judgment.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed 08/23/16]

No.: 10-cv-02477

THERESA RIFFEY, *et al*.,

Plaintiffs,

v.

GOVERNOR BRUCE RAUNER, in his official capacity as Governor of the State of Illinois; and SEIU HEALTHCARE ILLINOIS & INDIANA,

Defendants.

Judge: Honorable Manish S. Shah

JUDGMENT

Pursuant to the joint motion of the parties, the Court hereby enters judgment in favor of Plaintiffs Theresa Riffey, Susan Watts, and Stephanie Yencer-Price and against Defendants Governor Bruce Rauner, in his official capacity as Governor of the State of Illinois, and SEIU Healthcare Illinois & Indiana, as follows:

Defendant SEIU Healthcare Illinois & Indiana (now known as SEIU Healthcare Illinois Indiana Missouri Kansas) shall pay the following amounts to Plaintiffs: Theresa Riffey: $4,994.14; Susan Watts: $4,327.02; Stephanie Yencer-Price: $965.69.

Defendants Governor Bruce Rauner, in his official capacity as Governor of the State of Illinois, and SEIU Healthcare Illinois & Indiana (now known as SEIU Healthcare Illinois Indiana Missouri Kansas) ARE HEREBY ENJOINED AND RESTRAINED from entering into a "fair-share agreement" within the meaning of Section 3(g) of the Illinois Public Labor Relations Act that is applicable to personal assistants who work under the Illinois Home Services Program. This injunction shall not apply if the Supreme Court overrules its decision in *Harris v. Quinn*, 134 S.Ct. 2618 (2014).

If Plaintiffs appeal from this final judgment and the Order denying their motion for class certification (Doc. 182), Plaintiffs' deadlines to file a bill of costs in accordance with Local Rule 54.1 and to move for attorney's fees and related non-taxable expenses in accordance with Local Rule 54.3 are extended until 90 days after the issuance of the mandate by the Court of Appeal.

IT IS SO ORDERED.

Dated: 8/23/16

/s/ Manish S. Shah
Manish S. Shah
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed 06/07/16]

No. 10 CV 02477

THERESA RIFFEY, SUSAN WATTS, and
STEPHANIE YENCER-PRICE,

Plaintiffs,

v.

GOVERNOR BRUCE RAUNER and
SEIU HEALTHCARE ILLINOIS & INDIANA,

Defendants.

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

Plaintiffs are personal assistants who provide in-home care for individuals through the Illinois Department of Human Services Home Services Program. The State of Illinois pays the plaintiffs, and they are represented by defendant SEIU Healthcare Illinois & Indiana for purposes of collective bargaining with the state. Plaintiffs are not members of the union (nor are they public employees), but until recently, they were compelled to pay to the union a "fair-share" fee in order to support its collective bargaining efforts. Plaintiffs filed suit to object to the deduction of those fees

as a violation of their First Amendment rights. The Supreme Court, in *Harris v. Quinn*, 134 S.Ct. 2618 (2014), agreed with plaintiffs and held that the fair-share fee procedures violated the First Amendment. Now on remand from the Supreme Court—with an amended complaint adjusting the named plaintiffs and substituting the current governor of Illinois as a defendant—plaintiffs seek a refund of the fair-share fees paid to the union.

Plaintiffs move to certify a class consisting of all personal assistants who, at any point in time from April 22, 2008, to the present, were not members of the union and who had fair-share fees deducted from payments made to them under Illinois's Home Services Program without their prior, written authorization. They further request that their attorneys, including attorneys from the National Right to Work Legal Defense Foundation, be appointed class counsel.

The central First Amendment issue in this case has been resolved by the Supreme Court. But there are a few issues still on the table. Whether defendants' conduct injured the plaintiffs, whether the affirmative defenses have merit, and what is the appropriate remedy, if any, are all questions to be decided. While there are certain common topics that may be suitable for class-wide resolution, individualized questions predominate on the most pressing and important issue-whether and how much money should be refunded to people who had fair-share fees deducted from their pay. Plaintiffs' motion for class certification is denied.

I. Legal Standards

A plaintiff seeking to certify a class under Rule 23 of the Federal Rules of Civil Procedure must first meet the "implicit requirement" that the class is defined

clearly and that membership is defined by objective criteria. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). The plaintiff must also meet the four requirements of Rule 23(a)—numerosity, adequacy of representation, commonality, and typicality. *Harper v. Sheriff of Cook County*, 581 F.3d 511, 513 (7th Cir. 2009). Finally, the plaintiff must satisfy the requirements of at least one subsection of Rule 23(b). *Id*. Because plaintiffs seek to certify a class under Rule 23(b)(3), they must show that issues common to the class members predominate over questions affecting only individual members, and that a class action is superior to other available adjudication methods. Fed. R. Civ. P. 23(b)(3); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

A party seeking class certification "must affirmatively demonstrate" compliance with Rule 23. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). Compliance with each requirement must be shown by a preponderance of the evidence. *Messner*, 669 F.3d at 811. A class may be certified only if a district court is "satisfied, after a rigorous analysis," that compliance with Rule 23 has been shown, even if the analysis entails some overlap with the merits of the underlying claims. *Wal-Mart Stores, Inc.*, 564 U.S. at 350–51; *see also Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010). And if a class is certified, the district court must also appoint class counsel. Fed. R. Civ. P. 23(g).

II. Background

Under the Illinois Department of Human Services Home Services Program, sometimes called the Rehabilitation Program, certain individuals who require

in-home care can hire personal assistants, who are paid by the state. 20 ILCS § 2405/3. The statute provides that the personal assistants are considered public employees only for the purposes of collective bargaining with the state, and SEIU serves as their exclusive representative. *Id*. The union is obligated to represent all personal assistants—both members of the union and nonmembers alike. 5 ILCS §§ 315/6, 315/8.

Personal assistants who are members of the union, naturally, pay union dues in exchange for their membership. But until recently, the collective bargaining agreements between the union and Illinois required that nonmembers pay fair-share fees to the union. Fair-share fees, also known as agency fees, are fees collected from personal assistants who are represented by, but not members of, the union and earmarked for activities related to collective bargaining, as opposed to political or ideological activities. The Supreme Court has authorized the collection of fair-share fees by public employee unions. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 232 (1977).

Plaintiffs objected to the collection of those fees and filed suit. Their complaint was dismissed, and that dismissal was affirmed by the Seventh Circuit. The Supreme Court reversed and remanded the case for further proceedings. *Harris*, 134 S.Ct. at 2644. Plaintiffs then filed an amended complaint and now move for class certification. SEIU estimates that the putative class would include approximately 80,000 personal assistants who paid approximately $32 million in fair-share fees from April 2008 to the present. [106]

¶¶ 26, 29.[1] Defendant SEIU opposes class certification, while defendant Governor Rauner takes no position. *See* [176].

The Supreme Court held that the "First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union," *Harris*, 134 S.Ct. at 2644, but several issues are still pending. In particular, SEIU has asserted affirmative defenses, including good faith, unjust enrichment, estoppel, and the statute of limitations (to the extent plaintiffs seek a remedy for violations outside the applicable period). [90] at 4–5. If defendants are found liable for First Amendment violations, the remedy must be determined. Pursuant to 42 U.S.C. § 1983, plaintiffs seek nominal and compensatory damages from the union, and in particular, seek a full refund of all fair-share fees deducted from their pay. [79] at 11–12.

III. Analysis

A. First Amendment Injury and the Proposed Class Definition

At the heart of the parties' arguments over class certification are the necessary elements of an injury in the context of compelled subsidization of third-party speech, and whether such an injury can be proven on a class-wide basis. "Section 1983 is a tort statute. A tort to be actionable requires injury." *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). Relatedly, "there can be no award of compensatory damages if there is no harm (i.e., no loss to compensate *for*)." *Gilpin v. Am.*

[1] Bracketed numbers refer to entries on the district court docket.

Fed'n of State, Cty., and Mun. Emps., AFL-CIO, 875 F.2d 1310, 1314 (7th Cir. 1989) (emphasis in original).

The union insists that an individual cannot suffer a First Amendment injury for compelled subsidization unless she also subjectively opposed the payment at the time. Plaintiffs believe that a First Amendment injury occurs whenever an individual is compelled to subsidize the speech of another without prior authorization. And because the union received fair-share fees from nonmember personal assistants without their affirmative consent, plaintiffs conclude that all the nonmember personal assistants who paid fair-share fees suffered First Amendment injuries—their money was wrongfully seized whether they agreed with the union or not.

In *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012), the Court decided whether a public union could collect a special fee, to be used for political activities, from nonmembers who had previously objected to subsidizing such activities, and what procedural safeguards the union must put in place to comport with the First Amendment. It ultimately held that the union had to first seek nonmembers' affirmative consent before collecting fees for political activities, because failing to do so "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S.Ct. at 2290. The Court held that the First Amendment prohibited the fee-collection practice at issue, but it did so in the context of developing a procedural framework that would minimize the risk of First Amendment infringement. Although "[c]ourts 'do not presume acquiescence in the loss of fundamental rights,'" *id.* (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed.*

Expense Bd., 527 U.S. 666, 682 (1999)), the Court did not hold that everyone from whom fees were taken suffered a First Amendment injury.

Implicit in the Court's reasoning on compelled subsidization is a requirement of the payor's contemporaneous subjective opposition. For example, the First Amendment prohibits public sector unions from extracting a loan from "unwilling" nonmembers. *Knox*, 132 S.Ct. at 2293. This suggests that a loan extracted from a willing nonmember would not encroach on the willing nonmember's free-speech rights. Opt-in procedures and obtaining affirmative consent minimizes the risk to First Amendment values that comes with compelled subsidies. *See id*. at 2295–96 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001)). But the harm to be avoided is the forced support of speech that the compelled person does not want to support. In invalidating the fair-share fees in this case, the Court relied on "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S.Ct. at 2644. It follows that if a personal assistant wants to support the union, collecting a fair-share fee from her would not result in a First Amendment injury. Thus, to prove injury, and the complete constitutional tort, plaintiffs must prove contemporaneous subjective opposition to the compelled payments.

The possibility that not every individual included in the class definition was injured does not preclude class certification. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) ("[A] class will often include persons who have not been injured by the defendant's conduct." (quoting *Kohen v. Pac. Inv.*

Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009))). If the class includes a significant number of people who could have been injured, but were not, it may be certified. But if "a great many" or "a great number of" putative class members could not have been harmed by defendants' conduct, then the proposed class is too broad and should not be certified. *Kohen*, 571 F.3d at 677; *Messner*, 669 F.3d at 824.

The union provides compelling evidence that a substantial number of proposed class members did not object to paying the fair-share fee, and would have consented if they had been given a choice. These personal assistants could not have suffered a First Amendment injury. The majority of personal assistants in 2003 voted for union representation, and a majority ratified the CBA in 2008 and 2012. The union points out that 65% of the proposed class members who are still personal assistants have since joined the union. While views can change over time—and a decision to join the union at a later date does not guarantee that the person supported the union earlier—the union believes these people likely have always supported the union and would not have objected to the deduction of fair-share fees. Plaintiffs do not rebut this evidence; instead, plaintiffs argue that class members who support the union should opt out after certification. This procedure might be suitable if the class definition were not overly broad, but plaintiffs have the burden to demonstrate—with evidence—that class certification is appropriate. Without evidence to rebut the defense showing that a great many nonmembers who paid fair-share fees had no subjective opposition to the union, the proposed class includes too many people who could not have been injured by the deduction.

Alternatively, if SEIU committed a complete First Amendment tort by taking fees without consent (whether or not the nonmember wanted to support the union), or if the proposed class simply includes people who were not (as opposed to could not have been) damaged, class certification—as currently proposed by plaintiffs—is nevertheless inappropriate under Rule 23.

B. Rule 23(a)

"The general gate-keeping function of Federal Rule 23(a) ensures that a class format is an appropriate procedure for adjudicating a particular claim by requiring that the class meet the following requirements: (1) the class is so numerous that joinder of all members is impracticable (numerosity);[2] (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation)." *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015).[3]

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[2] The union does not challenge the numerosity requirement. According to defendant, the proposed class would contain more than 80,000 members. [106] ¶ 26. This satisfies the numerosity requirement of Rule 23(a).

[3] Plaintiffs must demonstrate that the proposed class is sufficiently definite such that its members are ascertainable. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). The class definition must be 1) precise, 2) defined by objective criteria, and 3) not defined in terms of success on the merits. *Id*. Plaintiffs' proposed class is precisely defined by union membership status and defendants' conduct, and the definition does not depend on the defendants' liability. The ascertainability requirement, which defendant does not challenge, is satisfied.

1. Commonality and Typicality

Commonality and typicality are frequently assessed together, as "both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc.*, 564 U.S. at 349 n.5 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–58 n.13 (1982)).

To satisfy Rule 23(a)'s commonality requirement, plaintiffs must show that the claims "depend upon a common contention that is capable of class-wide resolution." *Bell*, 800 F.3d at 374. And "class-wide resolution means that determining the truth or falsity of the common contention will resolve an issue that is central to the validity of each claim." *Id*. "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek*, 764 F.3d at 756. Similarly, plaintiffs can satisfy the typicality requirement if they show that their claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

The plaintiffs had fair-share fees deducted without consent,[4] and in that respect, defendants' conduct

[4] Plaintiff Yencer-Price does not meet the typicality requirement because the union's records show that she has been paying union dues rather than fair-share fees. Although she disputes her

gives rise to the same kinds of claim across the proposed class. The union argues that plaintiffs' claims are neither typical nor common because many class members had no objections to financially supporting the union. I agree that whether class members were injured (or what amount of damages would compensate for the injury, discussed below) is an individual question. But "[t]he fact that the plaintiffs might require individualized relief or not share all questions in common does not preclude certification of a class." *Bell*, 800 F.3d at 379. Rule 23(a) does not require that all issues be common to the class, or even the most important issue. *See Wal-Mart Stores, Inc.*, 564 U.S. 338 at 359. Classes may be certified even if "individual class members will still have to prove the fact and extent of their individual injuries." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003).

Although the claim as a whole cannot be resolved on a class-wide basis, there exist common issues that can, and Rule 23(c)(4) permits certification on particular issues. "If there are genuinely common issues . . . identical across all the claimants, . . . the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." *McReynolds v. Merrill Lynch, Pierce, Fenner*

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union membership (and a copy of her union card is not in defendant's records) it does appear that she is not a person who had fair-share fees deducted, and thus is not a class member. The dispute over her union-membership status makes her claim "idiosyncratic or possibly unique" and makes her an unsuitable class representative. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 758 (7th Cir. 2014).

& Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) (quoting *Mejdrech*, 319 F.3d at 911). Whether defendant escapes liability because it acted in good faith based on the law in effect at the time, whether the doctrine of unjust enrichment precludes monetary relief, and whether plaintiffs should be estopped from seeking monetary relief because they accepted the benefits of the CBA's, are questions that are not dependent on the individualized inquiries. Plaintiffs' claims are typical of the proposed class's with respect to these common defenses. But in this case, plaintiffs seek class certification "primarily to require that SEIU-HCII return to personal assistants the monies wrongfully seized from them." [81] at 1. With this professed focus on the damages remedy, and without additional briefing on the prospect of narrower, issue-based class certification, I decline—at this time—plaintiffs' invitation to certify any alternative class I deem appropriate.

If class-wide compensatory damages is plaintiffs' goal, their proposal for class certification is not workable. As discussed above, I reject plaintiffs' argument that a First Amendment injury has already been established for each class member. But even if injury can be assumed, the extent of the injury—the amount of damages beyond nominal damages—will depend on the nonmembers' subjective beliefs. If the nonmember would have willingly paid a fair-share fee if given the choice, then the deduction did not cause a monetary loss to that nonmember.[5] The amount of fair-share fees these people paid would not be a measure of the interference in their First Amendment rights.

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[5] The union's evidence indicates there are many such people within the proposed class.

In addition, to the extent the compelled payment resulted in some tangible benefit to the nonmember from the union, the deduction may not be an accurate measure of loss. Compensatory damages are measured by the plaintiff's loss, not the defendant's gain, *see* 1 D. Dobbs, Law of Remedies § 1.1, p. 5 (2d ed. 1993), and so if the personal assistants received something of value, the net loss is not the amount of the fair-share deduction. *See Gilpin*, 875 F.2d at 1316 (discussing, as a matter of restitution, the prospect of offsetting improperly taken fees by the benefits obtained by the union's efforts). Perhaps the services received were not an adequate, or even partial, substitute for the money that plaintiffs paid. Or perhaps the loss of the opportunity to choose how to spend one's own money should never be measured by reference to the benefits coincidentally received. The point here is that the compensatory damages remedy that plaintiffs seek is not simply a matter of calculating full refunds of fair-share fees.

So even though plaintiffs' claims share common questions with the proposed class's, and are typical in that they involve fair-share fee deductions, it would not make sense to certify a class only to immediately enter a phase of individualized damages inquiries—likely leading to decertification of the class for reasons of adequacy and predominance.

2. Adequacy

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[A] class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (quoting *Rosario*, 963 F.2d at 1018).

Plaintiffs argue that they are adequate representatives of their proposed class because, in their view, they experienced the same First Amendment injury resulting from the same conduct as the rest of the class members and share with them an interest in not being compelled to pay fair-share fees without consent. The union contends that plaintiffs' requested relief and their anti-union ideology create a fundamental conflict between them and the rest of the proposed class, which includes union members and supporters, making plaintiffs inadequate representatives.

The union relies on *Gilpin*, 875 F.2d 1310, to argue that the relief sought by plaintiffs conflicts with the interests of the rest of the class, precluding class certification. *Gilpin*, another case sponsored by the National Right to Work Legal Defense Foundation, involved a challenge by nonmembers to the calculation of fair-share fees imposed by a union. *Id*. at 1312. In that case, the named plaintiffs sought a refund of the full fair-share fee amount—relief that was essentially punitive in nature because it exceeded actual damages. *Id*. at 1315. In upholding a denial of certification of a class of non-union members, the Seventh Circuit determined that such punitive relief was aligned with the pronounced anti-union ideology of the Foundation rather than the goals of class members who opposed being overcharged but otherwise supported the existence and activities of the union. *Id*. at 1313.

Gilpin is not quite as on-point as defendant suggests because the compensatory damages remedy sought here—available only to those who did not wish to join or support the union—is not punitive and can be awarded to those who may not share plaintiffs' ideological opposition to the union, but still did not want

to support the union with money.[6] But to avoid the problems of a fail-safe class definition, the proposed class necessarily includes people who do support the union and are in ideological conflict with the named plaintiffs. Each of the named plaintiffs believes that she did not receive any benefit from union representation, and would seek damages even if it hampered or destroyed the union in its representational capacity. [107-3] at 23–25, 28; [107-4] at 42, 44–45, 51; [107-5] at 24, 28. Plaintiffs Riffey and Yencer-Price testified that they did not want a union representing personal assistants at all. [107-3] at 24; [107-5] at 23. And plaintiff Watts accepted a national award from the Right to Work Foundation, whose goal is to weaken or destroy public unions. [107-4] at 46–47; [107-8] at 2. In contrast, defendant submitted 57 declarations from personal assistants in the proposed class, from a variety of backgrounds, who say they support the union and did not object to the fair-share fees deducted from their paychecks. *See* [110]–[166]. Some even mistakenly thought they were members of the union

[6] The union does put forth evidence suggesting that a full refund of all fair-share fees would be burdensome, and if plaintiffs' injury and damages theory were correct, it would cripple the union. SEIU collected roughly $32 million in fair-share fees from nonmember personal assistants during the six-year class period. [106] ¶ 26. In 2014, it collected approximately $7.3 million in union dues from members. *Id*. ¶ 27. The implication is that providing a full refund of fair-share fees would be difficult given its limited annual income. Plaintiffs' approach to remedy, while in the guise of compensatory damages, could be seen as a litigation strategy designed to undermine the union. But the union does not elaborate on either its ability to provide a refund or the effect a refund would have on its operations and activities. In any event, not every class member suffered a First Amendment injury that would entitle them to a refund, and a truly compensatory damages remedy would not be punitive.

while paying fair-share fees. *See* [122] ¶ 5; [135] ¶ 7; [145] ¶ 3; [148] ¶ 3; [161] ¶ 7. These class members do not want a refund and are worried about a large damages award's effect on the union. *See, e.g.*, [115] ¶ 6; [152] ¶ 7; [159] ¶ 9. The class includes current members of the union (formerly fair-share-fee-payors), and, the union argues, their views will not be fairly and adequately represented by people who would be undeterred by the prospect of the union's dissolution.

