

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAMELA HARRIS, ET AL., :

4 Petitioners :

5 v. : No. 11-681

6 PAT QUINN, GOVERNOR OF :

7 ILLINOIS, ET AL. :

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9 Washington, D.C.

10 Tuesday, January 21, 2014

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 WILLIAM L. MESSENGER, ESQ., Springfield, Virginia; on
17 behalf of Petitioners.

18 PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of
19 Respondents.

20 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
21 Department of Justice, Washington, D.C.; for United
22 States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-681, Harris v. Quinn.

5 Mr. Messenger.

6 ORAL ARGUMENT OF WILLIAM L. MESSENGER

7 ON BEHALF OF THE PETITIONERS

8 MR. MESSENGER: Mr. Chief Justice, and may
9 it please the Court:

10 Illinois is forcing Susan Watts and
11 thousands of other home care providers to pay compulsory
12 fees to the SEIU to petition the State about its
13 Medicaid program that pays for their services to persons
14 with disabilities, in Mrs. Watts' case, her daughter
15 Libby.

16 This violates the First Amendment because
17 the purpose of this mandatory association is inherently
18 expressive, petition the government for a redress of
19 grievances, otherwise, lobby. And also because this
20 program --

21 JUSTICE GINSBURG: I thought it was to
22 negotiate what's typically negotiated in collective
23 bargaining; that is, wages, is that not so? Wages and
24 benefits?

25 MR. MESSENGER: The subjects of bargaining

1 here are the reimbursement rates given to the providers,
2 and the State now offers or pays money to the SEIU for a
3 health benefit, but that is petitioning the government
4 with regard to those negotiations.

5 JUSTICE GINSBURG: But how does it differ
6 from the typical bargaining that a union does? It asks
7 for a wage rate, and it asks for various benefits. So
8 are you saying that when it's a public -- in the public
9 sector, it gets converted into something else?

10 MR. MESSENGER: Yes. When -- in the public
11 sector, when a group is petitioning the government for
12 money, that is, petitioning the government over a public
13 program, here from a Medicaid program, it would be very
14 little different than if the American Medical
15 Association was asking for higher Medicaid rates for
16 doctors or for nurses.

17 JUSTICE SOTOMAYOR: Is your argument
18 dependent on this being sort of a dual employee
19 situation, that it's reimbursement, as opposed to
20 policemen, fire -- police people, fire people, teachers,
21 other public -- other public employees who are directly
22 employed by the State?

23 MR. MESSENGER: That is our position for why
24 Aboud is distinguishable on that point, is that, here,
25 the State is not the common law employer or the sole

1 employer of these providers. It simply pays them for
2 their services, much like a health insurer pays for the
3 services of medical professionals.

4 JUSTICE KAGAN: But your argument, of
5 course, isn't limited to that. It goes beyond that
6 situation?

7 MR. MESSENGER: Yes. And that the -- the
8 actual bargaining, even on behalf of true employees, is
9 also petitioning and political in nature, and for that
10 reason Abood should be overruled.

11 JUSTICE KENNEDY: Is there any likelihood
12 that the union that represents these -- what do I call
13 them -- healthcare workers, health providers -- care
14 providers, is there any likelihood that they would try
15 to bargain for benefits for these -- these workers?

16 MR. MESSENGER: Would the union attempt to?

17 JUSTICE KENNEDY: Yes, yes. Is there any
18 likelihood? Do we know anything about what the
19 likelihood would be for certain subjects to be brought
20 up in the bargaining with the State?

21 MR. MESSENGER: Well, one thing that has
22 happened, this is in the collective bargaining
23 agreement, is the State has agreed to give certain
24 amounts of money to an SEIU healthcare fund to offer
25 access to health benefits for those providers. So the

1 State is funding the SEIU's health benefit program to
2 that extent.

3 JUSTICE SOTOMAYOR: Did they have that
4 before the union?

5 MR. MESSENGER: No.

6 JUSTICE SCALIA: Suppose you have a
7 policeman who -- who is dissatisfied with his wages. So
8 he makes an appointment with the commissioner -- police
9 commissioner, and he goes in and grouses about his
10 wages. He does this -- you know, 10 or 11 times.

11 And the commissioner finally is fed up, and
12 he tells his secretary, I don't -- I don't want to see
13 this man again. Has he violated the Constitution?

14 MR. MESSENGER: No.

15 JUSTICE SCALIA: He has prevented a petition
16 for a redress of grievances?

17 MR. MESSENGER: No, because in that -- with
18 an individual speaking, it's, sir, a matter of private
19 or internal proprietary matter that, under this Court's
20 precedence, don't rise to a matter of public concern.

21 However, if you had an organization
22 petitioning a -- a police district for wages across the
23 board for police officers, then that is a matter of
24 public concern and would violate the First --

25 JUSTICE SCALIA: I really don't understand

1 that. When -- when you -- so what if it's 10 policemen
2 who do this? It's still not a matter of public concern?
3 Or does it have to be the whole police force?

4 MR. MESSENGER: The line would be, once you
5 have the collective, it would be start to become a
6 matter of public concern. It'd be the public
7 concern test.

8 JUSTICE SCALIA: It seems to me it's always
9 a matter of public concern, whether you're going to
10 raise the salaries of policemen, whether it's an
11 individual policeman asking for that or -- or a -- a
12 combination of policemen or a union. It's always a
13 matter of public concern, isn't it?