The union also relies on *Schlaud v. Snyder*, 785 F.3d 1119 (6th Cir. 2015) *cert. denied sub nom. Schlaud v. Int'l Union, UAW*, 136 S.Ct. 1512 (2016), to argue that a conflict of interest precludes class certification. In *Schlaud*, the Sixth Circuit upheld the denial of class certification under a similar set of facts because of a conflict of interest between the named plaintiffs and the rest of the class. *Id*. at 1128. The court emphasized the fact that the proposed class included union members, including "a substantial number" of workers who had voted in favor of the collective bargaining agreement requiring fair-share fees. *Id*. at 1125. Because members of the class were likely willing to financially support the union without compulsion, the court held that the named plaintiffs did not fairly and adequately represent their interests. *Id.* at 1128.

In response, plaintiffs say that their private motives and thoughts on unionization are irrelevant, because they do not affect the merits of the case. In their view, liability turns on the lack of affirmative consent to the fair-share fees, so they seek the same relief that absent class members are already entitled to. They argue that any ideological conflict between themselves and absent class members will only manifest itself in a split between those injured class members who want a remedy for their injuries and those who do not, and

that those who do not want a remedy can simply opt out of the class. But as noted above, subjective support of the union, or lack thereof, for each absent class member is central to this case, and not just a factor in the decision to seek a remedy.

The Sixth Circuit's concern about certifying a class with people who were not damaged is less weighty here, in light of the Seventh Circuit's repeated admonition that class certification can be appropriate even when some class members experienced no harm and do not have valid claims. *See, e.g., Suchanek*, 764 F.3d at 757–58. In addition, the "adequacy of class representatives is an issue that can be examined throughout the litigation." *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 715 (7th Cir. 2015). But in the end, both *Schlaud* and *Gilpin* point out that a class representative who wants to undermine the union is not likely to be a suitable representative for a group that includes people who have no such hostility. If Riffey and Watts seek damages to weaken the union, they are not likely to faithfully identify and inform class members who would want to opt out. This is a First Amendment case in which subjective beliefs are critical to resolution of the remaining issues, yet plaintiffs seek to represent a class that includes many people who would not want to associate with plaintiffs. The named plaintiffs are not adequate representatives of such a class.[7]

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[7] At this point, it is not necessary to address the adequacy of class counsel. *See* Fed. R. Civ. P. 23(g)(4). Like the named plaintiffs, if class counsel want to advance an agenda to weaken the union through class-wide damages, they would not adequately represent the interests of class members who are current union members. But if a more limited, issue-based class were certified, these concerns would be minimized. The attorneys—

C. Rule 23(b)(3)

Because plaintiffs seek to certify the class pursuant to Rule 23(b)(3), they must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). "Predominance is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1059 (7th Cir. 2016) (quoting *Messner*, 669 F.3d at 815). "Ultimately, the court must decide whether classwide resolution would substantially advance the case." *Suchanek*, 764 F.3d at 761.

Damages—the primary reason plaintiffs seek class certification—cannot be resolved in a single adjudication, and the damages questions for 80,000 potential class members would predominate over other questions. Predominance might not be an issue if a class were certified solely to adjudicate the affirmative defense of good faith before determining liability, but as currently conceived, plaintiffs' pursuit of class-wide refunds is the most significant issue remaining in the

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who have the skills and resources to be class counsel—would be ethically bound to exercise their independent legal judgment (not take direction from the National Right to Work Legal Defense Foundation) and represent the interests of the class. Plaintiffs and their counsel may be adequate representatives for a class that does not depend on the subjective beliefs of class members. For example, whether the union can assert a good faith defense is a question that named plaintiffs and their attorneys should be able to litigate without intra-class conflict. But, as noted above, this prospect has not been briefed by the parties.

case. Now that plaintiffs have prevailed on the central First Amendment question—whether fair-share fees can be deducted without consent—the predominant issue is the scope of relief, and that is an individual, not a class, question.

In addition, plaintiffs' proposed class presents significant manageability issues. *See* Fed. R. Civ. P. 23(b)(3)(D). Personal assistants are in a profession with high turnover. [106] ¶ 29. Obtaining evidence from each class member would be difficult, *see* [106] ¶ 32 (reporting difficulty with phone numbers and addresses for personal assistants), and plaintiffs propose no plan that would successfully determine on a class-wide basis whether fair-share-fee-paying personal assistants did not want to join or support the union. In light of my conclusion that subjective beliefs about the fair-share fees are relevant, indeed paramount, to the availability and amount of relief here, individual interests in controlling the First Amendment claim would be significant. *See* Fed. R. Civ. P. 23(b)(3)(A). And there is no longer any reason to concentrate each proposed class member's claim for damages in a single forum, *see* Fed. R. Civ. P. 23(b)(3)(C), because, armed with *Harris*, any individual who did not want to join or support the union can pursue individual relief (with the potential benefit of 42 U.S.C. § 1988 fee-shifting). Plaintiffs have not met their burden to demonstrate predominance and superiority for their proposed class under Rule 23(b)(3).

IV. Conclusion

Plaintiffs' motion for class certification [80] is denied. The proposed class definition is too broad because it contains a great number of people who could not have been injured by defendants' conduct. But even if injury can be presumed, plaintiffs' pursuit of refunds on

behalf of a class requires individualized determinations that predominate over the remaining common questions. This denial is without prejudice to plaintiffs revising their proposed class definition or seeking class certification on non-damages issues.

ENTER:

/s/ Manish S. Shah
Manish S. Shah
United States District Judge

Date: 6/7/16

APPENDIX G

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with
Fed. Rule. App. P. 32.1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed 05/01/2015]

No. 10-3835

No. 10 cv 02477

PAMELA J. HARRIS, *et al.*,

Plaintiffs-Appellants,
v.

BRUCE V. RAUNER, in his official capacity as
Governor of the State of Illinois, *et al.*,

Defendants-Appellees.

On Remand from the Supreme Court
of the United States

Submitted August 1, 2014*
Decided May 1, 2015

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* After examining the briefs and record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and record. See FED. R. APP. P. 34(a)(2).

Before

DIANE P. WOOD, *Chief Judge*
DANIEL A. MANION, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

Sharon Johnson-Coleman, *Judge*.

ORDER

When this case was last before us, we held that plaintiffs, providers of in-home care for people with disabilities or health problems, did not have a First Amendment right to refuse to pay certain fair-share fees to a union. *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011). This had the effect of affirming the district court's decision to dismiss Count I of the complaint, which presented claims on behalf of personal assistants to customers in the state's Rehabilitation Program. (Count II, which we note briefly below, asserted similar claims on behalf of customers in the state's Disabilities Program.) The Supreme Court then granted certiorari and concluded that our judgment had to be reversed in part and affirmed in part. *Harris v. Quinn*, 134 S. Ct. 2618 (2014). With respect to Count I, the Court held that the First Amendment does not permit a state "to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support." *Id*. at 2623. It concluded that the state's involvement in the terms and conditions of employment for the in-home personal assistants was not enough to make the state their employer. It stressed the customer's control of the assistant's location, training, day-to-day work, dis-

cipline, and other aspects of the employment relationship. That meant that this court's conclusion that the case was governed by *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), was in error: *Abood* applies only to public-sector employees, and the Court declined to extend it to the circumstances presented in this case, where there is state involvement but fundamentally a private employment relationship. The Court thus reversed the decision to dismiss the claims of the plaintiffs who served customers in the Rehabilitation Program; it affirmed our ruling that the claims of plaintiffs who worked in the Disabilities Program (Count II) were not ripe. 134 S. Ct. at 2644 & n.30.

As required by Seventh Circuit Rule 54, the parties were given an opportunity to address the proper next steps in light of the Supreme Court's decision. They filed a joint statement, in which they recommended that (1) we reverse the district court's decision to dismiss Count I of the complaint and remand that part of the case for further proceedings consistent with the Supreme Court's opinion, and (2) we order the claims raised in Count II to be dismissed without prejudice. They also ask us to recognize that defendants-appellees Service Employees International Union (SEIU) Local 73 and American Federation of State, County and Municipal Employees (AFSCME) Council 31 are no longer defendants in the case. We agree with the parties that this is the appropriate way to respond to the Supreme Court's ruling.

In addition, there are some remaining questions about costs and fees. In keeping with the Joint Stipulation, we hereby award the Plaintiffs-Appellees 50% of their costs in this court pursuant to Circuit Rule 39. With respect to attorney's fees, we believe that the parties' first suggestion is preferable, namely,

to include that issue in the matters remanded to the district court and to allow it to consider what fees Plaintiffs-Appellees are entitled to recover for work done both in this court and before the Supreme Court. That proceeding may also include fees incurred for work done after remand.

In summary, we hereby REVERSE the district court's judgment dismissing Count I of the complaint; we REMAND the judgment dismissing Count II of the complaint so that the district court can modify it to be without prejudice; and we otherwise REMAND this case to the district court for further proceedings consistent with this order.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 11–681

OCTOBER TERM, 2013

HARRIS *et al*.

v.

QUINN, GOVERNOR OF ILLINOIS, *et al*.

Argued January 21, 2014—
Decided June 30, 2014

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

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

Illinois' Home Services Program (Rehabilitation Program) allows Medicaid recipients who would normally need institutional care to hire a "personal assistant" (PA) to provide homecare services. Under

State law, the homecare recipients (designated "customers") and the State both play some role in the employment relationship with the PAs. Customers control most aspects of the employment relationship, including the hiring, firing, training, supervising, and disciplining of PAs; they also define the PA's duties by proposing a "Service Plan." Other than compensating PAs, the State's involvement in employment matters is minimal. Its employer status was created by executive order, and later codified by the legislature, solely to permit PAs to join a labor union and engage in collective bargaining under Illinois' Public Labor Relations Act (PLRA).

Pursuant to this scheme, respondent SEIU Healthcare Illinois & Indiana (SEIU–HII) was designated the exclusive union representative for Rehabilitation Program employees. The union entered into collective-bargaining agreements with the State that contained an agency-fee provision, which requires all bargaining unit members who do not wish to join the union to pay the union a fee for the cost of certain activities, including those tied to the collective-bargaining process. A group of Rehabilitation Program PAs brought a class action against SEIU–HII and other respondents in Federal District Court, claiming that the PLRA violated the First Amendment insofar as it authorized the agency-fee provision. The District Court dismissed their claims, and the Seventh Circuit affirmed in relevant part, concluding that the PAs were state employees within the meaning of *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209.

Held: The First Amendment prohibits the collection of an agency fee from Rehabilitation Program PAs who do not want to join or support the union. Pp. 8–40.

(a) In upholding the Illinois law's constitutionality, the Seventh Circuit relied on *Abood*, which, in turn, relied on *Railway Employes* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740. Unlike *Abood*, those cases involved private-sector collective-bargaining agreements. The *Abood* Court treated the First Amendment issue as largely settled by *Hanson* and *Street* and understood those cases to have upheld agency fees based on the desirability of "labor peace" and the problem of " 'free riders[hip].' " 431 U. S., 220–222, 224. However, "preventing nonmembers from free-riding on the union's efforts" is a rationale "generally insufficient to overcome First Amendment objections," *Knox* v. *Service Employees*, 567 U. S. ___, ___, and in this respect, *Abood* is "something of an anomaly," 567 U. S., at ___.

The *Abood* Court's analysis is questionable on several grounds. The First Amendment analysis in *Hanson* was thin, and *Street* was not a constitutional decision. And the Court fundamentally misunderstood *Hanson*'s narrow holding, which upheld the authorization, not imposition, of an agency fee. The *Abood* Court also failed to appreciate the distinction between core union speech in the public sector and core union speech in the private sector, as well as the conceptual difficulty in public-sector cases of distinguishing union expenditures for collective bargaining from those designed for political purposes. Nor does the *Abood* Court seem to have anticipated the administrative problems that would result in attempting to classify union expenditures as either chargeable or nonchargeable, see, *e.g., Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, or the practical problems that would arise from the heavy burden facing objecting nonmembers wishing to challenge the union's actions. Finally, the *Abood* Court's critical

"labor peace" analysis rests on the unsupported empirical assumption that exclusive representation in the public sector depends on the right to collect an agency fee from nonmembers. Pp. 8–20.

(b) Because of *Abood*'s questionable foundations, and because Illinois' PAs are quite different from full-fledged public employees, this Court refuses to extend *Abood* to the situation here. Pp. 20–29.

(1) PAs are much different from public employees. Unlike full-fledged public employees, PAs are almost entirely answerable to the customers and not to the State, do not enjoy most of the rights and benefits that inure to state employees, and are not indemnified by the State for claims against them arising from actions taken during the course of their employment. Even the scope of collective bargaining on their behalf is sharply limited. Pp. 20–25.

(2) *Abood*'s rationale is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law. Even the best argument for *Abood*'s anomalous approach is a poor fit here. What justifies the agency fee in the *Abood* context is the fact that the State compels the union to promote and protect the interests of nonmembers in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances." *Lehnert, supra,* at 556. That rationale has little application here, where Illinois law requires that all PAs receive the same rate of pay and the union has no authority with respect to a PA's grievances against a customer. Pp. 25–27.

(3) Extending *Abood*'s boundaries to encompass partial public employees would invite problems. State

regulations and benefits affecting such employees exist along a continuum, and it is unclear at what point, short of full-fledged public employment, *Abood* should apply. Under respondents' view, a host of workers who currently receive payments from a government entity for some sort of service would become candidates for inclusion within *Abood*'s reach, and it would be hard to see where to draw the line. Pp. 27–29.

(c) Because *Abood* does not control here, generally applicable First Amendment standards apply. Thus, the agency-fee provision here must serve a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox, supra,* at ___. None of the interests that respondents contend are furthered by the agency-fee provision is sufficient. Pp. 29–34.

(1) Their claim that the agency-fee provision promotes "labor peace" misses the point. Petitioners do not contend that they have a First Amendment right to form a rival union or that SEIU–HII has no authority to serve as the exclusive bargaining representative. This, along with examples from some federal agencies and many state laws, demonstrates that a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked. Features of the Illinois scheme—*e.g.,* PAs do not work together in a common state facility and the union's role is very restricted—further undermine the "labor peace" argument. Pp. 31–32.

(2) Respondents also argue that the agency-fee provision promotes the welfare of PAs, thereby contributing to the Rehabilitation Program's success. Even assuming that SEIU–HII has been an effective

advocate, the agency-fee provision cannot be sustained unless the union could not adequately advocate without the receipt of non-member agency fees. No such showing has been made. Pp. 32–34.

(d) Respondents' additional arguments for sustaining the Illinois scheme are unconvincing. First, they urge the application of a balancing test derived from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563. This Court has never viewed *Abood* and its progeny as based on *Pickering* balancing. And even assuming that *Pickering* applies, that case's balancing test clearly tips in favor of the objecting employees' First Amendment interests. Second, respondents err in contending that a refusal to extend *Abood* here will call into question this Court's decisions in *Keller* v. *State Bar of Cal.*, 496 U. S. 1, and *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, for those decisions fit comfortably within the framework applied here. Pp. 34–40.

656 F. 3d 692, reversed in part, affirmed in part, and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 11–681

PAMELA HARRIS, ET AL.,

Petitioners

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.

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

[June 30, 2014]

Opinion of the Court

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or

support. We hold that it does not, and we therefore reverse the judgment of the Court of Appeals.

I

A

Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care. In order to prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization. See 42 U. S. C. §1396n(c)(1). A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care. *Ibid.*; see also 42 CFR §§440.180, 441.300–441.310 (2013). Almost every State has established such a program. See Dept. of Health and Human Services, Understanding Medicaid Home and Community Services: A Primer (2010).

One of those States is Illinois, which has created the Illinois Department of Human Services Home Services Program, known colloquially as the state "Rehabilitation Program." Ill. Comp. Stat., ch. 20, §2405/3(f) (West 2012); 89 Ill. Admin. Code §676.10 (2007). "[D]esigned to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State," §676.10(a), the Rehabilitation Program allows participants to hire a "personal assistant" who provides homecare services tailored to the individual's needs. Many of these personal assistants are relatives of the person receiving care, and some of them provide care in their own homes. See App. 16–18.

Illinois law establishes an employer-employee relationship between the person receiving the care and the person providing it. The law states explicitly that the person receiving home care—the "customer"—"shall be *the* employer of the [personal assistant]." 89 Ill. Admin. Code §676.30(b) (emphasis added). A "personal assistant" is defined as "an individual employed *by the customer* to provide . . . varied services that have been approved by the customer's physician," §676.30(p) (emphasis added), and the law makes clear that Illinois "shall not have control or input in the employment relationship between the customer and the personal assistants." §676.10(c).

Other provisions of the law emphasize the customer's employer status. The customer "is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant (or PA)], including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the personal assistant, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA." §676.30(b).[1] In general, the customer "has complete

[1] Although this regulation states clearly that a customer has complete discretion with respect to hiring and firing a personal assistant, the dissent contends that the State also has the authority to end the employment of a personal assistant whose performance is not satisfactory. Nothing in the regulations supports this view. Under 89 Ill. Admin. Code §677.40(d), the State may stop paying a personal assistant if it is found that the assistant does not meet "the standards established by DHS as found at 89 Ill. Adm. Code 686." These standards are the basic hiring requirements set out in §686.10, see n. 2, *infra*. Providing adequate performance after hiring is nowhere mentioned in §686.10.

discretion in which Personal Assistant he/she wishes to hire." §684.20(b).

A customer also controls the contents of the document, the Service Plan, that lists the services that the customer will receive. §684.10(a). No Service Plan may take effect without the approval of both the customer and the customer's physician. See §684.10, 684.40, 684.50, 684.75. Service Plans are highly individualized. The Illinois State Labor Relations Board noted in 1985 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 . . . to work under the direction and control of private third parties." *Illinois Dept. of Central Management Serv.*, No. S–RC–115, 2 PERI ¶2007, p. VIII–30, (1985), superseded, 2003 Ill. Laws p. 1929.

While customers exercise predominant control over their employment relationship with personal assistants, the State, subsidized by the federal Medicaid program, pays the personal assistants' salaries. The amount paid varies depending on the services provided, but as a general matter, it "corresponds to the amount the State would expect to pay for the nursing care component of institutionalization if the individual chose institutionalization." 89 Ill. Admin. Code §679.50(a).

Other than providing compensation, the State's role is comparatively small. The State sets some basic threshold qualifications for employment. See §§686.10(h)(1)–(10).[2] (For example, a personal assistant must have a Social Security number, must

[2] It is true, as the dissent notes, *post*, at 4, that a personal assistant must provide two written or oral references, see

possess basic communication skills, and must complete an employment agreement with the customer. §§686.10, 686.20, 686.40.) The State mandates an annual performance review *by the customer, helps the customer* conduct that review, and mediates disagreements between customers and their personal assistants. §686.30. The State *suggests* certain duties that personal assistants should assume, such as performing "household tasks," "shopping," providing "personal care," performing "incidental health care tasks," and "monitoring to ensure the health and safety of the customer." §686.20. In addition, a state employee must "identify the appropriate level of service provider" "*based on the customer's approval* of the initial Service Plan," §684.20(a) (emphasis added), and must sign each customer's Service Plan. §684.10.

B

Section 6 of the Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor unions and to bargain collectively on the terms and conditions of employment. Ill. Comp. Stat., ch. 5, §315/6(a). This law applies to "[e]mployees of the State and any political subdivision of the State," subject to certain exceptions, and it provides for a union to be

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§686.10(c), but judging the adequacy of these references is the sole prerogative of the customer. See §676.30(b). And while the regulations say that an applicant must have either previous experience or training, see §686.10(f), they also provide that a customer has complete discretion to judge the adequacy of training and prior experience. See §684.20(b) (the customer has complete discretion with respect to hiring and training a personal assistant). See also §686.10(b) (the customer may hire a minor—even under some circumstances, a person as young as 14); §686.10(f) (the customer may hire a personal assistant who was never previously employed so long as the assistant has adequate training); §684.20(b) (criminal record check not required).

recognized if it is "designated by the [Public Labor Relations] Board as the representative of the majority of public employees in an appropriate unit . . . ." §§315/6(a), (c).

The PLRA contains an agency-fee provision, *i.e.*, a provision under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union. See *Workers* v. *Mobil Oil Corp.*, 426 U. S. 407, 409, n. 1 (1976). Labeled a "fair share" provision, this section of the PLRA provides: "When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." §315/6(e). This payment is "deducted by the employer from the earnings of the nonmember employees and paid to the employee organization." *Ibid.*

In the 1980's, the Service Employees International Union (SEIU) petitioned the Illinois Labor Relations Board for permission to represent personal assistants employed by customers in the Rehabilitation Program, but the board rebuffed this effort. *Illinois Dept. of Central Management Servs.*, *supra*, at VIII–30. The board concluded that "it is clear . . . that [Illinois] does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the [PLRA], their 'employer' or, at least, their sole employer." *Ibid.*

In March 2003, however, Illinois' newly elected Governor, Rod Blagojevich, circumvented this decision by issuing Executive Order 2003–08. See App. to Pet.

for Cert. 45a–47a. The order noted the Illinois Labor Relations Board decision but nevertheless called for state recognition of a union as the personal assistants' exclusive representative for the purpose of collective bargaining with the State. This was necessary, Gov. Blagojevich declared, so that the State could "receive feedback from the personal assistants in order to effectively and efficiently deliver home services." *Id*., at 46a. Without such representation, the Governor proclaimed, personal assistants "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." *Ibid.*

Several months later, the Illinois Legislature codified that executive order by amending the PLRA. Pub. Act no. 93–204, §5, 2003 Ill. Laws p. 1930. While acknowledging "the right of the persons receiving services . . . to hire and fire personal assistants or supervise them," the Act declared personal assistants to be "public employees" of the State of Illinois—but "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." Ill. Comp. Stat., ch. 20, §2405/3(f). The statute emphasized that personal assistants are 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." *Ibid.*

Following a vote, SEIU Healthcare Illinois & Indiana (SEIU–HII) was designated as the personal assistants' exclusive representative for purposes of collective bargaining. See App. 23. The union and the State subsequently entered into collective-bargaining agreements that require all personal assistants who are not union members to pay a "fair share" of the

union dues. *Id*., at 24–25. These payments are deducted directly from the personal assistants' Medicaid payments. *Ibid.* The record in this case shows that each year, personal assistants in Illinois pay SEIU–HII more than $3.6 million in fees. *Id.,* at 25.

C

Three of the petitioners in the case now before us Theresa Riffey, Susan Watts, and Stephanie YencerPrice—are personal assistants under the Rehabilitation Program. They all provide in-home services to family members or other individuals suffering from disabilities.[3] Susan Watts, for example, serves as personal assistant for her daughter, who requires constant care due to quadriplegic cerebral palsy and other conditions. See App. 18.

In 2010, these petitioners filed a putative class action on behalf of all Rehabilitation Program personal assistants in the United States District Court for the Northern District of Illinois. See 656 F. 3d 692, 696 (CA7 2011). Their complaint, which named the Governor and the union as defendants, sought an injunction against enforcement of the fair-share provision and a declaration that the Illinois PLRA violates the First Amendment insofar as it requires personal assistants to pay a fee to a union that they do not wish to support. *Ibid.*

The District Court dismissed their claims with prejudice, and the Seventh Circuit affirmed in relevant part, concluding that the case was controlled by this Court's decision in *Abood* v. *Detroit Bd. of Ed.* 431 U. S. 209 (1977). 656 F. 3d, at 698. The Seventh Circuit

[3] The other five petitioners are personal assistants under a similar Illinois program called the "Disabilities Program." See, *infra*, at 39–40, and n. 30.

held that Illinois and the customers who receive in-home care are "joint employers" of the personal assistants, and the court stated that it had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." *Ibid.*

Petitioners sought certiorari. Their petition pointed out that other States were following Illinois' lead by enacting laws or issuing executive orders that deem personal assistants to be state employees for the purpose of unionization and the assessment of fair-share fees. See App. to Pet. for Cert. 22a. Petitioners also noted that Illinois has enacted a law that deems "individual maintenance home health workers"—a category that includes registered nurses, licensed practical nurses, and certain therapists who work in private homes—to be "public employees" for similar purposes. Ill. Pub. Act no. 97–1158, 2012 Ill. Laws p. 7823.

In light of the important First Amendment questions these laws raise, we granted certiorari. 570 U. S. ___ (2013).

II

In upholding the constitutionality of the Illinois law, the Seventh Circuit relied on this Court's decision in *Abood supra*, which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process. *Id*., at 235–236. Two Terms ago, in *Knox* v. *Service Employees*, 567 U. S. ___ (2012), we pointed out that *Abood* is "something of an anomaly." *Id.,* at ___ (slip op., at 11). "'The primary purpose' of permitting unions to collect fees from nonmembers," we noted, "is 'to prevent nonmembers from free-riding on the

union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Id.,* at ___ (slip op., at 10) (quoting *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181 (2007)). But "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 567 U. S., at ___ (slip op., at 10–11).

For this reason, *Abood* stands out, but the State of Illinois now asks us to sanction what amounts to a very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee. Faced with this argument, we begin by examining the path that led to this Court's decision in *Abood*.

A

The starting point was *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), a case in which the First Amendment was barely mentioned. The dispute in *Hanson* resulted from an amendment to the Railway Labor Act (RLA). *Id.*, at 229, 232. As originally enacted in 1926, the Act did not permit a collective-bargaining agreement to require employees to join or make any payments to a union. See *Machinists* v. *Street*, 367 U. S. 740, 750 (1961). At that time and for many years thereafter, there was "a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions." *Ibid*.

Eventually, however, the view of the unions changed. See *id*., at 760–761. The RLA's framework for resolving labor disputes "is more complex than that of any other industry," *id*., at 755, and amendments enacted in 1934 increased the financial burden on

unions by creating the 36-member National Railroad Adjustment Board, one-half of whose members were appointed and paid by the unions. *Id*., at 759–760. In seeking authorization to enter into union-shop agreements, *i.e.*, agreements requiring all employees to join a union and thus pay union dues, see *Oil Workers*, 426 U. S., at 409, n. 1, the unions' principal argument "was based on their role in this regulatory framework." *Street*, 367 U. S., at 761. A union spokesman argued that the financial burdens resulting from the Act's unique and complex scheme justified union-shop provisions in order to provide the unions with needed dues. *Ibid.*

These arguments were successful, and the Act was amended in 1951 to *permit* a railroad and a union to enter into an agreement containing a union-shop provision. This amendment brought the Act into conflict with the laws of States that guaranteed the "right to work" and thereby outlawed the union shop. Nebraska, the setting of *Hanson*, was one such State. 351 U. S., at 228.

In *Hanson*, the Union Pacific Railroad Company and its unionized workers entered into a collective-bargaining agreement that contained a provision requiring employees, "as a condition of their continued employment," to join and remain members of the union. *Id*., at 227. Employees who did not want to join the union brought suit in state court, contending that the union-shop provision violated a provision of the Nebraska Constitution banning adverse employment actions "'because of refusal to join or affiliate with a labor organization.'" *Id*., at 228 (quoting Neb. Const., Art. XV, §13). The employer countered that the RLA trumped the Nebraska provision, but the Nebraska

courts agreed with the employees and struck down the union-shop agreement.

When the case reached this Court, the primary issue was whether the provision of the RLA that authorized union-shop agreements was "germane to the exercise of power under the Commerce Clause." 351 U. S., at 234– 235. In an opinion by Justice Douglas, the Court held that this provision represented a permissible regulation of commerce. The Court reasoned that the challenged provision "'stabilized labor-management relations'" and thus furthered "'industrial peace.'" *Id*., at 233–234.

The employees also raised what amounted to a facial constitutional challenge to the same provision of the RLA. The employees claimed that a "union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id*., at 236. But because the lawsuit had been filed shortly after the collective-bargaining agreement was approved, the record contained no evidence that the union had actually engaged in political or ideological activities.[4]

The *Hanson* Court dismissed the objecting employees' First Amendment argument with a single sentence. The Court wrote: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of

[4] The employees' First Amendment claim necessarily raised the question of governmental action, since the First Amendment does not restrict private conduct, and the *Hanson* Court, in a brief passage, concluded that governmental action was present. This was so, the Court reasoned, because the union-shop provision of the RLA took away a right that employees had previously enjoyed under state law. 351 U. S., at 232–233.

a lawyer who by state law is required to be a member of an integrated bar." *Id*., at 238.

This explanation was remarkable for two reasons. First, the Court had never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion. Indeed, that issue did not reach the Court until five years later, and it produced a plurality opinion and four separate writings. See *Lathrop* v. *Donohue*, 367 U. S. 820 (1961) (plurality opinion).[5]

Second, in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar. See 367 U. S., at 878–880. The analogy drawn in *Hanson*, he wrote, fails. "Once we approve this measure," he warned, "we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose." 367 U. S., at 884. He continued:

> "I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment." *Id*., at 884–885 (footnote omitted).

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[5] A related question arose in *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), which we discuss *infra*, at 37–38.

The First Amendment analysis in *Hanson* was thin, and the Court's resulting First Amendment holding was narrow. As the Court later noted, "all that was held in *Hanson* was that [the RLA] 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 (emphasis added). The Court did not suggest that "industrial peace" could justify a law that "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," or a law that forces a person to "conform to [a union's] ideology." *Hanson, supra,* at 236–237. The RLA did not compel such results, and the record in *Hanson* did not show that this had occurred.

B

Five years later, in *Street*, *supra*, the Court considered another case in which workers objected to a union shop. Employees of the Southern Railway System raised a First Amendment challenge, contending that a substantial part of the money that they were required to pay to the union was used to support political candidates and causes with which they disagreed. A Georgia court enjoined the enforcement of the union-shop provision and entered judgment for the dissenting employees in the amount of the payments that they had been forced to make to the union. The Georgia Supreme Court affirmed. *Id*., at 742–745.

Reviewing the State Supreme Court's decision, this Court recognized that the case presented constitutional questions "of the utmost gravity," *id*., at 749, but the Court found it unnecessary to reach those questions. Instead, the Court construed the RLA "as

not vesting the unions with unlimited power to spend exacted money." *Id*., at 768. Specifically, the Court held, the Act "is to be construed 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 768–769.

Having construed the RLA to contain this restriction, the *Street* Court then went on to discuss the remedies available for employees who objected to the use of union funds for political causes. The Court suggested two: The dissenting employees could be given a refund of the portion of their dues spent by the union for political or ideological purposes, or they could be given a refund of the portion spent on those political purposes that they had advised the union they disapproved.[6] *Id*., at 774–775.

Justice Black, writing in dissent, objected to the Court's suggested remedies, and he accurately predicted that the Court's approach would lead to serious practical problems. *Id*., at 796–797. That approach, he wrote, while "very lucrative to special masters, accountants and lawyers," would do little for "the individual workers whose First Amendment freedoms have been flagrantly violated." *Id.,* at 796. He concluded:

> "Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they

[6] Only four Justices fully agreed with this approach, but a fifth, Justice Douglas, went along due to "the practical problem of mustering five Justices for a judgment in this case." *Id*., at 778–779 (concurring opinion).

> favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group." *Ibid.*

Justice Frankfurter, joined by Justice Harlan, also dissented, arguing that the Court's remedy was conceptually flawed because a union may further the objectives of members by political means. See *id.*, at 813–815. He noted, for example, that reports from the AFL–CIO Executive Council "emphasize that labor's participation in urging legislation and candidacies is a major one." *Id.*, at 813. In light of "the detailed list of national and international problems on which the AFL–CIO speaks," he opined, "it seems rather naive" to believe "that economic and political concerns are separable." *Id.*, at 814.

C

This brings us to *Abood*, which, unlike *Hanson* and *Street*, involved a public-sector collective-bargaining agreement. The Detroit Federation of Teachers served "as the exclusive representative of teachers employed by the Detroit Board of Education." 431 U. S., at 211–212. The collective-bargaining agreement between the union and the board contained an agency-shop clause requiring every teacher to "pay the Union a service charge equal to the regular dues required of Union members." *Id.*, at 212. A putative class of teachers sued to invalidate this clause. Asserting that "they opposed collective bargaining in the public sector," the plaintiffs argued that "'a substantial part'" of their dues would be used to fund union "'activities and programs which are economic, political, professional, scientific and religious in nature of which

Plaintiffs do not approve, and in which they will have no voice.'" *Id*., at 212–213.

This Court treated the First Amendment issue as largely settled by *Hanson* and *Street*. 431 U. S., at 217, 223. The Court acknowledged that *Street* was resolved as a matter of statutory construction without reaching any constitutional issues, 431 U. S., at 220, and the Court recognized that forced membership and forced contributions impinge on free speech and associational rights, *id*., at 223. But the Court dismissed the objecting teachers' constitutional arguments with this observation: "[T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.,* at 222.

The *Abood* Court understood *Hanson* and *Street* to have upheld union-shop agreements in the private sector based on two primary considerations: the desirability of "labor peace" and the problem of "'free riders[hip].'" 431 U. S., at 220–222, 224.

The Court thought that agency-shop provisions promote labor peace because the Court saw a close link between such provisions and the "principle of exclusive union representation." *Id*., at 220. This principle, the Court explained, "prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization." *Id*., at 220–221. In addition, the Court noted, 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." *Id*., at 220. And the Court pointed out that exclusive representation

"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." *Id*., at 221.

Turning to the problem of free ridership, *Abood* noted that a union must "'fairly and equitably . . . represent all employees'" regardless of union membership, and the Court wrote as follows: The "union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation." *Id*., at 221–222.

The plaintiffs in *Abood* argued that *Hanson* and *Street* should not be given much weight because they did not arise in the public sector, and the Court acknowledged that public-sector bargaining is different from private-sector bargaining in some notable respects. 431 U. S., at 227–228. For example, although public and private employers both desire to keep costs down, the Court recognized that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases." *Id*., at 228. The Court also noted that "decisionmaking by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate." *Ibid.* Thus, whether a public employer accedes to a union's demands, the Court wrote, "will depend upon a blend of political ingredients," thereby giving public employees "more influence in the decisionmaking process that is possessed by employees similarly organized in the private sector." *Ibid.* But despite these acknowledged

differences between private- and public-sector bargaining, the Court treated *Hanson* and *Street* as essentially controlling.

Instead of drawing a line between the private and public sectors, the *Abood* Court drew a line between, on the one hand, a union's expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes," 431 U. S., at 232, and, on the other, expenditures for political or ideological purposes. *Id*., at 236.

D

The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.

The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. As we have explained, *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later. Surely a First Amendment issue of this importance deserved better treatment.

The *Abood* Court fundamentally misunderstood the holding in *Hanson*, which was really quite narrow. As the Court made clear in *Street*, "all that was held in *Hanson* was that [the RLA] 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." 367 U. S., at 749 (emphasis added). In *Abood*, on the other hand, the State of Michigan did more than

simply *authorize* the imposition of an agency fee. A state instrumentality, the Detroit Board of Education, actually *imposed* that fee. This presented a very different question.

Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.[7]

Abood failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.

Abood does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector

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[7] Recent experience has borne out this concern. See DiSalvo, The Trouble with Public Sector Unions, National Affairs No. 5, p. 15 (2010) ("In Illinois, for example, public-sector unions have helped create a situation in which the state's pension funds report a liability of more than $100 billion, at least 50% of it unfunded").

union expenditures as either "chargeable" (in *Abood*'s terms, expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes," *id.,* at 232) or nonchargeable (*i.e.*, expenditures for political or ideological purposes, *id*., at 236). In the years since *Abood*, the Court has struggled repeatedly with this issue. See *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984); *Teachers* v. *Hudson*, 475 U. S. 292 (1986); *Lehnert* v. *Ferris Faculty Assn*., 500 U. S. 507 (1991); *Locke* v. *Karass*, 555 U. S. 207 (2009). In *Lehnert*, the Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U. S., at 519. But as noted in JUSTICE SCALIA's dissent in that case, "each one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden)." *Id*., at 551 (opinion concurring in judgment in part and dissenting in part).

Abood likewise did not foresee the practical problems that would face objecting nonmembers. Employees who suspect that a union has improperly put certain expenses in the "germane" category must bear a heavy burden if they wish to challenge the union's actions. "[T]he onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion," *Knox*, 567 U. S., at ___ (slip op., at 19) (citing *Lehnert*, *supra*, at 513), and litigating such cases is expensive. Because of the open-ended nature of the *Lehnert* test, classifying particular categories of expenses may not be straightforward. See *Jibson* v. *Michigan Ed. Assn.*–NEA, 30 F. 3d 723, 730 (CA6 1994)). And although *Hudson* required that a union's

books be audited, auditors do not themselves review the correctness of a union's categorization. See *Knox*, *supra*, at ___ (slip op., at 18–19) (citing *Andrews* v. *Education Assn. of Cheshire*, 829 F. 2d 335, 340 (CA2 1987)). See also *American Federation of Television and Recording Artists, Portland Local*, 327 N. L. R. B. 474, 477 (1999) ("It is settled that determinations concerning whether particular expenditures are chargeable are legal determinations which are outside the expertise of the auditor. Thus, as we have stated, the function of the auditor is to verify that the expenditures that the union claims it made were in fact made for the purposes claimed, not to pass on the correctness of the union's allocation of expenditures to the chargeable and nonchargeable categories"); *California Saw and Knife Works*, 320 N. L. R. B. 224, 241 (1995) ("We first agree [that the company at issue] did not violate its duty of fair representation by failing to use an independent auditor to determine the allocation of chargeable and nonchargeable expenditures"); *Price* v. *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am.*, 927 F. 2d 88, 93–94 (CA2 1991) ("*Hudson* requires only that the usual function of an auditor be performed, *i.e.,* to determine that the expenses claimed were in fact made. That function does not require that the auditor make a legal decision as to the appropriateness of the allocation of expenses to the chargeable and non-chargeable categories").

Finally, a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop. As we will explain, see *infra*, at 31–34, this assumption is unwarranted.

III

A

Despite all this, the State of Illinois now asks us to approve a very substantial expansion of *Abood's* reach. *Abood* involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees. This approach has important practical consequences.

For one thing, the State's authority with respect to these two groups is vastly different. In the case of full-fledged public employees, the State establishes all of the duties imposed on each employee, as well as all of the qualifications needed for each position. The State vets applicants and chooses the employees to be hired. The State provides or arranges for whatever training is needed, and it supervises and evaluates the employees' job performance and imposes corrective measures if appropriate. If a state employee's performance is deficient, the State may discharge the employee in accordance with whatever procedures are required by law.

With respect to the personal assistants involved in this case, the picture is entirely changed. The job duties of personal assistants are specified in their individualized Service Plans, which must be approved by the customer and the customer's physician. 89 Ill. Admin. Code §684.10. Customers have complete discretion to hire any personal assistant who meets the meager basic qualifications that the State prescribes in §686.10. See §676.30(b) (the customer "is responsible for controlling all aspects of the employment

relationship between the customer and the [personal assistant], including, *without limitation*, locating and hiring the [personal assistant]" (emphasis added)); §684.20(b) ("complete discretion in which Personal Assistant [the customer] wishes to hire" subject to baseline eligibility requirements).

Customers supervise their personal assistants on a daily basis, and no provision of the Illinois statute or implementing regulations gives the State the right to enter the home in which the personal assistant is employed for the purpose of checking on the personal assistant's job performance. Cf. §676.20(b) (customer controls "without limitation . . . supervising the work performed by the [personal assistant], imposing . . . disciplinary action against the [personal assistant]"). And while state law mandates an annual review of each personal assistant's work, that evaluation is also controlled by the customer. §§686.10(k), 686.30. A state counselor is assigned to assist the customer in performing the review but has no power to override the customer's evaluation. See *ibid.* Nor do the regulations empower the State to discharge a personal assistant for substandard performance. See n. 1, *supra*. Discharge, like hiring, is entirely in the hands of the customer. See §676.30.

Consistent with this scheme, under which personal assistants are almost entirely answerable to the customers and not to the State, Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees. As we have noted already, state law explicitly excludes personal assistants from statutory retirement and health insurance benefits. Ill. Comp. Stat., ch. 20, §2405/3(f). It also excludes personal assistants from group life

insurance and certain other employee benefits provided under the State Employees Group Insurance Act of 1971. *Ibid*. ("Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971"). And the State "does not provide paid vacation, holiday, or sick leave" to personal assistants. 89 Ill. Admin. Code §686.10(h)(7).

Personal assistants also appear to be ineligible for a host of benefits under a variety of other state laws, including the State Employee Vacation Time Act (see Ill. Stat., ch. 5, §360/1); the State Employee Health Savings Account Law (see Ill. Stat., ch. 5, §377/10–1); the State Employee Job Sharing Act (see Ill. Stat., ch. 5, §380/0.01); the State Employee Indemnification Act (see Ill. Stat., ch. 5, §350/2); and the Sick Leave Bank Act. See Ill. Stat., ch. 5, §400/1. Personal assistants are apparently not entitled to the protection that the Illinois Whistleblower Act provides for full-fledged state employees. See Ill. Stat., ch. 740, §174/1. And it likewise appears that personal assistants are shut out of many other state employee programs and benefits. The Illinois Department of Central Management Services lists many such programs and benefits, including a deferred compensation program, full worker's compensation privileges,[8] behavioral health programs, a program that allows state employees to retain health insurance for a time after leaving state employment, a commuter savings program, dental and vision programs, and a flexible spending program.[9] All of these programs and benefits appear to fall within

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[8] Under §686.10(h)(9), a personal assistant "may apply for Workers' Compensation benefits through [the State] . . . however, . . . the customer, not DHS, is the employer for these purposes."