14 MR. MESSENGER: Then if it is, then I submit
15 that it's unconstitutional for --

16 JUSTICE SCALIA: Okay. To not -- not give
17 this guy an appointment the 12th time.

18 MR. MESSENGER: No. The police just --
19 chief can certainly shut his door, but what would be
20 unconstitutional is to force --

21 JUSTICE SCALIA: Well, how can he shut his
22 door if -- he has a right to petition, a constitutional
23 right to petition for the redress of grievances? His
24 grievance is he's not being paid enough.

25 MR. MESSENGER: But in that case, under our

1 public concern test, which goes within the Pickering
2 line, that that individual grievance would not rise to a
3 First Amendment petition.

4 JUSTICE SCALIA: But it's the same grievance
5 if the union had presented it. The -- the grievance is
6 the salaries for policemen are not high enough.

7 MR. MESSENGER: But the --

8 JUSTICE SCALIA: He's not asking for just
9 his salary to be raised. He wants salaries of all --
10 all the cops to be raised.

11 MR. MESSENGER: Well, two points. The first
12 is the scale is what differentiates. So here, you have
13 a union petitioning a State for Medicaid rates that are
14 paid for 20,000-some care providers, and so the scale of
15 it is what makes it a matter of public concern or a
16 matter of lobbying, as opposed to --

17 JUSTICE KAGAN: But what -- what you're
18 objecting to, to the extent that you're not objecting to
19 the entire system of collective bargaining, you're
20 objecting -- you're saying an individual employee can
21 say, I don't feel like supporting a union that makes a
22 certain kind of argument about wages or about benefits.

23 So, just to carry on with Justice Scalia's
24 example, the subject matter is the exact same in the two
25 contexts, whether it's an individual employee or whether

1 it's a union, and in both contexts, the -- the ultimate
2 sanction is the same, right? Somebody grouches about his
3 pay too much, he could get fired. Somebody refuses to
4 support a union that is negotiating about pay, he can
5 lose his job.

6 So it's -- it's really identical across the
7 two situations.

8 MR. MESSENGER: Well, I'd say --

9 JUSTICE KAGAN: Same subject matter, same
10 sanction. What's the difference?

11 MR. MESSENGER: There's two -- two
12 differences. One, again, is the scale. When you're
13 talking about a union collectively petitioning a school
14 district or in the States --

15 JUSTICE KAGAN: But you're not objecting, I
16 think, to the union as a whole. What you're objecting
17 to is an individual employee having to support that
18 activity. The scale is no different. It's an
19 individual employee.

20 MR. MESSENGER: Yes, the -- it's an
21 individual employee being forced to support that
22 expressive activity. So the question becomes: What
23 expressive activity are they being forced to support?

24 And when you're speaking of changing an
25 entire government program, for example, Medicaid rates

1 across the board, that is a matter of public concern.
2 That is a matter of lobbying or political concerns.

3 JUSTICE KAGAN: But that's exactly what the
4 individual employee in Justice Scalia's hypothetical is
5 arguing for. He wants wage rates to be changed across
6 the board. He knows they're not going to be changed
7 just for him. He wants higher wage rates.

8 MR. MESSENGER: But, again, under this
9 Court's private -- under the public concern test, an
10 individual simply speaking to that usually does not rise
11 to a matter of public concern.

12 JUSTICE ALITO: Well, Mr. Messenger, I'm
13 confused by this whole line of argumentation. I didn't
14 think there was any issue in this case about the right
15 of the plaintiffs or any of the other affected workers
16 to say whatever they want on their own. That -- they're
17 not prohibited from doing that, are they?

18 MR. MESSENGER: No, they're not.

19 JUSTICE ALITO: So there isn't any issue
20 about that in the case. I thought the issue -- and they
21 can try to -- to meet with anybody they want as many
22 times as they want. I suppose that -- that person has a
23 perfect right to say: Enough is enough; I don't want to
24 meet with you for the fifth time or for the first time.

25 I thought the issue was whether they could

1 be required to pay for somebody else to go and speak and
2 possibly say things that they disagree with.

3 MR. MESSENGER: Yes, exactly, that they are
4 being forced to support an organization, here, the SEIU,
5 to speak or petition the State over its Medicaid rates.
6 So the distinction is --

7 JUSTICE SOTOMAYOR: So let's break this
8 down. You're not arguing that there's something wrong
9 with a union qua union. Is there anything wrong with
10 the State saying, we're not going to negotiate with any
11 employee who's not a member of the union?

12 MR. MESSENGER: Yes, under -- I'm sorry.
13 There is -- Your Honor, there is not a problem with that
14 because my whole --

15 JUSTICE SOTOMAYOR: All right. Is there a
16 problem for the State to say -- the union, to organize,
17 has a certain amount of costs. So putting aside fair
18 representation laws, could the State say, this is what
19 we're going to pay police officers, \$100, but we're
20 going to pay union members \$110 to reimburse them for the
21 cost of negotiation. Would that be okay?

22 MR. MESSENGER: Yes. Under Knight, the
23 State can choose who it bargains with, and if it chooses
24 to set different rates for union and -- union and
25 non-union, it could, as you said, notwithstanding

1 fair -- or duty of fair representation --

2 JUSTICE SOTOMAYOR: So there's no problem
3 here with the representation. Your problem is with the
4 fair share?

5 MR. MESSENGER: Yes, forcing the individuals
6 to support the union for the purpose of petitioning the
7 State over here the Medicaid rates for homecare.

8 CHIEF JUSTICE ROBERTS: Are there any -- you
9 suggest, in response to my colleague's question, that
10 they could -- the State could pay healthcare providers
11 different rates. Is there -- are there any limitations?
12 We're talking about Medicaid reimbursement.

13 MR. MESSENGER: Yes.

14 CHIEF JUSTICE ROBERTS: Are there any
15 limitations that would prevent differential rates of
16 pay, reimbursement, under Medicaid for the same
17 services?