[9] See www2.illinois.gov/cms/Employees/benefits/StateEmployee/Pages/default.

the provision of the Rehabilitation Program declaring that personal assistants are not state employees for "any purposes" other than collective bargaining. See Ill. Comp. Stat., ch. 20, §2405/3(f).

Just as the State denies personal assistants most of the rights and benefits enjoyed by full-fledged state workers, the State does not assume responsibility for actions taken by personal assistants during the course of their employment. The governing statute explicitly disclaims "vicarious liability in tort." *Ibid*. So if a personal assistant steals from a customer, neglects a customer, or abuses a customer, the State washes its hands.

Illinois deems personal assistants to be state employees for one purpose only, collective bargaining, [10] but the scope of bargaining that may be conducted on their behalf is sharply limited. Under the governing Illinois statute, collective bargaining can occur only for "terms and conditions of employment that are within the State's control." Ill. Comp. Stat., ch. 20, §2405/3(f). That is not very much.

As an illustration, consider the subjects of mandatory bargaining under federal and state labor law that are out of bounds when it comes to personal assistants. Under federal law, mandatory subjects include the days of the week and the hours of the day during which

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[10] What is significant is not the label that the State assigns to the personal assistants but the substance of their relationship to the customers and the State. Our decision rests in no way on state-law labels. Cf. *post*, at 10. Indeed, it is because the First Amendment's meaning does not turn on state-law labels that we refuse to allow the state to make a nonemployee a full-fledged employee "[s]olely for purposes of coverage under the Illinois Public Labor Relations Act," Ill. Comp. Stat., ch. 20, §2405/3(f), through the use of a statutory label.

an employee must work,[11] lunch breaks,[12] holidays,[13] vacations,[14] termination of employment,[15] and changes in job duties.[16] Illinois law similarly makes subject to mandatory collective-bargaining decisions concerning the "hours and terms and conditions of employment." *Belvidere* v. *Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 201, 692 N. E. 2d 295, 301 (1998); see also, *e.g., Aurora Sergeants Assn.*, 24 PERI ¶25 (2008) (holding that days of the week worked by police officers is subject to mandatory collective bargaining). But under the Rehabilitation Program, all these topics are governed by the Service Plan, with respect to which the union has no role. See §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 the PA, and terminating the employment relationship between the customer and the PA"); §684.50 (the Service Plan must specify "the frequency with which the specific tasks are to be provided" and "the number of hours each task is to be provided per month").

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[11] See *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

[12] See *In re National Grinding Wheel Co.*, 75 N. L. R. B. 905 (1948).

[13] See *In re Singer Manufacturing Co.*, 24 N. L. R. B. 444 (1940).

[14]See *Great Southern Trucking Co.* v. *NLRB*, 127 F. 2d 180 (CA4 1942).

[15] See *N. K. Parker Transport, Inc.*, 332 N. L. R. B. 547, 551 (2000).

[16] See *St. John's Hospital*, 281 N. L. R. B. 1163, 1168 (1986).

B

1

The unusual status of personal assistants has important implications for present purposes. *Abood*'s rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law. Under the Illinois scheme now before us, however, the union's powers and duties are sharply circumscribed, and as a result, even the best argument for the "extraordinary power" that *Abood* allows a union to wield, see *Davenport,* 551 U. S., at 184, is a poor fit.

In our post-*Abood* cases involving public-sector agency-fee issues, *Abood* has been a given, and our task has been to attempt to understand its rationale and to apply it in a way that is consistent with that rationale. In that vein, *Abood*'s reasoning has been described as follows. The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert*, 500 U. S., at 556 (opinion of SCALIA, J.). What justifies the agency fee, the argument goes, is the fact that the State compels the union to promote and protect the interests of nonmembers. *Ibid*. Specifically, the union must not discriminate between members and nonmembers in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances." *Ibid.* This means that the union "cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Ibid*. And it has

the duty to provide equal and effective representation for nonmembers in grievance proceedings, see Ill. Comp. Stat. Ann., ch. 5, §§315/6, 315/8, an undertaking that can be very involved. See, *e.g.*, SEIU: Member Resources, available at www.seiu.or/a/members/disputes-and-grievances-rightsprocedures-and-best-practices.php (detailing the steps involved in adjusting grievances).

This argument has little force in the situation now before us. Illinois law specifies that personal assistants "shall be paid at the hourly rate set by law," see 89 Ill. Admin. Code §686.40(a), and therefore the union cannot be in the position of having to sacrifice higher pay for its members in order to protect the nonmembers whom it is obligated to represent. And as for the adjustment of grievances, the union's authority and responsibilities are narrow, as we have seen. The union has no authority with respect to any grievances that a personal assistant may have with a customer, and the customer has virtually complete control over a personal assistant's work.

The union's limited authority in this area has important practical implications. Suppose, for example that a customer fires a personal assistant because the customer wrongly believes that the assistant stole a fork. Or suppose that a personal assistant is discharged because the assistant shows no interest in the customer's favorite daytime soaps. Can the union file a grievance on behalf of the assistant? The answer is no.

It is true that Illinois law requires a collective-bargaining agreement to "contain a grievance resolution procedure which shall apply to all employees in the bargaining unit," Ill. Comp. Stat., ch. 5, §315/8, but in the situation here, this procedure

appears to relate solely to any grievance that a personal assistant may have with the State,[17] not with the customer for whom the personal assistant works.[18]

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[17] Under the current collective-bargaining agreement, a "grievance" is "a dispute regarding the meaning or implementation of a specific provision brought by the Union or a Personal Assistant." App. 51; see also *id.*, at 51–54. "Neither the Union nor the Personal Assistant can grieve the hiring or termination of the Personal Assistant, reduction in the number of hours worked by the Personal Assistant or assigned to the Customer, and/or any action taken by the Customer." *Id.*, at 51. That apparently limits the union's role in grievance adjustments to the State's failure to perform its duties under the collective-bargaining agreement, *e.g.*, if the State were to issue an incorrect paycheck, the union could bring a grievance. See *id.*, at 48

[18] Contrary to the dissent's argument, *post*, at 10–11, the scope of the union's bargaining authority has an important bearing on the question whether *Abood* should be extended to the situation now before us. As we have explained, the best argument that can be mounted in support of *Abood* is based on the fact that a union, in serving as the exclusive representative of all the employees in a bargaining unit, is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so. But where the law withholds from the union the authority to engage in most of those activities, the argument for *Abood* is weakened. Here, the dissent does not claim that the union's approach to negotiations on wages or benefits would be any different if it were not required to negotiate on behalf of the nonmembers as well as members. And there is no dispute that the law does not require the union to undertake the burden of representing personal assistants with respect to their grievances with customers; on the contrary, the law entirely excludes the union from that process. The most that the dissent can identify is the union's obligation to represent nonmembers regarding grievances with the State, but since most aspects of the personal assistants' work is controlled entirely by the customers, this obligation is relatively slight. It bears little resemblance to the obligation imposed on the union in *Abood*.

Because of *Abood*'s questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situation now before us.[19] *Abood* itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems. Consider a continuum, ranging, on the one hand, from full-fledged state employees to, on the other hand, individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group to which they do not belong and pay no dues. A State may not force every person who benefits from this group's efforts to make payments to the group. See *Lehnert*, 500 U. S., at 556 (opinion of SCALIA, J.). But what if regulation of this group is increased? What if the Federal Government or a State begins to provide or increases subsidies in this area? At what point, short of the point at which the individuals in question become full-fledged state employees, should *Abood* apply?

If respondents' and the dissent's views were adopted, a host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach. Medicare-funded home health employees may be one such group. See Brief for Petitioners 51; 42 U. S. C.

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[19] It is therefore unnecessary for us to reach petitioners' argument that *Abood* should be overruled, and the dissent's extended discussion of *stare decisis* is beside the point. Cf. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164–166 (2008) (declining to extend the "implied" right of action under §10(b) of the Securities Exchange Act "beyond its present boundaries").

§1395x(m); 42 CFR §424.22(a). The same goes for adult foster care providers in Oregon (Ore. Rev. Stat. §443.733 (2013)) and Washington (Wash. Rev. Code §41.56.029 (2012)) and certain workers under the federal Child Care and Development Fund programs (45 CFR §98.2).

If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line,[20] and we therefore confine *Abood*'s reach to full-fledged state employees.[21]

IV

A

Because *Abood* is not controlling, we must analyze the constitutionality of the payments compelled by

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[20] The dissent suggests that the concept of joint employment already supplies a clear line of demarcation, see *post*, at 8–9, but absent a clear statutory definition, employer status is generally determined based on a variety of factors that often do not provide a clear answer. See generally 22 Illinois Jurisprudence: Labor and Employment §1:02 (2012); *American Federation of State, County and Municipal Employees, Council 31* v. *State Labor Relations Bd.*, 216 Ill. 2d 567, 578–582, 839 N. E. 2d 479, 486–487 (2005); *Manahan* v. *Daily News-Tribune*, 50 Ill. App. 3d 9, 12–16, 365 N. E. 2d 1045, 1048–1050 (1977). More important, the joint-employer standard was developed for use in other contexts. What matters here is whether the relationship between the State and the personal assistants is sufficient to bring this case within *Abood*'s reach.

[21] The dissent claims that our refusal to extend *Abood* to the Rehabilitation Program personal assistants produces a "perverse result" by penalizing the State for giving customers extensive control over the care they receive. *Post*, at 12. But it is not at all perverse to recognize that a State may exercise more control over its full-fledged employees than it may over those who are not full-fledged state employees or are privately employed.

Illinois law under generally applicable First Amendment standards. As we explained in *Knox,* "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." 567 U. S., at ___ (slip op. at 8–9); see also, *e.g., R.A.V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); *Riley* v. *National Federation of Blind of N.C.,* 487 U. S. 781, 797 (1988) *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943); *Wooley* v. *Maynard*, 430 U. S. 705, 713–715 (1977). And "compelled funding of the speech of other private speakers or groups" presents the same dangers as compelled speech. *Knox*, *supra,* at ___ (slip op. at 9). As a result, we explained in *Knox* that an agency-fee provision imposes "a 'significant impingement on First Amendment rights,'" and this cannot be tolerated unless it passes "exacting First Amendment scrutiny." 567 U. S., at ___ (slip op. at 9–10).

In *Knox*, we considered specific features of an agency-shop agreement—allowing a union to impose upon nonmembers a special assessment or dues increase without providing notice and without obtaining the nonmembers' affirmative agreement—and we held that these features could not even satisfy the standard employed in *United States* v. *United Foods, Inc.*, 533 U. S. 405, 415 (2001), where we struck down a provision that compelled the subsidization of commercial speech. We did not suggest, however, that the compelled speech in *Knox* was like the commercial speech in *United Foods*. On the contrary, we observed that "[t]he subject of the speech at issue [in *United Foods*]—promoting the sale of mushrooms—was not one that is likely to stir the passions of many, but the mundane commercial nature of that speech only highlights the importance of our analysis and our holding." *Knox*, *supra,* at ___ (slip op. at 9).

While the features of the agency-fee provision in *Knox* could not meet even the commercial-speech standard employed in *United Foods*, it is apparent that the speech compelled in this case is not commercial speech. Our precedents define commercial speech as "speech that does no more than propose a commercial transaction," *United Foods*, *supra*, at 409 (citing *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761–762 (1976)), and the union speech in question in this case does much more than that. As a consequence, it is arguable that the *United Foods* standard is too permissive.

B

For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*. Specifically, this provision does not serve a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, *supra,* at ___ (slip op. at 10) (quoting *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984)). Respondents contend that the agency-fee provision in this case furthers several important interests, but none is sufficient.

1

Focusing on the benefits of the union's status as the exclusive bargaining agent for all employees in the unit, respondents argue that the agency-fee provision promotes "labor peace," but their argument largely misses the point. Petitioners do not contend that they have a First Amendment right to form a rival union. Nor do they challenge the authority of the SEIU–HII to serve as the exclusive representative of all the

personal assistants in bargaining with the State. All they seek is the right not to be forced to contribute to the union, with which they broadly disagree.

A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, "[e]ach employee shall have the right to form, join, or assist any labor organization, *or to refrain from any such activity*, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U. S. C. §7102 (emphasis added).[22]

Moreover, even if the agency fee provision at issue here were tied to the union's status as exclusive bargaining agents, features of the Illinois scheme would still undermine the argument that the agency fee plays an important role in maintaining labor peace. For one thing, any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own. Cf. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 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"). Federal labor law reflects the fact that the organization of household workers like the personal assistants does

[22] A similar statute adopts the same rule specifically as to the U. S. Postal Service. See 39 U. S. C. §1209(c).

not further the interest of labor peace. "[A]ny individual employed . . . in the domestic service of any family or person at his home" is excluded from coverage under the National Labor Relations Act. See 29 U. S. C. §152(3).

The union's very restricted role under the Illinois law is also significant. Since the union is largely limited to petitioning the State for greater pay and benefits, the specter of conflicting demands by personal assistants is lessened. And of course, State officials must deal on a daily basis with conflicting pleas for funding in many contexts.

2

Respondents also maintain that the agency-fee provision promotes the welfare of personal assistants and thus contributes to the success of the Rehabilitation Program. As a result of unionization, they claim, the wages and benefits of personal assistants have been substantially improved;[23] orientation and training programs, background checks, and a program to deal with lost and erroneous paychecks have been instituted;[24] and a procedure was established to resolve grievances arising under the collective-bargaining agreement (but apparently not grievances relating to a Service Plan or actions taken by a customer).[25]

The thrust of these arguments is that the union has been an effective advocate for personal assistants in

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[23] Wages rose from $7 per hour in 2003 to $13 per hour in 2014. Brief for Respondent Quinn 7. Current wages, according to respondents, are $11.65 per hour. Brief for Respondent SEIU–HII 6.

[24] See generally Brief for Respondent Quinn 6–8; Brief for Respondent SEIU–HII 6.

[25] See Brief for Respondent Quinn 7.

the State of Illinois, and we will assume that this is correct. But in order to pass exacting scrutiny, more must be shown. The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.

In claiming that the agency fee was needed to bring about the cited improvements, the State is in a curious position. The State is not like the closed-fisted employer that is bent on minimizing employee wages and benefits and that yields only grudgingly under intense union pressure. As Governor Blagojevich put it in the executive order that first created the Illinois program, the State took the initiative because it was eager for "feedback" regarding the needs and views of the personal assistants. See App. to Pet. for Cert. 46. Thereafter, a majority of the personal assistants voted to unionize. When they did so, they must have realized that this would require the payment of union dues, and therefore it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues. Why are these dues insufficient to enable the union to provide "feedback" to a State that is highly receptive to suggestions for increased wages and other improvements? A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions. Respondents' showing falls far short of what the First Amendment demands.

V

Respondents and their supporting *amici* make two additional arguments that must be addressed.

A

First, respondents and the Solicitor General urge us to apply a balancing test derived from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). See Brief for Respondent Quinn 25–26; Brief for SEIU–HII 35–36; Brief for *United States* as *Amicus Curiae* 11. And they claim that under the *Pickering* analysis, the Illinois scheme must be sustained. This argument represents an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case have we seen *Abood* as based on *Pickering* balancing.[26]

In any event, this effort to recast *Abood* falls short. To begin, the *Pickering* test is inapplicable because with respect to the personal assistants, the State is not

[26] The *Abood* majority cited *Pickering* once, in a footnote, for the proposition that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. And it was cited once in Justice Powell's concurrence, for the uncontroversial proposition that "'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Id.,* at 259 (opinion concurring in judgment) (quoting *Pickering*, 391 U. S., at 568). *United States* v. *United Foods, Inc.,* 533 U. S. 405 (2001), cited *Pickering* only once—in dissent. 533 U. S., at 425 (opinion of BREYER, J.). Neither *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), nor *Knox* cited *Pickering* a single time.

acting in a traditional employer role.[27] But even if it were, application of *Pickering* would not sustain the agency-fee provision.

Pickering and later cases in the same line concern the constitutionality of restrictions on speech by public employees. Under those cases, employee speech is unprotected if it is not on a matter of public concern (or is pursuant to an employee's job duties), but speech on matters of public concern may be restricted only if "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern." 391 U. S., at 568. See also *Borough of Duryea* v. *Guarnieri*, 564 U. S. ___ (2011); *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006); *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994) (plurality opinion); *Connick* v. *Myers*, 461 U. S. 138 (1983).

Attempting to fit *Abood* into the *Pickering* framework, the United States contends that union speech that is germane to collective bargaining does not address matters of public concern and, as a result, is not protected. Taking up this argument, the dissent insists that the speech at issue here is not a matter of public concern. According to the dissent, this is "the prosaic stuff of collective bargaining." *Post*, at 9. Does it have any effect on the public? The dissent's answer is: "not terribly much." *Post*, at 20. As the dissent sees it, speech about such funding is not qualitatively different from the complaints of a small-town police chief regarding such matters as the denial of $338 in

[27] Nor is the State acting as a "proprietor in managing its internal operations" with respect to personal assistants. See *NASA* v. *Nelson*, 562 U. S. ___ (2011) (slip op. at 1–2, 14).

overtime pay or directives concerning the use of police vehicles and smoking in the police station. See *post*, at 20; *Borough of Duryea*, *supra,* at ___ (slip op. at 3).[28]

This argument flies in the face of reality. In this case, for example, the category of union speech that is germane to collective bargaining unquestionably includes speech in favor of increased wages and benefits for personal assistants. Increased wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.

In recent years, Medicaid expenditures have represented nearly a quarter of all state expenditures. See National Association of State Budget Officers, Summary: Fall 2013 Fiscal Survey of States (Dec. 10, 2013), online at http://www.nasbo.org. "Medicaid has steadily eaten up a growing share of state budgets."[29] In fiscal year 2014, "[t]hirtyfive states increased spending for Medicaid for a net increase of $6.8

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[28] The dissent misunderstands or mischaracterizes our cases in this line. We have never held that the wages paid to a public-sector bargaining unit are not a matter of public concern. The $338 payment at issue in *Guarnieri* had a negligible impact on public coffers, but payments made to public-sector bargaining units may have massive implications for government spending. See *supra,* at 18, and n. 7. That is why the dissent's "analogy," *post*, at 20–21, is not illustrative at all. We do not doubt that a single public employee's pay is usually not a matter of public concern. But when the issue is pay for an entire collective-bargaining unit involving millions of dollars, that matter affects statewide budgeting decisions.

[29] See Cooper, Bigger Share of State Cash for Medicaid, N. Y. Times, Dec. 14, 2011.

billion." *Ibid*. Accordingly, speech by a powerful union that relates to the subject of Medicaid funding cannot be equated with the sort of speech that our cases have treated as concerning matters of only private concern. See, *e.g.*, *San Diego* v. *Roe*, 543 U. S. 77 (2004) (*per curiam*); *Connick*, *supra*, at 148 (speech that "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause célèbre*" (emphasis added)).

For this reason, if *Pickering* were to be applied, it would be necessary to proceed to the next step of the analysis prescribed in that case, and this would require an assessment of both the degree to which the agency-fee provision promotes the efficiency of the Rehabilitation Program and the degree to which that provision interferes with the First Amendment interests of those personal assistants who do not wish to support the union.

We need not discuss this analysis at length because it is covered by what we have already said. Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees. See *Knox*, 567 U. S., at ___ (slip op. at 19) (citing *Lehnert*, 500 U. S., at 513; *Jibson* v. *Michigan Ed. Assn.*, 30 F. 3d 723, 730 (CA6 1994). And on the other side of the balance, the arguments on which the United States relies—relating to the promotion of labor peace and the problem of free riders—have already been discussed. Thus, even if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld.

B

Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller* v. *State Bar of Cal.* 496 U. S. 1 (1990), and *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000). Respondents are mistaken.

In *Keller*, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, *i.e.*, "an association of attorneys in which membership and dues are required as a condition of practicing law." 496 U. S., at 5. We held that members of this bar could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members. *Id*., at 14.

This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." *Ibid.* States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Contrary to respondents' submission, the same is true with respect to *Southworth*, *supra*. In that case, we upheld the constitutionality of a university-imposed mandatory student activities fee that was used in part to support a wide array of student groups

that engaged in expressive activity. The mandatory fee was challenged by students who objected to some of the expression that the fee was used to subsidize, but we rejected that challenge, and our holding is entirely consistent with our decision in this case.

Public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). This may be done by providing funding for a broad array of student groups. If the groups funded are truly diverse, many students are likely to disagree with things that are said by some groups. And if every student were entitled to a partial exemption from the fee requirement so that no portion of the student's fee went to support a group that the student did not wish to support, the administrative problems would likely be insuperable. Our decision today thus does not undermine *Southworth*.