18 MR. MESSENGER: There may be statutory. I
19 know that most Medicaid programs are -- across the board
20 set rates. But also, constitutionally, if there was a
21 differential act or degree, it could be considered a
22 penalty for the individual exercising their rights.

23 But as far as I know, most Medicaid
24 programs, in particular the one here, it's always been a
25 fixed rate established across the board.

1 JUSTICE SCALIA: Mr. Messenger, just to
2 clarify what was the purpose of my earlier line of
3 questioning, it was simply to show that, if you have a
4 case, it doesn't rest on the right to petition the
5 government for redress of grievances.

6 It -- it rests on the First Amendment.
7 You -- you say that there is being -- your -- your
8 people are being required to support speech that they
9 don't agree with.

10 MR. MESSENGER: Yes, Your Honor.

11 JUSTICE SCALIA: Now, that is -- you know,
12 that is an arguable position, but I don't -- I don't
13 think it's even arguable that the right to petition the
14 government for redress of grievances is -- is involved
15 here.

16 MR. MESSENGER: It's the expression they're
17 being forced to support, Your Honor. So the violation,
18 as you say, is they're being forced to support
19 expressive activity and that expressive activity --

20 JUSTICE SCALIA: That's a First Amendment
21 violation, not a violation -- not a denial of the right
22 to petition the government.

23 MR. MESSENGER: Yes, Your Honor. They're
24 not being denied the right to petition, in the sense
25 that the State is saying they cannot petition. Instead,

1 they're being forced to support petitioning.

2 JUSTICE KAGAN: Mr. Messenger, I'm not sure
3 that Justice Scalia's answer satisfies his own question.

4 (Laughter.)

5 JUSTICE SCALIA: What -- what was the
6 question?

7 (Laughter.)

8 JUSTICE KAGAN: Because here's the thing:
9 That, in the workplace, we've given the government a
10 very wide degree of latitude, and there's much that the
11 government can do. It can fire people, it can demote
12 people for things that they say in the workplace, not
13 for things that they say as a citizen, but for things
14 that they say in the workplace. That's the fundamental
15 lesson of Garcetti and of many, many others of our
16 cases.

17 So you're saying, well, the government can
18 punish somebody for saying something, but the government
19 in the exact same position cannot compel somebody to say
20 something they disagree with. And I want to know what's
21 the basis for that distinction, which it seems to me is
22 just as hard as -- as if you were answering under the
23 Petition Clause.

24 JUSTICE SCALIA: I want to hear the answer,
25 too, because, contrary to what Justice Kagan suggests,

1 I -- I didn't say your First Amendment argument was
2 valid.

3 (Laughter.)

4 JUSTICE KAGAN: Good, okay.

5 JUSTICE SCALIA: I said at least it was a
6 comprehensible argument.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Jump in whenever
9 you'd like.

10 (Laughter.)

11 MR. MESSENGER: The way in which homecare
12 providers petition the State, I submit, is not an
13 internal proprietary matter that the government has free
14 rein to manage. And so the distinction between
15 government acting as proprietor, as you say, the
16 government can tell an employee on work time that you
17 can't engage in certain speech if it interferes with the
18 workplace.

19 But the way in which an individual
20 associates with to lobby or petition the State is not an
21 internal proprietary matter. So for example, here, the
22 way in which Susan Watts and other homecare providers
23 petition the State is not internal workplace speech.

24 JUSTICE SCALIA: Why isn't it? I mean, it
25 is for private employers. There are some private

1 employers who think they're better off with a closed
2 shop, and they just want to deal with one union, and --
3 and they require all the people that they hire to become
4 a member of this union and to pay union dues for
5 representational purposes.

6 They do this as private employers because
7 they think it is in their interest as an employer. Why
8 can't the government have the same interest?

9 MR. MESSENGER: Because when the government
10 is involved, the First Amendment interests are much
11 heightened because you're dealing with attempting to
12 influence government policy.

13 JUSTICE SCALIA: All right. But -- but
14 don't tell me that there's no employer interest. There
15 is an employer interest. You're just saying it is
16 not -- it is not considerable enough, right?

17 MR. MESSENGER: Yes, it's not considerable
18 enough. Here, the State lacks --

19 JUSTICE SOTOMAYOR: But what stops the --
20 the non -- the people who oppose a union policy from
21 sending a letter, asking a meeting, expressing their
22 disapproval in any forum they want and in any way they
23 want, to whatever policy a union is advocating?

24 Is there anything that stops them from doing
25 that?

1 MR. MESSENGER: No, there isn't, Your Honor.
2 However, I submit that it's not --

3 JUSTICE SOTOMAYOR: So where's the First
4 Amendment abridgement? They can do whatever they want.
5 They can speak however they want in support of or in
6 opposition to absolutely anything the union is doing.

7 MR. MESSENGER: It's -- Your Honor, it's the
8 compelled speech, and the fact that the individuals have
9 other First Amendment rights is not exculpatory. So
10 it's the -- it's the compulsion to support the SEIU's
11 positions in petitioning the State. That is the First
12 Amendment violation.

13 And the fact that --

14 JUSTICE SCALIA: I suppose -- I suppose the
15 fact that you're entitled to speak against abortion
16 would not justify the government in requiring you to
17 give money to Planned Parenthood?

18 MR. MESSENGER: Exactly, Your Honor.

19 JUSTICE SCALIA: That's the argument you're
20 making.

21 MR. MESSENGER: Yes. And actually, I submit
22 that the fact that providers do remain free to petition
23 the State only shows that the so-called "labor peace"
24 interest hasn't been done here by Illinois because the
25 interest there is to avoid competing demands from

1 various providers.