* * *

For all these reasons, we refuse to extend *Abood* in the manner that Illinois seeks. If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

The judgment of the Court of Appeals is reversed in part and affirmed in part,[30] and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[30] The Court of Appeals held—and we agree—that the First Amendment claims of the petitioners who work, not in the Rehabilitation Program, but in a different but related program, the "Disabilities Program," are not ripe. This latter program is similar in its basic structure to the Rehabilitation Program, see App. to Pet. for Cert. 14a, but the Disabilities Program personal assistants have not yet unionized. The Disabilities Program petitioners claim that under Illinois Executive Order No. 2009–15, they face imminent unionization and, along with it, compulsory dues payments. Executive Order No. 2009– 15, they note, is "almost identical to EO 2003–08, except that it targets providers in the Disabilities Program." Brief for Petitioners 10.

In a 2009 mail-ballot election, the Disabilities Program personal assistants voted down efforts by SEIU Local 73 and American Federation State, County and Municipal Employees Council 31 to become their representatives. See App. 27. The record before us does not suggest that there are any further elections currently scheduled. Nor does the record show that any union is currently trying to obtain certification through a card check program. Under these circumstances, we agree with the holding of the Court of Appeals.

SUPREME COURT OF THE UNITED STATES

No. 11–681

PAMELA HARRIS, *et al.*,

Petitioners

v.

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

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

[June 30, 2014]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Abood v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), answers the question presented in this case. *Abood* held that a government entity may, consistently with the First Amendment, require public employees to pay a fair share of the cost that a union incurs negotiating on their behalf for better terms of employment. That is exactly what Illinois did in entering into collective bargaining agreements with the Service Employees International Union Healthcare (SEIU) which included fair-share provisions. Contrary to the Court's decision, those agreements fall squarely within *Abood*'s holding. Here, Illinois employs, jointly with individuals

suffering from disabilities, the in-home care providers whom the SEIU represents. Illinois establishes, following negotiations with the union, the most important terms of their employment, including wages, benefits, and basic qualifications. And Illinois's interests in imposing fair-share fees apply no less to those caregivers than to other state workers. The petitioners' challenge should therefore fail.

And that result would fully comport with our decisions applying the First Amendment to public employment. *Abood* is not, as the majority at one point describes it, "something of an anomaly," allowing uncommon interference with individuals' expressive activities. *Ante*, at 8. Rather, the lines it draws and the balance it strikes reflect the way courts generally evaluate claims that a condition of public employment violates the First Amendment. Our decisions have long afforded government entities broad latitude to manage their workforces, even when that affects speech they could not regulate in other contexts. *Abood* is of a piece with all those decisions: While protecting an employee's most significant expression, that decision also enables the government to advance its interests in operating effectively—by bargaining, if it so chooses, with a single employee representative and preventing free riding on that union's efforts.

For that reason, one aspect of today's opinion is cause for satisfaction, though hardly applause. As this case came to us, the principal question it presented was whether to overrule *Abood*: The petitioners devoted the lion's share of their briefing and argument to urging us to overturn that nearly 40-year-old precedent (and the respondents and *amici* countered in the same vein). Today's majority cannot resist taking potshots at *Abood*, see *ante*, at 17–20, but it

ignores the petitioners' invitation to depart from principles of *stare decisis*. And the essential work in the majority's opinion comes from its extended (though mistaken) distinction of *Abood*, see *ante*, at 20–28, not from its gratuitous dicta critiquing *Abood*'s foundations. That is to the good—or at least better than it might be. The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation. Our precedent about precedent, fairly understood and applied, makes it impossible for this Court to reverse that decision.

I

I begin where this case should also end—with this Court's decision in *Abood*. There, some public school teachers in Detroit challenged a clause in their collective bargaining agreement compelling non-union members to pay the union a service charge equivalent to regular dues. The Court upheld the requirement so long as the union was using the money for "collective bargaining, contract administration, and grievance adjustment," rather than for political or ideological activities. 431 U. S., at 225–226. In so doing, the Court acknowledged that such a fair-share provision "has an impact upon [public employees'] First Amendment interests"; employees, after all, might object to policies adopted or "activities undertaken by the union in its role as exclusive representative." *Id.*, at 222. Still, the Court thought, the government's own interests "constitutionally justified" the interference. *Ibid.* Detroit had decided, the Court explained, that bargaining with a single employee representative would promote "labor stability" and peaceful labor relations—by ensuring, for example, that different groups of employees did not present "conflicting demands." *Id.*,

at 221, 229. And because such an exclusive bargaining agent has a legal duty to represent all employees, rather than just its own members, a compulsory surcharge fairly distributes "the cost of [bargaining] among those who benefit" and "counteracts the incentive that employees might otherwise have to become 'free riders.'" *Id.*, at 222.

This case thus raises a straightforward question: Does *Abood* apply equally to Illinois's care providers as to Detroit's teachers? No one thinks that the fair-share provisions in the two cases differ in any relevant respect. Nor do the petitioners allege that the SEIU is crossing the line *Abood* drew by using their payments for political or ideological activities. The only point in dispute is whether it matters that the personal assistants here are employees not only of the State but also of the disabled persons for whom they care. Just as the Court of Appeals held, that fact should make no difference to the analysis. See 656 F. 3d 692, 698 (CA7 2011).

To see how easily *Abood* resolves this case, consider how Illinois structured the petitioners' employment, and also why it did so. The petitioners work in Illinois's Medicaid-funded Rehabilitation Program, which provides in-home services to persons with disabilities who otherwise would face institutionalization. Under the program, each disabled person (the State calls them "customers") receives care from a personal assistant; the total workforce exceeds 20,000. The State could have asserted comprehensive control over all the caregivers' activities. But because of the personalized nature of the services provided, Illinois instead chose (as other States have as well) to share authority with the customers themselves. The result is that each caregiver has joint employers—the State

and the customer—with each controlling significant aspects of the assistant's work.[1]

For its part, Illinois sets all the workforce-wide terms of employment. Most notably, the State determines and pays the employees' wages and benefits, including health insurance (while also withholding taxes). See 89 Ill. Admin. Code §§686.10(h)(10), 686.40(a)–(b) (2007); App. 44–46. By regulation, Illinois establishes the job's basic qualifications: for example, the assistant must provide references or recommendations and have adequate experience and training for the services given. See §§686.10(c), (f). So too, the State describes the services any personal assistant may provide, and prescribes the terms of standard employment contracts entered into between personal assistants and customers. See §§686.10(h), 686.20.

Illinois as well structures the individual relationship between the customer and his assistant (in ways the majority barely acknowledges). Along with both the customer and his physician, a state-employed counselor develops a service plan laying out the assistant's specific job responsibilities, hours, and working conditions. See §§684.10, 684.50. That counselor also assists the customer in conducting a state-mandated annual performance review, based on

[1] The majority describes the petitioners as "partial" or "quasi" public employees, a label of its own devising. *Ante*, at 28. But employment law has a real name—joint employees—for workers subject at once to the authority of two or more employers (a not uncommon phenomenon). See, *e.g.*, 29 CFR §791.2 (2013); *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 475 (1964). And the Department of Labor recently explained that in-home care programs, if structured like Illinois's, establish joint employment relationships. See 78 Fed. Reg. 60483–60484 (2013).

state-established criteria, and mediates any resulting disagreements. See §686.30.

Within the structure designed by the State, the customer of course has crucial responsibilities. He exercises day-to-day supervisory control over the personal assistant. See §676.30(b). And he gets both to hire a particular caregiver (from among the pool of applicants Illinois has deemed qualified) and to impose any needed discipline, up to and including discharge. See *ibid.*; §677.40(d). But even as to those matters, the State plays a role. Before a customer may hire an assistant, the counselor must sign off on the employee's ability to follow the customer's directions and communicate with him. See §§686.10(d)–(e) (requiring that the employee demonstrate these capabilities "to the satisfaction of" the counselor). And although only a customer can actually fire an assistant, the State can effectively do so by refusing to pay one who fails to "meet [state] standards." §677.40(d). The majority reads that language narrowly, see *ante*, at 3, n. 1, 22, but the State does not: It has made clear not just in its litigation papers, but also in its collective bargaining agreements and customer guidance that it will withhold payment from an assistant (or altogether disqualify her from the program) based on credible allegations of customer abuse, neglect, or financial exploitation. See App. 55; Brief for Respondent Quinn 3, 50; Ill. Dept. of Human Servs., Customer Guidance for Managing Providers 8, online at http://www.dhs.state.il.us/OneNetLibrary/27897/documents/Brochures/4365.pdf (as visited June 27, 2014, and available in Clerk of Court's case file).[2]

[2] Indeed, pursuant to the grievance procedure in the present collective bargaining agreement, the SEIU obtained an arbitration award reversing the State's decision to disqualify an

Given that set of arrangements, *Abood* should control. Although a customer can manage his own relationship with a caregiver, Illinois has sole authority over every workforce-wide term and condition of the assistants' employment—in other words, the issues most likely to be the subject of collective bargaining. In particular, if an assistant wants an increase in pay, she must ask the State, not the individual customer. So too if she wants better benefits. (Although the majority notes that caregivers do not receive *statutory* retirement and health insurance benefits, see *ante*, at 22, that is irrelevant: Collective bargaining between the State and SEIU has focused on benefits from the beginning, and has produced state-funded health insurance for personal assistants.) And because it is Illinois that would sit down at a bargaining table to address those subjects—the ones that matter most to employees and so most affect workforce stability—the State's stake in a fair-share provision is the same as in *Abood*. Here too, the State has an interest in promoting effective operations by negotiating with an equitably and ade- quately funded exclusive bargaining agent over terms and conditions of employment. That Illinois has delegated to program customers various individualized employment issues makes no difference to those state interests. If anything, as the State has contended, the dispersion of employees across numerous workplaces and the absence of day-to-day state supervision provides an additional reason for Illinois to want to "address concerns common to all personal assistants" by negotiating with a single representative: Only in that way, the State explains,

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assistant from the program for such reasons. See Brief for Respondent SEIU 7 (citing Doc. No. 32–5 in Case No. 10–cv–02477 (ND Ill.)).

can the employees effectively convey their concerns about employment under the Rehabilitation Program. App. to Pet. for Cert. 46a (Exec. Order No. 2003–8).

Indeed, the history of that program forcefully demonstrates Illinois's interest in bargaining with an adequately funded exclusive bargaining agent—that is, the interest *Abood* recognized and protected. Workforce shortages and high turnover have long plagued in-home care programs, principally because of low wages and benefits. That labor instability lessens the quality of care, which in turn, forces disabled persons into institutions and (massively) increases costs to the State. See Brief for Paraprofessional Healthcare Institute as *Amicus Curiae* 16–26; Brief for State of California et al. as *Amici Curiae* 4–5. The individual customers are powerless to address those systemic issues; rather, the State—because of its control over workforce-wide terms of employment—is the single employer that can do so. And here Illinois determined (as have nine other States, see Brief for Respondent SEIU 51, n. 14) that negotiations with an exclusive representative offered the best chance to set the Rehabilitation Program on firmer footing. Because of that bargaining, as the majority acknowledges, home-care assistants have nearly doubled their wages in less than 10 years, obtained state-funded health insurance, and benefited from better training and workplace safety measures. See *ante,* at 32–33; Brief for Respondent Quinn 7; App. 44–48. The State, in return, has obtained guarantees against strikes or other work stoppages, see *id.*, at 55—and most important, believes it has gotten a more stable workforce providing higher quality care, thereby avoiding the costs associated with institutionalization. Illinois's experience thus might serve as a veritable poster child

for *Abood*—not, as the majority would have it, some strange extension of that decision.

It is not altogether easy to understand why the majority thinks what it thinks: Today's opinion takes the tack of throwing everything against the wall in the hope that something might stick. A vain hope, as it turns out. Even once disentangled, the various strands of the majority's reasoning do not distinguish this case from *Abood*.

Parts of the majority's analysis appear to rest on the simple presence of another employer, possessing significant responsibilities, in addition to the State. See *ante,* at 20–22, 24. But this Court's cases provide no warrant for holding that joint public employees are not real ones. To the contrary, the Court has made clear that the government's wide latitude to manage its workforce extends to such employees, even as against their First Amendment claims. The government's prerogative as employer, we recently explained, turns not on the "formal status" of an employee, but on the nature of the public "interests at stake"; we therefore rejected the view that "the Government's broad authority in managing its affairs should apply with diminished force" to contract employees whose "direct employment relationship" is with another party. *NASA* v. *Nelson*, 562 U. S. ___, ___ (2011) (slip op., at 14– 15). And indeed, we reached the same result (in language that might have been written for this case) when such employees "d[id] not work at the government's workplace[,] d[id] not interact daily with government officers and employees," and were not subject to the government's "day-to-day control" over "the details of how work is done." *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 676–677

(1996).[3] Here, as I have explained, Illinois's interests as an employer and program administrator are substantial, see *supra*, at 4–6; and accordingly, the State's sharing of employment responsibilities with another party should not matter.[4]

Next, the majority emphasizes that the Illinois Legislature deemed personal assistants "public employees" solely "for the purposes of coverage under the Illinois Public Labor Relations Act" and not for other purposes, like granting statutory benefits and incurring vicarious liability in tort. Ill. Comp. Stat., ch. 20, §2405/3(f) (West 2012); see *ante*, at 6, 22–23; but cf. *Martin* v. *Illinois*, 2005 WL 2267733, *5–*8 (Ill.

[3] The majority claims that the Court developed this law "for use in other contexts," *ante*, at 28–29, n. 20, but that is true only in the narrowest sense. The decisions I cite dealt with First Amendment claims that joint or contract employees made against the government. The only difference is that those suits challenged different restrictions on the employees' expressive activities.

[4] In a related argument, the majority frets that if *Abood* extends to the joint employees here, a "host of workers who receive payments from a governmental entity for some sort of service would be candidates for inclusion within *Abood*'s reach." *Ante*, at 28. But as I have just shown, this Court has not allowed such worries about line-drawing to limit the government's authority over joint and contract employees in the past. And rightly so, because whatever close cases may arise at the margin (there always are some), the essential distinction between such employees and mere recipients of government funding is not hard to maintain. Consider again the combination of things Illinois does here: set wages, provide benefits, administer payroll, withhold taxes, set minimum qualifications, specify terms of standard contracts, develop individualized service plans, fund orientation and training, facilitate annual reviews, and resolve certain grievances. That combination of functions places the petitioners so securely on one side of the boundary between public employees and mere recipients of public funding as to justify deferral of line-drawing angst to another case.

Workers' Compensation Comm'n, July 26, 2005) (treating caregivers as public employees for purposes of workers' compensation).[5] But once again, it is hard to see why that fact is relevant. The majority must agree (this Court has made the point often enough) that "state law labels," adopted for a whole host of reasons, do not determine whether the State is acting as an employer for purposes of the First Amendment. *E.g.*, *Umbehr*, 518 U. S., at 679. The true issue is whether Illinois has a sufficient stake in, and control over, the petitioners' terms and conditions of employment to implicate *Abood*'s rationales and trigger its application. And once more, that question has a clear answer: As I have shown, Illinois negotiates all workforce-wide terms of the caregivers' employment as part of its effort to promote labor stability and effectively administer its Rehabilitation Program. See *supra*, at 6–8. As contrasted to that all-important fact, whether Illinois incurs vicarious liability for caregivers' torts, see *ante*, at 23, or grants them certain statutory benefits like health insurance, see *ante*, at 22, is beside the point. And still more so because the State and SEIU can *bargain* over most such matters; for example, as I have noted, the two have reached agreement on providing state-funded health coverage, see *supra*, at 7.

Further, the majority claims, "the scope of bargaining" that the SEIU may conduct for caregivers is "circumscribed" because the customer has authority over individualized employment matters like hiring and firing. *Ante*, at 23–25. But (at the risk of sounding

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[5] As the opinion's quadruple repetition of the words "appear" and "apparently" suggests, *ante*, at 22–23, the majority is mostly guessing as to in-home caregivers' eligibility for various state programs.

like a broken record) so what? Most States limit the scope of permissible bargaining in the public sector—often ruling out of bounds similar, individualized decisions. See R. Kearney & P. Mareschal, Labor Relations in the Public Sector 75–77 (5th ed. 2014) ("The great majority of state statutes" exclude "certain matters from the scope of negotiations," including, for example, personnel decisions respecting "hiring, promotion, and dismissal"); Note, Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1684 (1984) (Many state statutes "explicitly limit[ ] the scope of bargaining, typically by excluding decisions on personnel management"). Here, the scope of collective bargaining—over wages and benefits, as well as basic duties and qualifications—more than suffices to implicate the state interests justifying *Abood*. Those are the matters, after all, most likely to concern employees generally and thus most likely to affect the nature and quality of the State's workforce. The idea that *Abood* applies only if a union can bargain with the State over every issue comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.

Finally, the majority places weight on an idiosyncrasy of Illinois law: that a regulation requires uniform wages for all personal assistants. See *ante*, at 25. According to the majority, that means *Abood*'s free-rider rationale "has little force in the situation now before us": Even absent the duty of fair representation (requiring the union to work on behalf of all employees, members and non-members alike, see *infra*, at 22–23), the union could not bargain one employee's wages against another's. *Ante*, at 26.[6] But that idea is doubly

[6] The majority also suggests in this part of its opinion that even if the union had latitude to demand higher wages only for its own

wrong. First, the Illinois regulation applies only to wages. It does not cover, for example, the significant health benefits that the SEIU has obtained for in-home caregivers, or any other benefits for which it may bargain in the future. Nor does the regulation prevent preferential participation in the grievance process, which governs all disputes between Illinois and caregivers arising from the terms of their agreement. See n. 2, *supra*. And second, even if the regulation covered everything subject to collective bargaining, the majority's reasoning is a non-sequitur. All the regulation would do then is serve as suspenders to the duty of fair representation's belt: That Illinois has *two* ways to ensure that the results of collective bargaining redound to the benefit of all employees serves to compound, rather than mitigate, the union's free-rider problem.

As far as I can tell, that covers the majority's reasons for distinguishing this case from *Abood*. And even when considered in combination, as the majority does, they do not succeed. What makes matters still worse is the perverse result of the majority's decision: It penalizes the State for giving disabled persons some control over their own care. If Illinois had structured the program, as it could have, to centralize every aspect of the employment relationship, no question could possibly have arisen about *Abood*'s application. Nothing should change because the State chose to respect the dignity and independence of program beneficiaries by allowing them to select and discharge, as well as supervise day-to-day, their own caregivers. A joint employer remains an employer, and here, as I

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supporters, it would not do so. See *ante*, at 27, n. 18. But why not? A rational union, in the absence of any legal obligation to the contrary, would almost surely take that approach to bargaining.

have noted, Illinois kept authority over all workforce-wide terms of employment—the very issues most likely to be the subject of collective bargaining. The State thus should also retain the prerogative—as part of its effort to "ensure efficient and effective delivery of personal care services"—to require all employees to contribute fairly to their bargaining agent. App. to Pet. for Cert. 45a (Exec. Order No. 2003–8).

II

Perhaps recognizing the difficulty of plausibly distinguishing this case from *Abood*, the petitioners raised a more fundamental question: the continued viability of *Abood* as to *all* public employees, even what the majority calls "full-fledged" ones. *Ante,* at 9. That issue occupied the brunt of the briefing and argument in this Court. See, *e.g.*, Brief for Petitioners 16–24; Brief for Respondent SEIU 15–44; Brief for Respondent Quinn 15–29; Brief for United States as *Amicus Curiae* 14–28; Tr. of Oral Arg. 5–21, 32–39, 42–47, 50–60. The majority declines the petitioners' request to overturn precedent—and rightly so: This Court does not have anything close to the special justification necessary to overturn *Abood*. Still, the majority cannot restrain itself from providing a critique of that decision, suggesting that it might have resolved the case differently in the first instance. That dicta is off-base: *Abood* corresponds precisely to this Court's overall framework for assessing public employees' First Amendment claims. To accept that framework, while holding *Abood* at arms-length, is to wish for a *sui generis* rule, lacking in justification, applying exclusively to union fees.

A

This Court's view of *stare decisis* makes plain why the majority cannot—and did not—overturn *Abood*. That doctrine, we have stated, is a "foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15). It "promotes the evenhanded, predictable, and consistent development of legal principles [and] fosters reliance on judicial decisions." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). As important, it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). For all those reasons, this Court has always held that "any departure" from precedent "demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

And *Abood* is not just any precedent: It is entrenched in a way not many decisions are. Over nearly four decades, we have cited *Abood* favorably numerous times, and we have repeatedly affirmed and applied its core distinction between the costs of collective bargaining (which the government can demand its employees share) and those of political activities (which it cannot). See, *e.g.*, *Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519 (1991); *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions, this Court recently—and unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U. S., 213–215. And indeed, the Court has relied on that rule in deciding cases involving compulsory fees outside the labor context—which today's majority reaffirms as good law, see *ante*, at 37–39. See,

e.g., *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *South-worth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments). Not until two years ago, in *Knox* v. *Service Employees*, 567 U. S. ___ (2012), did the Court so much as whisper (there without the benefit of briefing or argument, see *id.*, at ___ (SOTOMAYOR, J., concurring in judgment) (slip op., at 1–6)) that it had any misgivings about *Abood*.

Perhaps still more important, *Abood* has created enormous reliance interests. More than 20 States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multiyear contracts with unions containing such clauses. "*Stare decisis* has added force," we have held, when overturning a precedent would require "States to reexamine [and amend] their statutes." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991). And on top of that, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Here, governments and unions across the country have entered into thousands of contracts involving millions of employees in reliance on *Abood*. Reliance interests do not come any stronger.

The majority's criticisms of *Abood* do not remotely defeat those powerful reasons for adhering to the decision. The special justifications needed to reverse an opinion must go beyond demonstrations (much less assertions) that it was wrong; that is the very point of *stare decisis*. And the majority's critique extends no further. It is mostly just a catalog of errors *Abood* supposedly committed reproaches that could have

been leveled as easily 40 years ago as today. Only the idea that *Abood* did not "anticipate" or "foresee" the difficulties of distinguishing between collective bargaining and political activities, see *ante*, at 18–19, might be thought different. But in fact, *Abood* predicted precisely those issues. See 431 U. S., at 236 ("There will, of course, be difficult problems in drawing lines between collective-bargaining . . . and ideological activities"). It simply disagreed with today's majority about whether in this context, as in many others, lines that are less than pristine are still worth using. And in any event, the majority much overstates the difficulties of classifying union expenditures. The Court's most recent decision on the subject unanimously resolved the single issue that had divided lower courts. See *Locke*, 555 U. S., at 217–221. So it is not surprising that the majority fails to offer any concrete examples of thorny classification problems. If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports.

And the majority says nothing to the contrary: It does not pretend to have the requisite justifications to overrule *Abood*. Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so. Yet they will also know that the majority could not, even after receiving full-dress briefing and argument, come up with reasons anywhere near sufficient to reverse the decision. Much has gone wrong in today's ruling, but this has not: Save for an unfortunate hiving off of ostensibly "partial-public" employees, *ante*, at 28, *Abood* remains the law.

B

And even apart from *stare decisis*, that result is as it should be; indeed, it is the only outcome that makes sense in the context of our caselaw. In numerous cases decided over many decades, this Court has addressed the government's authority to adopt measures limiting expression in the capacity not of sovereign but of employer. *Abood* fits—fits hand-in-glove—with all those cases, in both reasoning and result. Were that rule not in place, our law respecting public employees' speech rights would contain a serious anomaly—a different legal standard (and not a good one) applying exclusively to union fees.

This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign. See *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate . . . and the government acting . . . to manage [its] internal operation" (internal quotation marks omitted)). "Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with other citizens. *NASA*, 562 U. S., at ___ (slip op., at 12). We have explained that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated" in the public workplace—that the government must have the ability to decide how to manage its employees in order to best provide services to the public. *Engquist*, 553 U. S., at 598. In effect, we have tried to place the government-qua-employer in a similar (though not identical) position to the private employer, recognizing that both face comparable challenges in maintaining a productive workforce. The

result is that a public employee "must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). "[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 553 U. S., at 600.

Further, this Court has developed and applied those principles in numerous cases involving First Amendment claims. "Government employers, like private employers," we have explained, "need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Accordingly, we have devised methods for distinguishing between speech restrictions reflecting the kind of concerns private employers often hold (which are constitutional) and those exploiting the employment relationship to restrict employees' speech as private citizens (which are not). Most notably, the Court uses a two-step test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). First, if the expression at issue does not relate to "a matter of public concern," the employee "has no First Amendment cause of action." *Garcetti*, 547 U. S., at 418. Second, even if the speech addresses a matter of public concern, a court is to determine whether the government "had an adequate justification" for its action, *ibid.*, by balancing "the interests of the [employee] as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U. S., at 568.

Abood is of a piece with all those decisions; and indeed, its core analysis mirrors *Pickering*'s. The

Abood Court recognized that fair-share provisions function as prerequisites to employment, assessed to cover the costs of representing employees in collective bargaining. Private employers, *Abood* noted, often established such employment conditions, to ensure adequate funding of an exclusive bargaining agent, and thus to promote labor stability. *Abood* acknowledged (contrary to the majority's statement, see *ante*, at 17) certain "differences in the nature of collective bargaining in the public and private sectors." 431 U. S., at 227; see *id.*, at 227–229. But the Court concluded that the government, acting as employer, should have the same prerogative as a private business in deciding how best to negotiate with its employees over such matters as wages and benefits. See *id.*, at 229 ("[T]here can be no principled basis for" distinguishing between a public and private employer's view that a fair-share clause will promote "labor stability"). At the same time, the Court recognized the need for some mechanism to ensure that the government could not leverage its power as employer to impinge on speech its employees undertook as citizens on matters of public import. See *id.,* at 234–236.

The Court struck the appropriate balance by drawing a line, corresponding to *Pickering*'s, between fees for collective bargaining and those for political activities. On the one side, *Abood* decided, speech within the employment relationship about pay and working conditions pertains mostly to private concerns and implicates the government's interests as employer; thus, the government could compel fair-share fees for collective bargaining. On the other side, speech in political campaigns relates to matters of public concern and has no bearing on the government's interest in structuring its workforce; thus, compelled

fees for those activities are forbidden. In that way, the law surrounding fair-share provisions coheres with the law relating to public employees' speech generally. Or, said otherwise, an anomaly in the government's regulation of its workforce would arise in *Abood*'s absence: Public employers could then pursue all policies, except this single one, reasonably designed to manage personnel and enhance the effectiveness of their programs.

The majority's critique of *Abood* principally goes astray by deeming all this irrelevant. This Court, the majority insists, has never "seen *Abood* as based on *Pickering* balancing." *Ante*, at 34. But to rely on *Abood*'s failure to cite *Pickering* more often, as the majority does, see *ante*, at 34, n. 26, is to miss the essential point. Although stemming from different historic antecedents, the two decisions addressed variants of the same issue: the extent of the government's power to adopt employment conditions affecting expression. And as just discussed, the two gave strikingly parallel answers, providing a coherent framework to adjudicate the constitutionality of those regulations.

To the extent the majority engages with that framework, its analysis founders at the first step, in assessing the First Amendment value of the speech at issue here. A running motif of the majority opinion is that collective bargaining in the public sector raises significant questions about the level of government spending. *Ante*, at 17–18 and n. 7, 36 and nn. 28–29. By financing the SEIU's collective bargaining over wages and benefits, the majority suggests, in-home caregivers—whether they wish to or not—take one side in a debate about those issues.

But that view of the First Amendment interests at stake blinks decades' worth of this Court's precedent. Our decisions (tracing from *Pickering* as well as *Abood*) teach that internal workplace speech about public employees' wages, benefits, and such—that is, the prosaic stuff of collective bargaining—does not become speech of "public concern" just because those employment terms may have broader consequence. To the contrary, we have made clear that except in narrow circumstances we will not allow an employee to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Borough of Durye*a v. *Guarnieri*, 564 U. S. ___, ___ (2011) (slip op., at 10); see *Umbehr*, 518 U. S., at 675 (public employees' "speech on merely private employment matters is unprotected"). Indeed, even *Abood*'s original detractors conceded that an employee's interest in expressing views, within the workplace context, about "narrowly defined economic issues [like] salaries and pension benefits" is "relatively insignificant" and "weak." 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). (Those Justices saved their fire for teachers' speech relating to education policy. See *ibid.*) And nowhere has the Court ever suggested, as the majority does today, see *ante*, at 35–36 and n. 28, that if a certain dollar amount is at stake (but how much, exactly?), the constitutional treatment of an employee's expression becomes any different.

Consider an analogy, not involving union fees: Suppose an employee violates a government employer's work rules by demanding, at various inopportune times and places, higher wages for both himself and his co-workers (which, of course, will drive up public spending). The government employer disciplines the

employee, and he brings a First Amendment claim. Would the Court consider his speech a matter of public concern under *Pickering*? I cannot believe it would, and indeed the petitioners' own counsel joins me in that view. He maintained at oral argument that such speech would concern merely an "internal proprietary matter," thus allowing the employer to take disciplinary action. Tr. of Oral Arg. 6, 10. If the majority thinks otherwise, government entities across the country should prepare themselves for unprecedented limitations on their ability to regulate their workforces. But again, I doubt they need to worry, because this Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern. (And on the off-chance that both the petitioners and I are wrong on that score, I am doubly confident that the government would prevail under *Pickering*'s balancing test.)

I can see no reason to treat the expressive interests of workers objecting to payment of union fees, like the petitioners here, as worthy of greater consideration. The subject matter of the speech is the same: wages and benefits for public employees. Or to put the point more fully: In both cases (mine and the real one), the employer is sanctioning employees for choosing either to say or not to say something respecting their terms and conditions of employment. Of course, in my hypothetical, the employer is stopping the employee from speaking, whereas in this or any other case involving union fees, the employer is forcing the employee to support such expression. But I am sure the majority would agree that that difference does not make a difference—in other words, that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v.

National Federation of Blind of N. C., Inc., 487 U. S. 781, 796 (1988). Hence, in analyzing the kind of expression involved in this case, *Abood* corresponds to *Pickering* (and vice versa) with each permitting a government to regulate such activity in aid of managing its workforce to provide public services.

Perhaps, though, the majority's skepticism about *Abood* comes from a different source: its failure to fully grasp the government's interest in bargaining with an adequately funded exclusive bargaining representative. One of the majority's criticisms of *Abood*, stated still more prominently in *Knox*, 567 U. S., at ___ (slip op., at 10–11), goes something as follows. *Abood* (so the majority says) wrongly saw a government's interest in bargaining with an exclusive representative as "inextricably linked" with a fair-share agreement. *Ante*, at 31; see *ante*, at 20. A State, the majority (a bit grudgingly) acknowledges, may well have reasons to bargain with a single agent for all employees; and without a fair-share agreement, that union's activities will benefit employees who do not pay dues. Yet "[s]uch free-rider arguments," the majority avers, "are generally insufficient to overcome First Amendment objections." *Ante*, at 8–9 (quoting *Knox*, 567 U. S., at ___ (slip op., at 10–11)). In the majority's words: "A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions." *Ante*, at 33–34.

But *Abood* and a host of our other opinions have explained and relied on an essential distinction between unions and special-interest organizations generally. See, *e.g.*, *Abood*, 431 U. S., at 221–222 and n. 15; *Communications Workers* v. *Beck*, 487 U. S. 735, 750

(1988); *Machinists* v. *Street*, 367 U. S. 740, 762 (1961). The law compels unions to represent—and represent fairly—every worker in a bargaining unit, regardless whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers. In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain their support. Hence arises the legal rule countenancing fair-share agreements: It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability—and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.

As is often the case, JUSTICE SCALIA put the point best:

> "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The 'compelling state interest' that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of 'free-riding' nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the 'free riders' [in unions] . . . is

> that . . . the law *requires* the union to carry [them]—indeed, requires the union to go *out of its way* to benefit [them], even at the expense of its other interests. . . . [T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree." *Lehnert*, 500 U. S., at 556 (opinion concurring in judgment in part and dissenting in part).

And in other parts of its opinion, the majority itself mimics the point, thus recognizing the core rationale of *Abood*: What justifies the agency fee, the majority notes, is "the fact that the State compels the union to promote and protect the interests of nonmembers." *Ante*, at 25; see *ante*, at 27, n. 18. Exactly right; indeed, that is as clear a one-sentence account of *Abood*'s free-rider rationale as appears in this Court's decisions.

Still, the majority too quickly says, it has no worries in this case: Given that Illinois's caregivers voted to unionize, "it may be presumed that a high percentage of [them] became union members and are willingly paying union dues." *Ante*, at 33. But in fact nothing of the sort may be so presumed, given that union supporters (no less than union detractors) have an economic incentive to free ride. See *supra*, at 22–23. The federal workforce, on which the majority relies, see *ante*, at 31, provides a case in point. There many fewer employees pay dues than have voted for a union to represent them.[7] And why, after all, should that

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[7] See, *e.g.*, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014) ("[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members. All

endemic free-riding be surprising? Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.

This case in fact offers a prime illustration of how a fair-share agreement may serve important government interests. Recall that Illinois decided that collective bargaining with an exclusive representative of in-home caregivers would enable it to provide improved services through its Rehabilitation Program. See *supra*, at 7–8. The State thought such bargaining would enable it to attract a better and more stable workforce to serve disabled patients, preventing their institutionalization and thereby decreasing total state expenditures. The majority does not deny the State's legitimate interest in choosing to negotiate with an exclusive bargaining agent, in service of administering an effective program. See *ante*, at 32–33. But the majority does deny Illinois the means it reasonably deemed appropriate to effectuate that policy—a fair-share provision ensuring that the union has the funds necessary to carry out its responsibilities on behalf of in-home caregivers. The majority does so against the weight of all precedent, and based on "empirical assumption[s]," *ante*, at 20, lacking any foundation. *Abood* got this matter right; the majority gets it wrong: Illinois has a more than sufficient interest, in managing its workforce and administering the

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told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues").

Rehabilitation Program, to require employees to pay a fair share of a union's costs of collective bargaining.

III

For many decades, Americans have debated the pros and cons of right-to-work laws and fair-share requirements. All across the country and continuing to the present day, citizens have engaged in passionate argument about the issue and have made disparate policy choices. The petitioners in this case asked this Court to end that discussion for the entire public sector, by overruling *Abood* and thus imposing a right-to-work regime for all government employees. The good news out of this case is clear: The majority declined that radical request. The Court did not, as the petitioners wanted, deprive every state and local government, in the management of their employees and programs, of the tool that many have thought necessary and appropriate to make collective bargaining work.

The bad news is just as simple: The majority robbed Illinois of that choice in administering its in-home care program. For some 40 years, *Abood* has struck a stable balance—consistent with this Court's general framework for assessing public employees' First Amendment claims between those employees' rights and government entities' interests in managing their workforces. The majority today misapplies *Abood*, which properly should control this case. Nothing separates, for purposes of that decision, Illinois's personal assistants from any other public employees. The balance *Abood* struck thus should have defeated the petitioners' demand to invalidate Illinois's fair-share agreement. I respectfully dissent.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed 09/01/2011]

No. 10-3835

PAMELA J. HARRIS, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10 CV 02477—Sharon Johnson-Coleman, *Judge.*

ARGUED JUNE 9, 2011—
DECIDED SEPTEMBER 1, 2011

Before MANION, WOOD, and HAMILTON, *Circuit Judges.*

MANION, *Circuit Judge.* The plaintiffs in this appeal provide in-home care for people with varying levels of disabilities and other health needs. They present a narrow question: Does a collective bargaining agreement that requires Medicaid home-care personal assistants to pay a fee to a union representative violate the First Amendment, regardless of the amount of those fees or how the union uses them? We

hold that it does not. Because the personal assistants are employees of the State of Illinois, at least in those respects relevant to collective bargaining, the union's collection and use of fair share fees is permitted by the Supreme Court's mandatory union fee jurisprudence in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1961), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). However, we lack jurisdiction to consider the claims of plaintiffs who have opted not to be in the union. Because they are not presently subject to mandatory fair share fees, their claims are not ripe.

I.

The plaintiffs in this case all provide in-home care to disabled individuals through Medicaid-waiver programs run by the Illinois Department of Human Services. Some are part of the Home Services Program administered by the Division of Rehabilitation Services. The others are part of the Home Based Support Services Program administered by the Division of Developmental Disabilities. We will call these groups the Rehabilitation Program plaintiffs and Disabilities Program plaintiffs respectively.

A. *Home-Based Medicaid Waiver Program Features*

These programs subsidize the costs of home-based services for disabled patients who might otherwise face institutionalization. The programs offer flexibility and self-direction for services that are tailored to patients' individual needs. In the Rehabilitation Program, each patient works with a counselor to develop an individual service plan, which specifies "the type of service(s) to be provided to the patient, 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 service(s)." 89 Ill. Admin. Code 684.50. The service plan must be certified by the patient's physician and approved by the State. *Id.* § 684.10.

Once a counselor identifies the type of personal assistant the patient needs for the service plan, the patient is free to select almost any personal assistant who meets the qualifications set by the State. *Id.* §§ 684.20, 684.30 The State, in turn, requires personal assistants to comply with age and work-hour limitations, provide written or oral recommendations from past employers, have related work experience or training, and satisfy the patient and counselor that they can communicate and follow directions. *Id.* § 686.10. Personal assistants sign employment agreements directly with patients, although the terms of the agreement are set by the State. *Id.* The State sets wages and pays personal assistants directly, withholding Social Security as well as federal and state taxes. *Id.* §§ 686.10, 686.40.

The Disabilities Program functions similarly. Each patient works with a State "service facilitator" to develop a "service/treatment plan." 59 Ill. Admin. Code 117.120, 117.225(a). The State then pays for services provided under the plan, including personal care services. *Id.* at 117.215. The record is much less developed on the exact relationship between the State and the Disabilities Program personal assistants. And for good reason: the district court dismissed the claims on jurisdictional grounds, so no court has yet considered the merits of those claims.[1]

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[1] The details of the relationship between the State and the Disabilities Program personal assistants are unimportant for this appeal. As elaborated *infra*, we agree with the district court that

B. *Rehabilitation Program Unionization*

In the mid-1980s, personal assistants in the Rehabilitation Program sought to unionize and, under the Illinois Public Labor Relations Act, collectively bargain with the State. The State Labor Relations Board, however, found that the personal assistants were in a unique employment relationship and that it lacked jurisdiction over that relationship because the State was not their sole employer. The personal assistants thus could not unionize until 2003, when the Illinois Public Labor Relations Act was amended to designate "personal care attendants and personal assistants working under the Home Services Program" as State employees for purposes of collective bargaining. 20 Ill. Comp. Stat. 2405/3. Then-Governor Blagojevich issued an executive order directing the State to recognize an exclusive representative for Rehabilitation Program personal assistants if they designated one by majority vote and to engage in collective bargaining concerning all employment terms within the State's control. According to the Governor, this was important because each patient employed only one or two personal assistants. Thus, only the State could control the economic terms of employment and the widely dispersed personal assistants could not "effectively voice their concerns" about the program or their employment terms without representation.

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the Disabilities Program claims are not yet ripe. But even if the claims were ripe, we would not consider the merits at this stage because the defendants have not cross-appealed seeking an expanded judgment on the merits. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008) ("Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. . . . [without] a cross-appeal.").

Later that year, a majority of the approximately 20,000 Rehabilitation Program personal assistants voted to designate SEIU Healthcare Illinois & Indiana as their collective bargaining representative with the State. The Union and the State negotiated a collective bargaining agreement which sets the pay rates, creates a health benefits fund for personal assistants, and establishes a joint Union-State committee to develop training programs. The agreement also contains other typical collective bargaining agreement provisions, including the union security clause that has given rise to this lawsuit and appeal. This "fair share" provision requires "all Personal Assistants who are not members of the Union . . . 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."

C. *Disabilities Program Attempted Unionization*

In 2009, Governor Pat Quinn issued an executive order directing the State to recognize an exclusive representative for the Disabilities Program personal assistants, if a majority so chose. *See* Ill. Exec. Order 2009-15. SEIU Local 713 petitioned for an election to become that representative, and AFSCME Council 31 intervened in the election as a rival candidate. In a mail ballot election, however, a majority of the approximately 4,500 Disabilities Program personal assistants rejected representation by either union. But that victory is not permanent: the unions can request new elections in the future, and, under Illinois labor law, may bypass an election altogether if they collect a

sufficient number of union cards from the personal assistants. *See id.*; 80 Ill. Admin. Code 1210.100(b).[2]

D. *Current Litigation*

The following year, the personal assistants from both groups filed a two-count complaint against the Governor and the three unions involved. The Rehabilitation Program plaintiffs claimed that the fair share fees they were required to pay violated the First Amendment by compelling their association with, and speech through, the Union. The Disabilities Program plaintiffs argued that although they did not yet pay fees, they are harmed by the mere threat of an agreement requiring fair share fees. The district court dismissed the Rehabilitation Program plaintiffs' claims for failure to state a claim upon which relief could be granted. It dismissed the Disabilities Program plaintiffs' claims for lack of subject matter jurisdiction because they lacked standing and their claims were not ripe. The plaintiffs appeal both dismissals.

II.