2 Here, the fact that each provider does, in
3 fact, remain free to petition the State through
4 organizations other than the SEIU shows that the State
5 has not achieved any sort of labor peace, as the State
6 could potentially achieve within its workplace by --

7 JUSTICE KAGAN: Mr. Messenger --

8 JUSTICE KENNEDY: Well, but, I mean, I
9 suppose there could be labor peace if the Respondents
10 were to prevail. I mean, that -- that assumes that your
11 theory of the case is going -- is going to prevail.

12 MR. MESSENGER: Well, no. Even if the
13 scheme here --

14 JUSTICE KENNEDY: I mean, doesn't the --
15 isn't there labor peace -- let's assume that's a valid
16 interest -- isn't there labor peace if one union
17 represents these healthcare providers and makes and
18 negotiates a contract with the government?

19 MR. MESSENGER: No, I submit that the labor
20 peace interest isn't valid here because, in dealing with
21 the Medicaid program, the State doesn't have an interest
22 in avoiding competing demands from rival groups
23 regarding its policies on that; That is, democratic --

24 JUSTICE KENNEDY: Well, why doesn't it?
25 It -- it gets the demand from the union, it recognizes

1 it's reasonable; that's the policy, and then it can move
2 forward with the policy.

3 MR. MESSENGER: Well, the State could
4 unilaterally do that, without bargaining with the union.

5 JUSTICE ALITO: Mr. Messenger, do you think
6 the issue of exclusive representation is inextricably
7 tied to the issue of the assessment of an agency fee?
8 Can't you have the former without the latter?

9 MR. MESSENGER: Yes, you can, in At least
10 two ways. The first of which is that Knox, of course,
11 lays out a two-part test. The second part test -- even
12 if the first is satisfied, that the mandatory
13 association, here, exclusive representation, is
14 justified by compelling interest, you still go to the
15 second test of whether or not fees are a necessary
16 incident to that representation, and I submit that
17 Illinois does not satisfy that test.

18 JUSTICE GINSBURG: But you're not -- you're
19 not challenging -- or it's confusing whether you are or
20 not -- the very idea of exclusive representation by a
21 union. Are you saying that, in the public sector, there
22 cannot be exclusive -- an exclusive bargaining agent?

23 MR. MESSENGER: It's not directly challenged
24 in this case, but it becomes relevant under the first
25 Knox test, which asks whether the mandatory association

1 being supported by the compulsory fees is justified by a
2 compelling State interest.

3 JUSTICE GINSBURG: Is the mandatory -- let's
4 take out, as Justice Alito suggested, take out the
5 agency fee or fair-share fee or whatever it is, but
6 there is an exclusive bargaining agent. Workers, your
7 clients, say, we don't want to be represented by that
8 union.

9 The union is authorized to represent
10 everybody in the workplace and has to represent even
11 nonmembers, as well, without any discrimination. And --
12 and are you taking the position that there cannot be an
13 exclusive bargaining agent if there are any dissenters
14 who don't want to be represented by a union?

15 MR. MESSENGER: Not in this case, Your
16 Honor. This case does not present the question of
17 whether exclusive representation alone would constitute
18 a First Amendment injury because the complaint here is
19 focused towards the compulsory fees, so that particular
20 issue is not here.

21 JUSTICE KAGAN: So, Mr. Messenger, even on
22 the compulsory fees -- I mean, what strikes me is that
23 this is -- I'm just going to use the word here -- it is
24 a radical argument. It would radically restructure the
25 way workplaces across this country are -- are run.

1 And let me just put it to you this way and
2 ask if you agree with this -- with this statement.
3 Since 1948, since the Taft-Hartley Act, there has been a
4 debate in every State across this country about whether
5 to be a right-to-work State, and people have disagreed.

6 Some States say yes, some States say no. It
7 raises considerable heat and passion and tension, as we
8 recently saw in Wisconsin. And -- but -- you know,
9 these are public policy choices that States make.

10 And is it fair to say that what you're
11 suggesting here -- your argument is essentially to say
12 that, for 65 years, people have been debating the wrong
13 question when they've been debating that because, in
14 fact, a right-to-work law is constitutionally compelled?

15 MR. MESSENGER: In the public sector, yes,
16 that it is in fact -- well, the first public sector
17 labor law was actually 1959 in Wisconsin, so it's
18 relatively recent when you're involving with government.
19 Yes, our position is -- is that, in the public sector,
20 when government is involved, compulsory fees are illegal
21 under the First Amendment.

22 JUSTICE KENNEDY: Suppose the Court were to
23 say that on the issue of salaries there is no First
24 Amendment violation, that -- that Abood should remain
25 applicable to public employee unions.

1 Are there other issues that public employee
2 unions necessarily raise in collective bargaining that
3 raise other concerns about governmental policies that
4 union members might disagree with?

5 MR. MESSENGER: Yes, Your Honor. Speaking
6 of true employees -- we're not speaking of Medicaid
7 providers, but speaking of true employees, this was
8 discussed in Abood with respect to public school
9 teachers and all the different aspects that the union
10 petitions over that has to do with class sizes, hours
11 worked.

12 Benefits are a huge issue, of course, in
13 terms of financially for many school districts, health
14 benefits. So there are many issues of the way the
15 school district actually operates.

16 JUSTICE SOTOMAYOR: How about here for your
17 employees? They negotiate health insurance. Do they --
18 they don't negotiate termination because that's up to
19 the individual --

20 MR. MESSENGER: Yes.

21 JUSTICE SOTOMAYOR: -- parties. So there's
22 no grievance committee. Do they negotiate the tasks
23 that will be reimbursed?

24 MR. MESSENGER: No. The tasks that the
25 State will reimburse are set in a service plan. That's

1 not a mandatory --

2 JUSTICE SOTOMAYOR: All right. So you're
3 being asked to have a fair share of how much you're
4 getting from the State for your services and health
5 insurance. What else is negotiated that you're being
6 asked to pay for?

7 MR. MESSENGER: Well, what -- as far as what
8 they're being forced to support is the reimbursement
9 rate. The State is giving money to an SEIU healthcare
10 fund, which many providers may or may not use. The
11 State is giving money to an SEIU member training fund to
12 provide voluntary training to providers and also to
13 conduct an orientation that new providers will be forced
14 to support.

15 JUSTICE SCALIA: Those things, you can
16 argue, are not part of the representation for which they
17 should be charged, and they should get their money back
18 for those things, if they're actually not -- not getting
19 any benefit from them.

20 MR. MESSENGER: Well, I would submit that
21 they shouldn't be forced to pay for any of this
22 petitioning regarding how the State chooses to run this
23 Medicaid program.

24 JUSTICE SCALIA: No, but they're -- I mean,
25 what our cases say is you -- you can be compelled not to

1 be a free rider, to -- to pay for those items of
2 bargaining that benefit you, as well as everybody else.

3 But you don't -- you don't have to pay for
4 stuff that -- that is not within that description, stuff
5 that doesn't benefit you at all.

6 MR. MESSENGER: That's true for true
7 employees, under this Court's previous cases, but the
8 question, of course, here is do those same principles
9 apply to Medicaid providers or anyone else who receives
10 money from government. And that's --

11 JUSTICE GINSBURG: They receive a salary --
12 I mean, they receive -- it's not a government grant to
13 the -- to the healthcare worker. They receive a
14 paycheck, and the government withholds from that. The
15 government makes a FICA contribution for them and
16 withholds the part that's their responsibility.

17 So it looks just like they are an employee
18 of the government, being paid by the government, and the
19 government doing things that an employer does, withhold
20 income tax, pay in part the FICA tax, withhold the other
21 part. And they are -- they're also covered by workers'
22 compensation, aren't they?

23 MR. MESSENGER: Oh, yes. Under Illinois
24 law, they have --

25 JUSTICE GINSBURG: As -- as employees of the

1 State?

2 MR. MESSENGER: Yes, Your Honor. But the
3 wage -- in fact, defining whether it's wages or a flat
4 reimbursement rate or a grant I don't -- I submit is not
5 constitutionally relevant. So, for example, the Act was
6 recently extended to independent nurses and therapists
7 who provide in-home care.

8 They're paid a flat rate, as opposed to an
9 hourly -- what do you call it, wage. Constitutionally,
10 there's no difference. The bottom line is it's money
11 from government, from, here, a Medicaid program, to
12 provide care to other individuals.

13 And I submit that doesn't create an
14 employment relationship any more than a doctor is
15 privately employed by a health insurer -- insurance
16 company, merely because they pay for it.

17 JUSTICE GINSBURG: They're not getting a
18 paycheck and the insurance -- insurer is not deducting
19 withholding tax -- isn't paying FICA tax?

20 MR. MESSENGER: Well -- that is paid, but
21 the State is doing it as pay agent. And so while the
22 money is coming from the State, the State is doing it as
23 pay agent for the person with disabilities, who is truly
24 the employer.

25 JUSTICE ALITO: I thought the State took the

1 position that these individuals are State employees for
2 one purpose only, collective bargaining. Isn't that
3 their position?

4 MR. MESSENGER: Yes, that's right in the
5 statute, Your Honor, that's it's solely for purposes of
6 collective bargaining.

7 JUSTICE ALITO: So if one of these
8 individuals commits gross misconduct, causes the death
9 of a patient, the State has no liability?

10 MR. MESSENGER: It's right in the statute.
11 The State said it's not -- does not extend vicarious
12 liability to independent providers.

13 JUSTICE BREYER: When you come back, I'd
14 appreciate your thinking about this, but obviously,
15 you're asking us to overturn a case that's been the law
16 for 35 years.

17 I count hundreds of citations in the
18 opinion, and I guess there are millions of instances in
19 which employees and employers and others have relied on
20 it in collective bargaining, so I'd appreciate your
21 saying sentence a or two of why we should upset
22 reasonable expectations over so long a period of time.

23 MR. MESSENGER: Sure.

24 I'd like to reserve the remainder of my
25 time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Smith.

3 ORAL ARGUMENT OF PAUL M. SMITH
4 ON BEHALF OF THE RESPONDENTS

5 MR. SMITH: Thank you, Your Honor.

6 Mr. Chief Justice, and may it please the
7 Court:

8 10 years ago, the State of Illinois made a
9 decision about the best way to deliver homecare services
10 to thousands of persons with physical disabilities in
11 the State who, without those services, would need to
12 live in institutional settings.

13 It made the judgment that working with the
14 union to negotiate and implement a collective bargaining
15 agreement for these workers that it was paying would
16 help meet its service delivery goals for this
17 population, this group of workers, which was --

18 JUSTICE SOTOMAYOR: Why? If -- your -- your
19 adversary says that the reimbursement rate is set by the
20 Medicaid program, so why do you need a union to tell you
21 how much to pay, if it's already set?

22 MR. SMITH: There is no reimbursement rate
23 for these workers set by the Medicaid program, Your
24 Honor. The amount of money they are paid is an hourly
25 wage set in the collectively bargaining agreement. When

1 the union was first recognized, it was \$7 an hour and
2 there were no benefits.