The two sets of plaintiffs in this case stand in very different positions. The Rehabilitation Program plaintiffs are currently subject to a collective bargaining agreement that requires them to pay fair share fees to their union representative. The Disabilities Program plaintiffs have successfully rejected unionization and are not subject to fair share fees, but fear that may change at any time. This difference has important consequences: we have jurisdiction to consider the Rehabilitation Program plaintiffs' claims, which we

[2] While the plaintiffs allege that the unions have used coercive tactics to get them and others to join, and to lobby state officials, the constitutional claim in this appeal is confined to the payment or potential payment of the fair share requirement.

discuss in the first part of the analysis. But we must dismiss the Disabilities Program plaintiffs' claims for lack of jurisdiction because they are not ripe for adjudication. We explain these holdings in order.

A. *Rehabilitation Program Claims*

The Rehabilitation Program plaintiffs mount a facial challenge to the fair share fees. That is, they do not allege that the actual fees collected are too high or that the fees are being used for purposes other than collective bargaining.[3] Their only argument is that they may not be forced to financially support collective bargaining with the State under any circumstances. They present a two-step argument. First, they argue that this case does not fall under the line of Supreme Court cases permitting mandatory fees to support collective bargaining representation because personal assistants are employed by individual Medicaid patients, not the State. Second, they argue that no compelling state interests justify extending these collective bargaining cases to reach personal assistants.

We first set out the controlling precedent. The Supreme Court has long approved collective bargaining agreements that compel even dissenting, non-union members to financially support the costs of collective bargaining representation, as well as other closely related costs, as long as they are not used to support political candidates or views, or other ideological causes. First in *Railway Employees' Dep't v. Hanson*, the Court refused to enjoin a "union shop"

[3] The plaintiffs do argue that in the Medicaid context, collective bargaining with the State amounts to political advocacy. The Supreme Court has rejected this argument in the employment context, so it falls with our conclusion that personal assistants are State employees. *See generally*, *Abood*, 431 U.S. 209.

agreement between a railroad company and a union that required all employees of the railroad to become nominal, dues-paying members of the union as a condition of employment.[4] 351 U.S. at 227. Although a "right to work" provision in the Nebraska Constitution outlawed such agreements, the Court held that the federal Railway Labor Act permitted union shop agreements and thus superseded state law to the contrary. Along the way, it held that this provision of the Act was justified by Congress's interest in supporting "industrial peace and stabilized labor-management" and in distributing the costs of collective bargaining to all those who benefit from it. *Id.* at 234, 238. It declined to consider hypothetical First Amendment issues that might arise if the union engaged in partisan or ideological speech. *Id.* at 238.

Then, in *Abood v. Detroit Bd. of Educ.*, the Court extended the scope of its holding in *Hanson* to include public employees and attempted to set out limits on the use of fees collected from dissenting employees. 431 U.S. 209. It held that an "agency shop" clause in an agreement between the Detroit Board of Education and its teachers' union could require teachers who were not union members to financially support the union's collective bargaining, contract administration,

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[4] In a "union shop," an "employer may hire nonunion employees on the condition that they join a union within a specified time"; in an "agency shop," discussed below, "a union acts as an agent for the employees, regardless of the union membership." *Black's Law Dictionary* 1504 (9th ed. 2009). The Supreme Court has treated union and agency shops as "practical equivalent[s]." *See Abood*, 431 U.S. at 219 n.10. In an open shop, union membership is permitted but is not a condition of securing or maintaining employment. Under a state right-to-work law, "employees are not to be required to join a union as a condition of receiving or retaining a job." *Black's* at 1504.

grievance-adjustment procedures, and other activities "germane to its duties as collective-bargaining representative." *Id.* at 232, 235. Since *Abood*, the Court has continued to refine its approach to the appropriate use of fees from non-union members in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (outlining appropriate procedures to protect non-member fees), and *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991) (elaborating specific charges that can and cannot be funded with union donations). But it has not wavered from its position that, as a general matter, employees may be compelled to support legitimate, non-ideological, union activities germane to collective-bargaining representation.

Against this backdrop, we next consider whether the personal assistants are, as the defendants contend, State employees. If so, this case is controlled by *Abood* and the plaintiffs' claims fail. As an initial matter, we note that we pay no particular heed to the State legislature's designation of personal assistants as State employees solely for purposes of collective bargaining under Illinois law. *See* 20 Ill. Comp. Stat. 2405/3(f). The label affixed by a state, whether in statute, regulation, or order, is not sufficient to designate the relationship "employment." Whether someone is an employee of the state has a host of implications—under both state and federal law—beyond whether mandatory union fees are permitted. Because of this, the Illinois legislature may have designated personal assistants as employees or not for reasons entirely unrelated to compelled speech under the First Amendment. Rather than accept either party's characterization of the relationship, we must consider the relationship itself and decide whether the State is an employer for purposes of compelling support for collective bargaining.

Two sources inform our analysis. First, neither *Hanson* nor *Abood* discusses the definition of employer, so we will assume the Court meant to give the word its ordinary meaning: "A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Black's* at 604. Second, we draw from labor relations law the notion that more than one person or company may be an individual's employer. *Cf. Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (discussing joint employment determination by NLRB); *DiMucci Const. Co. v. NLRB*, 24 F.3d 949, 952 (7th Cir. 1994) (listing factors courts consider in reviewing an NLRB determination of joint employment). We are aware of no cases specifically discussing *Abood* in a joint-employment situation. But it is not an uncommon situation for a single individual to find himself with more than one employer for the same job. This undermines the plaintiffs' attempt to distinguish between the typical employer-employee relationship, on one hand, and every other imaginable labor relationship, on the other. Thus, both the home-care patient and the State may be employers if they each exercise significant control over the personal assistants.

And in the Rehabilitation Program, the State does have significant control over virtually every aspect of a personal assistant's job. While the 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. 89 Ill. Admin. Code § 686.10. 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. *Id.* § 677.40. 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. *Id.* §§ 686.10, 686.30. 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 assistant after withholding federal and state taxes. *Id.* In light of this extensive control, we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*.

The plaintiffs raise two objections. First, they claim that the patient, not the State, employs them. But as we have explained, even if the patient is properly considered an employer, that would not prevent the State from being a joint employer. Second, they argue that, however we characterize the State's relationship with personal assistants, the interests in collective bargaining that *Abood* identified does not apply here. They claim that the differences between the personal assistants here and the typical employment situation at issue in *Abood* undermine the State's claimed interest in labor peace. Specifically, the plaintiffs characterize *Abood*'s labor peace interest thus: "that disruptions caused by diverse employee expressive association within a workplace could be solved by giving a union a monopoly over employee speech vis-à-vis their employer." Pl. brief at 20. Thus, they assert that because the personal assistants are "outside the workplace" and they cannot be compelled to speak to

the State with a single voice, the labor peace interest does not apply.[5]

We do not accept the plaintiffs' narrow characterization of the labor peace interest. In *Hanson*, the Supreme Court reasoned 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. 351 U.S. at 234. The Court thus envisioned labor peace to include "stabilized labor-management relations," which are at issue in any employer-employee relationship, regardless of whether employees share the same workplace. The Court expanded its description of labor peace in *Abood*:

> 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 with the work force and eliminating the advantages of employee 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

[5] The plaintiffs further argue that outside the workplace, the government has no lawful interest in quelling diverse, even disruptive, speech or association. But we do not understand the complaint to allege that the State has quelled any of the plaintiffs' speech, merely that they have been forced to financially support a single bargaining representative. Employee 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.

> are not subject to attack from rival labor organizations.

431 U.S. at 224. Given our conclusion that the State employs the personal assistants, with extensive control over the terms and conditions of employment, and has chosen (wisely or not) to establish some of those terms and conditions through negotiation rather than regulation, the interests identified by the Court in *Abood* are identical to those advanced by the State in this case. The plaintiffs' attempts to distinguish *Abood* are unavailing.

Thus, because of the significant control the state exercises over all aspects of the personal assistants' jobs, we conclude that personal assistants are employees of the State and reject the plaintiffs' arguments that the State's interests in collective bargaining do not apply to the unique circumstances of personal assistants. As such, the fair share fees in this case withstand First Amendment scrutiny—at least against a facial challenge to the imposition of the fees itself.

We once again stress the narrowness of our decision today. We hold that personal assistants in the Illinois home-care Medicaid waiver program are State employees solely for purposes of applying *Abood*. We thus have no reason to consider whether the State's interests in labor relations justify mandatory fees outside the employment context. We do not consider whether *Abood* would still control if the personal assistants were properly labeled independent contractors rather than employees. And we certainly do not consider whether and how a state might force union representation for other health care providers who are not state employees, as the plaintiffs fear. We hold simply that the State may compel the personal assistants, as *employees*—not contractors, health care providers, or

citizens—to financially support a single representative's exclusive collective bargaining representation.

B. *Disabilities Program Claims*

While the underlying legal issues raised by the Disabilities Program plaintiffs are similar to those we considered above, the district court dismissed their claims on ripeness and standing grounds. This is because the Disabilities Program plaintiffs are in a fundamentally different position. As we have noted, the Rehabilitation Program personal assistants have chosen to be represented by a union. Illinois is not a "right to work" state where paying dues for union membership is optional for each worker, and thus under state law the minority of caregivers opposed to the union may be required to pay their fair share of the dues used to bargain for pay, working conditions, and other universal benefits. The Disabilities Program personal assistants, on the other hand, have opted not to have union representation. By exercising that option, they have prevented collective bargaining and are not required to pay any fair share requirement. But because they are not subject to an agreement mandating fair share payments, we agree with the district court that the Disabilities Program plaintiffs' claims are not ripe, and we lack jurisdiction to consider the complaint.

A claim is not ripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008) (quoting *Texas v. United States*, 523 U.S. 296 (1998)). The Disabilities Program plaintiffs complain of the same conduct as the Rehabilitation Program plaintiffs: that one of the unions and the State will enter into an agreement that will require all personal assistants to pay a fair share fee to support

that union's collective bargaining activity. But unlike the Rehabilitation Program, the Disabilities Program personal assistants have rejected union representation, and there is no certainty that the Disabilities Program personal assistants will ever unionize. Hence, the State has no representative to recognize and cannot agree to compel the plaintiffs to pay fair share fees at all. The plaintiffs' claims are contingent on events that may never occur and thus are not ripe.

The plaintiffs argue that the very existence of the executive order committing the State to recognizing an exclusive union representative makes it significantly more likely that the plaintiffs will be forced to financially support that union's speech. Thus, there is a reasonable probability of future harm to the plaintiffs' constitutional interests, which the plaintiffs feel they should not have to spend resources to defeat. And they argue the courts can redress this harm by declaring that the plaintiffs may not be compelled to support a union, and by enjoining the State from enforcing its laws and executive orders in such a way that compels the plaintiffs to support a union.

But the plaintiffs do not allege that the mere existence of the executive order violates their rights, only that it makes such a violation more likely. Their argument thus confuses this increased likelihood of a future *violation* of their constitutional rights with the probabilistic future *harm* which is sufficient to meet the minimal injury-in-fact requirements of standing. The cases on which the plaintiffs rely stand only for the rule that a constitutional violation now may merely increase the likelihood of injury later. That would be a question of constitutional standing and inapplicable to the issue of ripeness we have before us. *E.g., Southworth v. Board of Regents*, 307 F.3d 566,

580-81 (7th Cir. 2002) (students had standing to challenge a facially unconstitutional system for allocating student fees); *Majors v. Abell*, 317 F.3d 719, 721-22 (7th Cir. 2003) (candidates had standing to challenge unconstitutional regulation of political ads despite lack of enforcement); *Mulhall v. UNITE Local 355*, 618 F.3d 1279, 1286-87 (11th Cir. 2010) (employee had standing to challenge unlawful agreement to facilitate unionization despite possibility that it would never occur). This case is different because the only violations alleged by the plaintiffs may never occur.

The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage. To do so would be to render an advisory opinion, which is precisely what the doctrine of ripeness helps to prevent. *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) ("[R]ipeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement.").

The district court did err in one respect however. After holding that the Disabilities Program plaintiffs' claims were not yet ripe, it dismissed the complaint with prejudice. Generally, when a complaint is dismissed because it is not ripe (or because the plaintiffs lack standing, for that matter) it is dismissed without prejudice unless it appears beyond a doubt that there is no way the plaintiffs' grievance could ever mature

into justiciable claims. *Chattanoga Mfg., Inc. v. Nike, Inc.*, 301 F.3d 789, 796 (7th Cir. 2002) (holding that district court erred in dismissing counterclaims with prejudice because "[i]f a dispute ripens between the parties, [the counterclaimant] should have the opportunity to litigate its claims."). If the Disabilities Program personal assistants ever do vote to unionize and enter an agreement with the State mandating fair share fees, the plaintiffs will have a ripe claim. Given our holding above, it may be that such a claim will not last long, but we will not prejudge the issue in this case. Therefore, we will remand the case to the district court with instructions to dismiss the claims of the Disabilities Program plaintiffs without prejudice.

III.

For these reasons, we reject the plaintiffs' First Amendment claims. The Disabilities Program plaintiffs do not allege that a constitutional violation has yet occurred. Thus, their claim is not ripe and we lack jurisdiction to consider it. But because the claim is unripe, it should be dismissed *without* prejudice, so we remand with instructions for the district court to correct the order of dismissal. The Rehabilitation Program plaintiffs do allege a justiciable claim, but we reject it on the narrow grounds that Supreme Court precedent permits the State, as a joint employer, to compel fair share fees in the interest of stable labor relations. The judgment of the district court is therefore AFFIRMED in part and REMANDED in part with instructions.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 10-cv-02477

PAMELA J. HARRIS, ELLEN BRONFELD, CAROLE GULO, MICHELLE HARRIS, WENDY PARTRIDGE, THERESA RIFFEY, GORDON P. STIEFEL, SUSAN WATTS, PATRICIA WITHERS, STEPHANIE YENCER-PRICE, and a class of similarly situated,

Plaintiffs,

v.

GOVERNOR PAT QUINN, in His Official Capacity as Governor of the State of Illinois, SEIU HEALTHCARE ILLINOIS & INDIANA, SEIU LOCAL 73, and AFSCME COUNCIL 31,

Defendants.

Hon. Sharon Johnson Coleman

MEMORANDUM OPINION AND ORDER

In this proposed class action lawsuit, Plaintiffs are individuals who provide in-home care to disabled participants in one of two Illinois Medicaid-waiver programs: (1) the Home Services Program administered by the Division of Rehabilitation Services of the Illinois Department of Human Services ("Rehabilitation Program"); or (2) the Home Based Support

Services Program for Mentally Disabled Adults administered by the Division of Developmental Disabilities of the Illinois Department of Human Services ("Disabilities Program"). Plaintiffs Theresa Riffey, Susan Watts, and Stephanie Yencer-Price ("Rehabilitation Plaintiffs") provide services to disabled participants in the Rehabilitation Program and allege that Defendant SEIU Healthcare Illinois & Indiana ("SEIU HII") violated the constitutional rights of these Plaintiffs by compelling them to pay SEIU HII compulsory union fees. Plaintiffs Pamela J. Harris, Ellen Bronfeld, Michelle Harris, Carole Gulo, Wendy Partridge, and Patricia Withers ("Disabilities Plaintiffs")[1] provide services to disabled participants in the Disabilities Program. The Disabilities Plaintiffs allege that Defendants Governor Pat Quinn ("Governor Quinn"), SEIU Local 73, and AFSCME Council 31 ("AFSCME") violated the constitutional rights of the Disabilities Plaintiffs by threatening to compel them to financially support either SEIU Local 73 or AFSCME. The Rehabilitation Plaintiffs and the Disabilities Plaintiffs seek monetary damages, injunctive relief, and a declaratory judgment that certain conduct, portions of two Illinois Executive Orders, and an Illinois Public Act are unconstitutional. In a consolidated motion, all Defendants moved for dismissal of Counts I and II pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) respectively. (Dkt. No. 30.) Defendants SEIU Local 73 and AFSCME moved for dismissal on the additional basis that the claims against them fail to establish state action. Governor Quinn moved for dismissal of any claim seeking monetary damages against him on the additional basis of the immunity

[1] Plaintiffs have filed notice with the Court of the voluntary dismissal of Gordon P. Stiefel. (Dkt. No. 49.)

protections provided by the Eleventh Amendment. The Court conducted a hearing on the pending motion on November 5, 2010. For the reasons stated below, the Court grants Defendants' Consolidated Motion to Dismiss.

I. Factual Background

The Plaintiffs are providers of home care service to disabled individuals enrolled in either the Disabilities Program or the Rehabilitation Program.[2] (Dkt. No. p. 2.) Both programs are Medicaid-waiver programs administered by the Illinois Department of Human Services, which subsidize the costs of providing home-based services to individuals with severe disabilities. (*Id*. at ¶¶ 7, 13.) The Plaintiffs provide personal care and certain health care services to program participants to allow the participants to remain in their homes and prevent their unnecessary institutionalization. (*Id.*) The program participants may select and hire any provider who meets certain minimum requirements as set by the State of Illinois ("State"). (Compl. ¶¶ 10, 16.) The participants supervise, discipline, and control certain terms and conditions of the providers they hire. (*Id.*) The State subsidizes a participant's cost of hiring a provider, ensures that providers meet certain minimum requirements, and controls the economic terms of the providers' employment. (Compl. ¶¶ 10-11, 17.)

[2] Providers in the Rehabilitation Program are generally referred to as "personal assistants" while providers in the Disabilities Program are generally referred to as "individual providers." (Dkt. No. 1 ¶¶ 9, 31.)

A. Providers in The Rehabilitation Program

In March 2003, former Illinois Governor Blagojevich issued "Executive Order on Collective Bargaining By Personal Assistants" ("EO 2003-08"), which recognized that the State was not the "sole employer" of the personal assistants who provide home services under the Rehabilitation Program. (Dkt. No. 32-1.) EO 2003-08 also recognized the importance of preserving the participants' "control over the hiring, in-home supervision, and termination of the personal assistants" while at the same time preserving the "State's ability to ensure efficient and effective delivery of personal care services and [to] control the economic terms of the personal assistants' employment." (*Id.*) In recognition of these twin objectives, EO 2003-08 provided that the State shall recognize a representative designated by the majority of the personal assistants as the exclusive representative of all personal assistants for the purposes of engaging in collective bargaining with the representative concerning the terms and conditions of employment "that are within the State's control." (*Id.*; Compl. ¶ 20.)

In July 2003, the Illinois General Assembly codified EO 2003-08 by enacting Public Act 0903-204, An Act Concerning Disabled Persons ("the 2003 Act"), which amended Section 3 of the Disabled Persons Rehabilitation Act. (Compl. ¶ 21; Dkt. No. 32-10.) Section 3(f) of the 2003 Act provided:

> [P]ersonal 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 their employer. (Dkt. No. 32-10.)

The 2003 Act also provided for a "Fair share agreement" which required all employees in a collective bargaining unit 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." (*Id.* at Sect. 3(g).) The fair share agreement specifically excluded payment of "any fees for contributions related to the election or support of any candidate for political office." (*Id.*)

Shortly after the 2003 Act was enacted, the majority of personal assistants in the Rehabilitation Program designated SEIU HII as the exclusive representative for all personal assistants and the State and SEIU HII subsequently entered into a collective bargaining agreement ("CBA") effective August 1, 2003 to December 31, 2007. (Compl. ¶¶ 22-24.) In 2008, the State and SEIU HII entered into a new CBA effective January 1, 2008 to June 30, 2012. (*Id.* at ¶ 24; Dkt. No. 32-3 p. 2.) The CBA allows the State, upon the written authorization of the personal assistant, to deduct union dues and initiation fees from the personal assistant's wages and remit such fees to SEIU HII. (Dkt. No. 32-3 p. 8.) The CBA also contains a fair share provision in Section 6 of Article X, which tracks the language in the 2003 Act and requires that all personal assistants who are not SEIU HII members 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." (Compl. ¶ 25; Dkt. No. 32-4 p. 7.)

The Rehabilitation Plaintiffs are personal assistants in the Rehabilitation Program who have either paid union dues or fair share fees through payroll

deductions that were ultimately remitted to SEIU HII. (Compl. ¶ 38.) The Rehabilitation Plaintiffs allege that they, and other similarly situated personal assistants, are compelled to financially support SEIU HII for purposes of speaking to, petitioning, and otherwise lobbying the State with respect to the Rehabilitation Program and that the compelled association abridges their right to freedom of association, freedom of speech, and to petition the government for redress of grievances under the First Amendment to the United States Constitution, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. (Compl. ¶ 46.)