3 Because the State has chosen to work with
4 this union, it has produced a package of benefits
5 designed to create a solution to the morale problems,
6 the recruitment problems, the retention problems --

7 JUSTICE SCALIA: I don't understand what
8 you're saying. If there were no union, there would be
9 no wages?

10 MR. SMITH: Your Honor, the -- the State's
11 judgment is that it can better make these determinations
12 in partnership with the union and that the process of
13 negotiation gives it both tangible and intangible
14 benefits. The tangible benefit is it figures out what
15 the priority needs of the workers are.

16 JUSTICE SCALIA: So from -- from the outset,
17 it set up the union, right, and the union said, We want
18 7 bucks an hour, was that it?

19 MR. SMITH: The 7 bucks an hour was what
20 they were getting paid before the union was on the
21 scene, Your Honor, and the State --

22 JUSTICE SCALIA: And who picked that number?

23 MR. SMITH: The State did.

24 JUSTICE SCALIA: The State did. Okay.

25 MR. SMITH: And -- and it gave the workers

1 the opportunity, as it has every right to do, to have a
2 majority of the people in the workforce say, we'd like
3 to be represented -- we'd like to have somebody in the
4 room representing us.

5 And, as a result, they not only have
6 substantially increased the wages, but they have paid
7 healthcare, they have paid training and orientation.
8 There's a grievance system, which is extremely --

9 CHIEF JUSTICE ROBERTS: I thought Medicaid
10 had something to do with how much they were reimbursed.
11 You're saying Medicaid is beside the point?

12 MR. SMITH: Your Honor, in this kind of
13 thing, we're talking about the wages of basic care
14 workers like, if they were in a nursing home or in a
15 State hospital or wherever they might be. The fact that
16 Medicaid --

17 CHIEF JUSTICE ROBERTS: If you hire a
18 homecare provider to provide homecare services, isn't
19 how much the person is compensated -- you have a
20 Medicaid program, a cooperative program with the Federal
21 Government, doesn't it set the rates with which those
22 services are reimbursed?

23 MR. SMITH: The wages for these kinds of
24 workers are set by the State under the Medicaid program.
25 They're not set by the Federal Government, Your Honor.

1 CHIEF JUSTICE ROBERTS: Well, right, that --
2 it's a cooperative State/Federal program. But isn't
3 there -- are you saying the wages have nothing to do
4 with how much the -- the Medicaid reimbursement for
5 these types of services?

6 MR. SMITH: Your Honor, the -- these are
7 people being employed by the State with money that
8 happens to come from the Medicaid program in order --
9 it's a Federal project to get people out of nursing
10 homes into their homes, and so they let the State divert
11 money over to pay for these people to be in the home.

12 CHIEF JUSTICE ROBERTS: But they don't just
13 give you a bunch of money and say, Well, here it is, you
14 figure out how much you want to -- I mean, I thought
15 this case had something to do with the fact that
16 Medicaid was used to reimburse these employees, and
17 you're saying it has nothing to do with that at all?

18 MR. SMITH: Your Honor, as I understand the
19 constitutional challenge in this case, the source of the
20 money -- the State's decision about --

21 CHIEF JUSTICE ROBERTS: I just want to
22 know -- not what their challenge is. I want to know
23 where the money comes from. It comes from Medicaid, and
24 I assume Medicaid sets some parameters about how much
25 you can reimburse homecare providers.

1 MR. SMITH: I'm not aware of any, Your
2 Honor. My understanding --

3 CHIEF JUSTICE ROBERTS: So you can negotiate
4 whatever rates you want with the homecare providers,
5 regardless of what Medicaid says about those services?

6 MR. SMITH: "You," the State of Illinois,
7 you mean?

8 CHIEF JUSTICE ROBERTS: Yes, yes.

9 MR. SMITH: The State of Illinois, Your
10 Honor, as far as I know -- I'm not aware of any
11 limitation. I expect that there may be some at some
12 point, but in terms of the --

13 JUSTICE SOTOMAYOR: Mr. Smith, I think that
14 there's -- I must say that I might have labored under
15 it. From your adversary's statement, it appears as if
16 there's a belief that the Federal Government sets a
17 fixed amount, and that's what the State has to pay.

18 Whether the Federal Government pays you a
19 certain amount, however, you seem to be saying the State
20 can go above that amount if it chooses. That's the
21 cooperative nature of this.

22 MR. SMITH: Your Honor, the exact nature of
23 the fund transfer from the Federal government to the
24 State may well be based on an individual's annual costs
25 with a particular diagnosis. I'm in the realm of

1 speculation here, but it's very clear from this record
2 that these decisions about how these individuals will be
3 paid are made by the State, and that they have the
4 discretion under the program to do that, and that they
5 decided that they would deal with the problems of
6 recruitment and retention and morale in this workforce,
7 which is, of course, scattered to tens of thousands of
8 work sites across the country.

9 JUSTICE ALITO: Mr. Smith, what I don't
10 understand is why the union's participation in this is
11 essential. The State can say, this is how much these
12 people are being paid -- it's not enough, we want to
13 increase it, we want to increase it by 10 percent, 20
14 percent, 30 percent, whatever it is. They need some --
15 they should have extra benefits. Well, we'll give them
16 these benefits and these benefits and these benefits.

17 Why do they need to have the union intervene
18 here?

19 MR. SMITH: The State of Illinois, like many
20 employers, decided that, A, they would get that right
21 more likely if they were dealing with a representative
22 of the workers who told them what they care about,
23 whether it's paid vacation versus higher wages versus
24 less hours during the week or more hours during the week
25 or whatever it might be.