B. Providers in the Disabilities Program

On June 29, 2009, Governor Quinn issued Executive Order 2009-15 ("EO 2009-15" or "the Order") titled "Collective Bargaining By Individual Providers of Home-Based Support Services." (Compl. ¶ 31; Dkt. No 32-2.) EO 2009-15 recognized that the individual providers of home-based services under the Disabilities Program are not State employees but that the "State controls the economic terms of their provision of services." (Dkt. No. 32-2 p. 2.) The Order also recognized the fact that the State had productively dealt with an exclusive representative of personal assistants in the Rehabilitation Program for many years. (*Id.*) EO 2009-15 authorized the State to recognize a representative designated by the majority of the individual providers in the Home-Based Support Services Program as the exclusive representative for collective bargaining purposes. (Compl ¶ 31.)

In October 2009, Defendants SEIU Local 73 and AFSCME unsuccessfully attempted to become the exclusive representative of the individual providers in the Disabilities Program. (*Id.*. ¶ 32.) As a result, the individual providers in the Disabilities program are

not represented by any union. (*Id.* at 33.) The Disabilities Plaintiffs allege that they devoted time, and in some cases money, to campaign against union representation. (*Id.* at 35.) These Plaintiffs also allege that SEIU Local 73 and AFSCME are continuing their efforts to become the exclusive representative pursuant to EO 2009-15 and that these ongoing efforts threaten to violate the constitutional rights of the Disabilities Plaintiffs and others similarly situated. (*Id.* at ¶¶ 36-37.)

II. Standard of Review

A. Motion To Dismiss for Failure To State a Claim

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *Christensen v. County* of Boone, 483 F.3d 454, 458 (7th Cir. 2007). Pursuant to the federal notice pleading standard, a complaint need only provide a short and plain statement of the claim showing that the plaintiff is entitled to relief and sufficient to provide the defendant with fair notice of the claim and its basis. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). When evaluating the sufficiency of a complaint, a district court must construe the complaint in the light most favorable to the nonmoving party. *Id.* The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). For a claim to have facial plausibility, a plaintiff must plead "factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Id*. As such, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

A Rule 12(b)(6) motion must be decided solely on the face of the complaint and any attachments that accompanied its filing. *Miller v. Herman*, 600 F.3d 726, 732 (7th Cir. 2010). Pursuant to Federal Rule of Civil Procedure 12(d), a district court cannot consider material outside of the complaint and its attachments without converting a Rule 12(b)(6) motion to a motion for summary judgment. *See* Fed. R. Civ. P 12(d) ("[i]f on motion under Rule 12(b)(6) or 12©), matters outside of the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"). A court may, however, consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper. *Id.*; *see also* Fed. R. Evid. 201.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When reviewing a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999). The district court is not, however, bound to accept as true the allegations of the complaint which tend to establish jurisdiction where an opposing party properly raises a factual question concerning the jurisdiction of the district court to proceed with the

action. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists. *Long*, 182 F.3d at 554.

C. Request for Judicial Notice

Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the complaint and are central to the claims. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Defendants requested that the Court take judicial notice of ten documents in support of their motion to dismiss. (Dkt. No. 32.) Plaintiffs do not oppose Defendants' request for judicial notice and indeed the Complaint relies upon several of the documents presented by the Defendants in their request for judicial notice. (*See* Dkt. No. 1 ¶¶ 20, 21, 24, 31.) The Court therefore takes judicial notice of the following documents because they are matters of public record and because they are central to Plaintiffs' claims: (1) Executive Order No. 2003-8 (Defendants' Request for Judicial Notice ("RJN"), Ex. A); (2) Executive Order No. 2009-15 (*id.* at Ex. B); (3) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective January 1, 2008 to June 30, 2012 (*id.* at Ex. C); (4) Collective Bargaining Agreement between SEIU HII and the State of Illinois effective August 1, 2003 to December 31, 2007) (*id.* at Ex. D); and (5) Illinois Public Act 93-0204 (2003) (*id.* at Ex. J). The Court also takes judicial notice of the August 30, 2002 Order in *West v. Serv. Employees Int'l Union Local 434B* in the United States District Court for the Central Division of California,

Western Division, (*id.* at Ex. F). *See, e.g., Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996) ("it is a well-settled principle that the decision of another court or agency . . . is a proper subject of judicial notice"). The Court declines to take judicial notice of the April 11, 2009 Arbitration Decision (RJN, Ex. E), the December 18, 1985 decision of the Illinois State Labor Relations Board (*id.* at Ex. G), the April 23, 2007 decision of the Illinois Labor Board (*id.* at Ex. H), and the March 18, 2002 decision of the State of Illinois Industrial Commission (*id.* at Ex. I) because Defendants have not established that these documents are necessary for resolution of their motion.

III. Analysis

A. Count I - Rehabilitation Plaintiffs

Count I, asserted on behalf of the Rehabilitation Plaintiffs, alleges the system of exclusive representation established by the State that allows Defendant SEIU HII to impose and collect fair share fees violates the Plaintiffs' First Amendment rights. Defendants move for dismissal of Count I alleging that the U.S. Supreme Court has held that collective bargaining arrangements permitting fair share fees are consistent with the First Amendment. (Dkt. No. 31 p. 13.) Defendants claim that a long and unbroken line of Supreme Court cases about collective bargaining have held that such arrangements are justified by the state's legitimate interest in establishing a harmonious system for labor relations. (*Id.*) Defendants also argue fair share fees have been found to fairly distribute the costs associated with collective bargaining among all who benefit to avoid the risk of "free riders." (*Id.*) Defendants rely upon *Hanson* and its progeny for the proposition that exclusive representation arrangements, while imposing some burden on an

individual's First Amendment rights, are justified by the employer's interest in "labor peace." *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 238 (1961) (holding "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work" does not violate the First Amendment*); Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (holding fair share fees used to finance expenditures germane to collective bargaining serve an important government interest in labor relations and are constitutionally justified); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (holding that a union could constitutionally charge dissenting employees for their share of union activities appurtenant to collective bargaining and contract implementation). Defendants find additional support in a recent decision dismissing a similar action on nearly identical facts. (Order Granting SEIU Local 434B's Motion to Dismiss Counts One Through Four, *West v. Serv. Employees Int'l Union Local 434B*, No. 01-cv-10862-CAS-FMO (C.D. Cal. Aug. 30, 2002), submitted as RJN, Ex. F.)

As noted by the Defendants, the Supreme Court has held that employees can be required to contribute fair share fees to compensate unions for their representational activities. *See, e.g.*, *Lehnert*, 500 U.S. at 519. A line is drawn for First Amendment purposes between fair share fees, which pay for representational or collective-bargaining activities, and full union dues that often support nonrepresentational activities. Unions cannot force employees to pay for "the support of ideological causes not germane to its duties as collective-bargaining agent." *See Abood*, 431 U.S. at 235-36; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986). In a recent decision, the Seventh Circuit explained that

fair share fees are permitted under the First Amendment because this forced speech promotes peaceful labor relations and serves legitimate government purposes for the benefit of both union members and non-members. *Kingstad v. State Bar of Wisc.*, No. 09-4080 (7th Cir. Sept. 9, 2010) (slip opinion pp. 10-11). Without a showing that fair share fees are used to fund ideological conformity or imposed for reasons unrelated to collective bargaining, these fees do not violate the First Amendment. *Hanson*, 351 U.S. at 235-38.

Plaintiffs do not deny that fair share fees in the collective bargaining context have been found constitutional. Rather, Plaintiffs argue that the exclusive representation arrangement here is "nothing short of compulsory political representation" that violates Plaintiffs' First Amendment rights by compelling them to support a state-designated entity for purposes of lobbying the State for additional benefits from a government program. (Dkt. No. 33 at pp. 9-10.) Plaintiffs also allege that fair share fees imposed under this arrangement are not justified by a vital government interest.

The Plaintiffs' claim that they are compelled by the State to support a state-designated representative to speak on their behalf for the purpose of getting more benefits from a government program is unsound. First, the State did not designate any entity to serve as the Plaintiffs' exclusive representative. Instead, as set forth in the Complaint, the State "recognize[d] a representative designated by a majority of the personal assistants as the exclusive representative of all personal assistants." (Dkt. No. 1 ¶ 20.) Second, the Complaint alleges that the disabled individuals, not the Plaintiffs, are the recipients of a government

program that subsidizes the cost of their in-home care. (Dkt. No. 1 ¶¶ 2-3, 7, 13.) Third, the Complaint is bereft of any allegation that the Plaintiffs are prevented from independently lobbying the State for any purpose. Finally, the authorities that Plaintiffs cite to support their claim found compelled support of beliefs or ideology unconstitutional; this is not the case that Plaintiffs find themselves in.[3] *See, e.g.*, *Rutan v. Republican Party*, 497 U.S. 62, 74-75 (1990) (holding any personnel decisions based upon support of political party violate First Amendment); *Abood*, 431 U.S. at 233-34 (holding union fees that support ideological activities violate First Amendment); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976) (holding policy that conditions employment on support of a political party violates First Amendment).

Defendants contend the State's legitimate interest in establishing effective collective bargaining justifies a system of exclusive representation and fair share fees. (Dkt. No. 31. p. 17.) Plaintiffs counter that such arrangements are only constitutional when justified by a vital government interest and that none exists

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[3] Plaintiffs filed a Citation to Supplemental Authorities in Support of Their Opposition to Defendants' Motion to Dismiss (Dkt. No. 39) after the close of briefing on the instant motion and without seeking leave of the Court. The filing consisted of a July 14, 2010 Order in *Schlaud v. Granholm*, Case No. 10-cv-147 (Dkt. No. 32) pending in the United States District Court for the Western District of Michigan, along with excerpts from a July 13, 2010 hearing in the same matter. No reasoning was included in the July 14, 2010 Order. During the November 5, 2010 hearing in the case *sub judice*, Plaintiff's counsel conceded that he speculated as to the district court's reasoning in *Schlaud*. The Court declines to speculate about the court's reasoning in *Schlaud* and thus the Court will not consider this supplemental filing in ruling on Defendants' Consolidated Motion to Dismiss.

here. (Dkt. No. 33. p. 11.) Plaintiffs once again rely upon *Elrod* and *Rutan*, both of which considered infringements on First Amendment rights outside of the collective bargaining environment.

Plaintiffs also claim *Lehnert* provides support for their claim. Plaintiffs' reliance upon *Lehnert,* however, is puzzling. The *Lehnert* plaintiffs were employees of a state college who challenged compelled union fees that were used for purposes *other* than collective bargaining. 500 U.S. at 513. In addressing plaintiffs' challenge, the Court first emphasized that its previous decisions recognized that the compelled financial support of a union's collective bargaining activities was constitutionally permissible. *Id.* at 516. The Court then articulated a three prong test for determining the range of fees that a union could constitutionally charge non-members consistent with the First Amendment. *Id.* at 519. Plaintiffs quote from a portion of this test when arguing that the State must demonstrate that a vital interest, rather than a legitimate interest as Defendants assert, justifies the fair share fees at issue here. (Dkt. No. 33 p. 11.) The full test set forth in *Lehnert* provides:

> [A]lthough the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union may constitutionally charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations . . . chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free

> speech that is inherent in the allowance of an agency or union shop.

Lehnert, 500 U.S. at 519. Read in full context, *Lehnert* explains that the government's interest in labor peace and avoiding free riders is a vital government interest. While Defendants may have characterized the State's interest in establishing a harmonious system for labor relations as a legitimate interest, this interest is considered vital in accordance with Supreme Court precedent. Plaintiffs' claim that no vital interest exists here lacks merit.

Throughout the hearing, Plaintiff's counsel repeatedly referred to the collective bargaining activities before the Court as "lobbying." Counsel argued that collective bargaining absent an employer-employee relationship is lobbying and that since no employment relationship exists between the State and the personal assistants in the Rehabilitation Program, that the fair share fees here support compulsory lobbying. This argument is flawed as the Complaint alleges that: (1) the State pays the providers (Dkt. No. 1 ¶¶ 11, 26); (2) the State controls certain terms and conditions of the providers' employment (*id.* at ¶¶ 10-11, 22, 26); and (3) the 20,000 providers are considered State employees solely for the purpose of collective bargaining (*id.* at ¶¶ 12, 21).

Although Plaintiff's counsel provided no authority to support this argument, *Lehnert* provides guidance on the sometimes "hazy line" between lobbying and collective bargaining in the public sector. *Lehnert*, 500 U.S. at 518-520. The Court explained that in public sector employment, unions must necessarily concern themselves not only with negotiations at the bargaining table but also with those activities necessary to ensure the agreement's implementation. *Id.* at 520.

These additional activities include efforts to secure ratification and acquire appropriations from the proper state body. *Id*. These post-negotiating activities are "pertinent to the duties of the union as a bargaining representative" and are an "indispensable prerequisite" to ensuring contract implementation. *Id.* at 519-520. The Court recognized that the question of whether these additional activities are lobbying is "a close one." *Id.* at 520. The Court held, however, that employees may be constitutionally compelled to subsidize legislative lobbying within the context of contract ratification or implementation. *Id.* at 522. Thus, characterizing the fair share fees here as "compulsory lobbying" does not, without more, implicate any First Amendment concerns. *Id.* at 517.

Plaintiffs' also claim that the labor peace justification does not apply here because the personal assistants are not State employees. Yet, the personal assistants have been designated as public employees for the purpose of collective bargaining. (Dkt. No. 1 ¶ 19.) There can be no doubt that the State has a vital interest in establishing peaceful labor relations with the 20,000 personal assistants paid with State subsidized funds. Plaintiffs next argue that First Amendment values should predominate over the State's interest because a contrary approach would inflict harm by causing individuals to support views and beliefs against their will thereby harming the democratic process that the First Amendment protects. (Dkt. No. 33 p. 36.) Plaintiffs' argument fails because they have not alleged either in the Complaint or in their Opposition Motion that Plaintiffs have been forced to support any ideology or viewpoint with which they disagree.

In their briefs, both Plaintiffs and Defendants refer to the order entered by the district court in *West v. SEIU Local 434B*. Defendants argue that *West* supports their claim that the system of collective bargaining established by the State of Illinois comports with the First Amendment while the Plaintiffs argue that *West* rests on faulty reasoning. (Dkt. No. 31 p. 26; Dkt. No. 33. p. 34.) While certainly not binding on this Court, we find the reasoning in *West* persuasive. The *West* plaintiffs provided in-home support services to low income elderly and disabled persons, who received benefits to fund these services through a statewide public entitlement program. (RJN, Ex. F at p. 4.) By statute, the plaintiff providers were designated as state employees and were thereby subject to an exclusive bargaining agreement, which permitted the defendant union to collect agency fees. (*Id.* at pp. 1-2.) The plaintiffs asserted a constitutional challenge to the statute alleging that it violated the First Amendment rights of the providers and impinged upon their right to free association. (*Id.* at 2.) The union sought dismissal arguing that the statutory framework was enacted to clarify that the public body was the employer of the providers for collective bargaining purposes only and that the program recipients were the employers of the providers for all other purposes. (*Id.* at 15.) The union also argued that under *Hanson* and *Abood*, the union could constitutionally collect agency fees to support the costs of collective bargaining. (*Id.* at 16-17.) The plaintiffs argued that the challenged statutory provisions constituted illegal content and viewpoint based regulations subject to strict scrutiny to be constitutional. (*Id.* at 18.) The plaintiffs further contended that no public employer-employee relationship existed to justify an exclusive

bargaining arrangement and that any such justification must be the least restrictive means available. (*Id.* at 20.)

The district court concluded that the plaintiffs were incorrect about the standard of scrutiny that applies to collective bargaining agreements. The court explained that "[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace." (*Id.* at 21.) The court found that the statutory framework classifying the providers as public employees subject to exclusive bargaining agreements was in accordance with longstanding Supreme Court precedent. (*Id.* at 22.) The district court dismissed the plaintiffs' claims with prejudice and noted that the plaintiffs failed to articulate any impermissible way in which the statutory scheme impinged upon their First Amendment rights. (*Id.* at 22-23.)

Similarly, Plaintiffs have not alleged that the exclusive representation system here has imposed any burden on Plaintiffs beyond supporting the collective bargaining arrangement from which they benefit. There are no allegations that the fair share fees here are used to support any political or ideological activities. The Complaint alleges only that the Rehabilitation Plaintiffs pay a compulsory fee to SEIU HII for "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." (Dkt. No. 1 ¶ 25.) These costs are constitutional under *Lehnert* and other longstanding Supreme Court precedent. The Complaint fails to state a plausible claim that the fair-share fee arrangement violates the First Amendment and thus the Court dismisses Count I with prejudice.

B. Count II - Disabilities Plaintiffs

Count II, asserted on behalf of the Disabilities Plaintiffs, alleges that Defendants Governor Quinn, SEIU Local 73, and AFSCME have threatened to violate Plaintiffs' First Amendment rights by attempting to unionize the individual providers in the Disabilities Program. (Dkt. No. 1 pp. 16-17.) Defendants seek dismissal of Count II arguing that the Court lacks subject matter jurisdiction because the claim is not ripe and the Plaintiffs lack standing. (Dkt. No. 31 p. 33.) Plaintiffs counter that because the threat to their First Amendment rights is imminent, they have standing to enjoin enforcement of the statutory framework which would subject them to exclusive representation and fair share fees. (Dkt. No. 33 pp. 40-41.)

Article III of the U.S. Constitution limits the authority of the federal courts to "cases or controversies." From that requirement flow two closely related concepts: ripeness and standing. *Rock Energy Coop. v. Village of Rockton*, 614 F.3d 745, 748 (7th Cir. 2010). Both of these doctrines bar a plaintiff from asserting an injury that depends on so many future events that a judicial opinion would be advice about remote contingencies. *Id.* To determine whether an actual controversy exists, a court must look at whether the facts alleged show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief. *Rock Energy*, 614 F.3d at 748.

1. Ripeness

Defendants argue that Count II is not ripe because there are several contingencies that must occur, that are not certain to occur, before the individual providers in the Disabilities Program would be subject to a fair share arrangement. The Complaint alleges that the majority of individual providers in the Disabilities Program elected not to designate any union as their exclusive representative in October 2009. (Dkt. No. 1 ¶¶ 32, 36.) Plaintiffs have not alleged that another election has been scheduled or that either Defendant SEIU Local 73 or Defendant AFSCME has petitioned to hold such an election. Further, as the Defendants asserted, the Disabilities providers could once again choose not to be represented by a labor organization. Even allowing for an election designating some union as the exclusive representative, a collective bargaining agreement that included a fair share fee provision would then need to be negotiated. Furthermore, Defendants SEIU Local 73 and AFSCME may choose not to participate in an election if one were to be held. Notwithstanding Plaintiffs' argument that an election is likely, there are simply too many "future events that may not occur as anticipated, or indeed may not occur at all" to find that the threatened alleged violation is imminent, and thus ripe for adjudication. *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008). Count II is dismissed because the claim is not ripe.

2. Standing

Defendants argue that no plaintiff has standing to assert Count II for the same reason that the claim is not ripe. Plaintiffs counter that they have standing because they can show a "reasonable probability" of suffering tangible harm and that they have expended time and money to prevent "Defendants' attempts to

impose a compulsory representative upon them in violation of their constitutional rights." (Dkt. No. 33. p. 42.)

The required elements of Article III standing are: (1) an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (2) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004).

To satisfy the injury-in-fact requirement, the Disabilities Plaintiffs must establish that they have sustained or are immediately in danger of sustaining some direct injury. *Id.*; *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001). This the Plaintiffs cannot do. Plaintiffs have couched their claim as involving an injury that the Defendants are "threatening." (Dkt. No. 1 p. 16.) Thus, the alleged injury is not actual and, as discussed above, it is not imminent given the multiple contingencies that may or may not occur. The fact that the Disabilities Plaintiffs voluntarily spent money to prevent what they perceive as a threatened violation of their First Amendment rights does not establish an injury-in-fact. *See, e.g. Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (granting summary judgment where plaintiffs' "expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized."). Having failed to establish an injury-in-fact, Plaintiffs cannot meet the remaining requirements necessary to establish standing.

The Court lacks subject matter jurisdiction over Count II because the claim is not ripe and Plaintiffs lack standing. As a result, the Court dismisses Count II against all Defendants with prejudice.[4]

C. Claims for Damages Against Governor Quinn

Defendants also move for dismissal of all claims against Defendant Governor Quinn that seek monetary relief on the ground that the Eleventh Amendment bars such claims. (Dkt. No. 31 p. 38.) Plaintiffs did not address this argument in their Opposition Motion. Since the Court has concluded that Counts I and II must be dismissed with prejudice, the Court need not reach the issue of sovereign immunity.

IV. CONCLUSION

For the above stated reasons, this Court GRANTS Defendants' Consolidated Motion to Dismiss.

IT IS SO ORDERED.

/s/ Sharon Johnson Coleman
Hon. Sharon Johnson Coleman
United States District Court

Dated November 12, 2010

[4] To the extent that Defendants argue that Count II should be dismissed against SEIU Local 73 and AFSCME for lack of state action, the Court's ruling dismissing all Defendants from Count II renders this argument moot.