1 It also said that, because these decisions
2 are going to be made in the process of negotiation,
3 which the workers know they have a place at the table,
4 somebody who was there looking out for their interests,
5 the workers will have a different sense of commitment
6 to --

7 JUSTICE ALITO: Well, that -- that's fine
8 for the workers who want the union to represent them in
9 making these demands on the State.

10 Let me give you this example, which I think
11 gets to what the -- the plaintiffs in this case find
12 disturbing. Let's say this is -- this involves a
13 teachers union. So the teachers union is negotiating
14 about the issue of tenure and merit pay, and the union
15 is opposed to any change in the tenure system, it's
16 opposed to merit pay.

17 Okay. Now, there's a teacher who's not a
18 member of the union who disagrees completely with the
19 union on these issues, but this teacher -- and the
20 teacher is not a member of the union, but still has to
21 pay a pretty hefty agency fee, maybe \$700 a year. So
22 the teacher is paying this money to the union to make an
23 argument to the employer with which the teacher
24 completely disagrees.

25 Now, if this teacher just wants to get back

1 to a neutral position, the teacher is going to have to
2 spend \$700 or maybe \$500 of his or her own money, pay
3 that to another organization that will present that
4 teacher's point of view to the employer.

5 How can that be -- what would you say to
6 that, to that teacher? That -- you know, You have a
7 right to be -- you have a right to say whatever you want
8 on these issues, but you don't have a right to be a
9 teacher?

10 MR. SMITH: Well, Your Honor, I would say
11 that the Court has correctly held, over a period of more
12 than 30 years, that that requirement is an appropriate
13 thing which a public employer is allowed to impose
14 because of the duty of fair representation and because
15 of the benefits of allowing collective bargaining to
16 proceed with the duty of fair representation imposed on
17 the union.

18 As Justice Scalia put it in his Lehnert
19 opinion, this is not a normal sort of free rider
20 argument. This is a free -- free rider argument where
21 the law requires the union to look after that teacher
22 and make sure that they get treated equally --

23 JUSTICE ALITO: Mr. Smith, are you saying
24 that this -- that the unions reluctantly accept the duty
25 of being the exclusive representative for all the

1 employees? They don't really want to do this, but the
2 law requires them to do this, but because the law
3 requires them to do this, then they have to get this
4 agency fee?

5 Is that really -- is that realistically what
6 happens?

7 MR. SMITH: Well, that is -- that is the
8 system we have, Your Honor. And imagine what the world
9 would look like if there weren't --

10 JUSTICE ALITO: Seriously, the unions do not
11 want to have the -- they don't want to be given the
12 status of the exclusive bargaining agent for the
13 employees?

14 MR. SMITH: I -- I think there may be
15 variation on that. I imagine there might be some union
16 out there that would love to be able to favor their
17 members over other. But the law doesn't require that,
18 and for a very good reason, including the First
19 Amendment reason.

20 Imagine a world in which that teacher is --
21 would be paid 10 percent less as we were discussing
22 before, because that teacher has chosen not to be a full
23 member of the union, and imagine the pressure on
24 associational rights that would be created for that
25 teacher faced with that choice.

1 You could be paid 10 percent less doing the
2 same work, or you can be paid the same as everybody
3 else, but you have to fully join the union and pay for
4 their political speech and pay for everything on the
5 nonchargeable side of the line.

6 And -- you know, what this Court has done
7 over the last 30 years is use that distinction between
8 chargeable and nonchargeable items to balance the First
9 Amendment interests of the --

10 JUSTICE KENNEDY: But in talking about First
11 Amendment interests, let me ask you this: Is it not a
12 standard issue in collective bargaining for the
13 employees' union to talk about the size of the
14 workforce?

15 MR. SMITH: Your Honor --

16 JUSTICE KENNEDY: Well, it's necessarily so
17 if they're talking about hours.

18 MR. SMITH: It is -- it is certainly
19 possible that in some situations --

20 JUSTICE KENNEDY: All right. And would you
21 think that this is a legitimate subject of collective
22 bargaining for which the nonunion member has to pay?

23 MR. SMITH: It is certainly not a subject of
24 collective bargaining that could arise in this
25 situation. This situation --

1 JUSTICE KENNEDY: No, I'm talking about --
2 let's say the teachers' union. They're talking about
3 classroom size. They're talking about hours. That
4 necessarily involves the size of the workforce, does it
5 not.

6 MR. SMITH: It -- it is possibly, Your
7 Honor. It's entirely up --

8 JUSTICE KENNEDY: It's not only possible;
9 it's necessarily true. Let's assume that it's true.

10 MR. SMITH: Assuming -- assuming a school
11 district decides to let --

12 JUSTICE KENNEDY: Let's -- let's assume that
13 it's true, that a union's position necessarily affects
14 the size of government. Is not the size of government a
15 question on which there are fundamental political
16 beliefs -- fundamental convictions that are being
17 sacrificed if a nonunion member objects to this line of
18 policy?

19 Are there not other union proposals that
20 say -- that State employee's salary must be a certain
21 percentage of the total -- total State expenditure?
22 Does this not also involve the size of government, which
23 is a fundamental issue of political belief?

24 MR. SMITH: Any outcome of a negotiation of
25 a collective bargaining agreement involving public

1 employees will involve the expenditure of public money
2 in a variety of ways, and the outcome of that will, in
3 that limited sense, at least, be a matter of public
4 concern every bit as much and -- but no more than when a
5 government contractor --

6 JUSTICE KENNEDY: I'm not talking about a
7 question of public concern. I'm talking about whether
8 or not a union can take money from an employee who
9 objects to the union's position on fundamental political
10 grounds.

11 MR. SMITH: Well, Your Honor, that is what
12 the Abood distinction between chargeable and
13 nonchargeable --

14 JUSTICE KENNEDY: And I'm -- I'm asking the
15 justification for that under the First Amendment.

16 MR. SMITH: Right. And --

17 JUSTICE KENNEDY: In -- in an era where
18 government is getting bigger and bigger, and this is
19 becoming more and more of an important issue to more
20 people.

21 MR. SMITH: But I think it's important to
22 understand that, while there is an impingement on the
23 First Amendment interest on any employer -- employee
24 required to pay the fair share fee, this isn't any --
25 the government employee context in which the government

1 has the ability when it serves its important interest as
2 employer to demand that its employees --

3 JUSTICE KENNEDY: Well, you say it's a fair
4 share, but that's the issue in the case if you're
5 looking at the legitimacy of Abood.

6 MR. SMITH: Well, Your Honor, look at --
7 look at --

8 JUSTICE KENNEDY: I mean, you say it's fair
9 share. The objectors to Abood say that it isn't.

10 MR. SMITH: Look at what the union is --
11 what the -- what the money is being spent on in this
12 case. It's being spent on negotiating the contract, which
13 has produced a package of benefits and wage increases
14 that have been extremely important to everybody in -- in
15 this workforce.

16 It's being spent on a call center that
17 allows people to call to their union and get answers to
18 questions about problems, a grievance system that makes
19 sure their paychecks don't go missing and helps them
20 address that problem, training, gloves that they need
21 for their personal safety in the workplace, and
22 healthcare benefits.

23 Now, there are -- may be people who think
24 it's politically controversial to have to contribute to
25 a union that does those things and nothing else. But I

1 submit to you that balance that against the interests of
2 the State as employer in saying we want to have this
3 partnership with this union, this will help us do a
4 better job delivering services to this vulnerable
5 population and save us a lot of money keeping the
6 matter --

7 CHIEF JUSTICE ROBERTS: One thing,
8 Mr. Smith, the first word in your brief is "Medicaid."
9 I don't understand because the argument can be made that
10 Medicaid reimbursement rates is an important public
11 policy issue, not simply a labor issue.

12 Now, let's say you have a teachers' union,
13 okay? They think it's a very important public issue.
14 They have a platform. They engage in activities to get
15 higher Medicaid reimbursement rates. Is that something
16 that a nonunion member would have to pay for, or would
17 they -- would that expense be segregated out of what
18 they must pay?

19 MR. SMITH: I'm sorry, Your Honor. Could I
20 just hear the question one more time?

21 CHIEF JUSTICE ROBERTS: Teacher -- teacher
22 union, okay?

23 MR. SMITH: Yes, sir.

24 CHIEF JUSTICE ROBERTS: They have a
25 political position on Medicaid rates. They spend money

1 to advance that position. If you're a teacher, but
2 you're not a member of the union, do you have to pay for
3 that expenditure?

4 MR. SMITH: It would seem to me, Your Honor,
5 something that's not within the chargeable expenses that
6 a teachers' union could charge --

7 CHIEF JUSTICE ROBERTS: Right. Same -- same
8 public -- same expenses for Medicaid --

9 MR. SMITH: Yes.

10 CHIEF JUSTICE ROBERTS: -- but you're a
11 homecare provider. Your union spends to get higher
12 Medicaid rates. You're not a member of the union. Do
13 you have to pay for their political activity to raise
14 Medicaid rates?

15 MR. SMITH: To the extent that you're
16 talking about the negotiation over how much you're going
17 to be paid for providing services, I think it's
18 perfectly appropriate under the Court's cases to --

19 CHIEF JUSTICE ROBERTS: So one -- I'm sorry.
20 If I could just finish the thought. So the same speech
21 with respect to one union is a speech on a matter of
22 public concern, but with respect to another union, it's
23 not?

24 MR. SMITH: It's on the chargeable side of
25 the line when it has to do with the -- the terms and

1 conditions of employment of the -- of the members of the
2 union or the nonmembers of the union.

3 CHIEF JUSTICE ROBERTS: Okay. So it's
4 Medicaid. Now, is that part of the chargeable expenses
5 or not? This union wants to talk about Medicaid
6 reimbursement rates. Can a nonunion member be compelled
7 to share that expense?

8 MR. SMITH: If what you mean by Medicaid
9 reimbursement rates, Mr. Chief Justice, is the hourly
10 rate that's going to be paid to those people --

11 CHIEF JUSTICE ROBERTS: I mean Medicaid
12 reimbursement rates. That's what I mean by Medicaid
13 reimbursement rates.

14 MR. SMITH: Well, if that's what you mean,
15 then it seems to me very clear that they should be
16 allowed to charge the -- the nonmember because that
17 person is going to get all the benefit of it.

18 CHIEF JUSTICE ROBERTS: So in this case --
19 in this case, if this union negotiates over Medicaid
20 reimbursement rates, it is chargeable.

21 MR. SMITH: Yes, Your Honor, to the
22 extent --

23 CHIEF JUSTICE ROBERTS: Even though, what I
24 understood your answer to be, is that Medicaid
25 reimbursement rates had nothing to do with this case.

1 MR. SMITH: The only thing that can be
2 negotiated about in this case, Your Honor, is the terms
3 and conditions of employment of these workers that is
4 within the control of the State. That's what the
5 Illinois statute says. And --

6 JUSTICE ALITO: What about the issue of --

7 CHIEF JUSTICE ROBERTS: And that includes
8 Medicaid reimbursement rates.

9 MR. SMITH: In the -- in the limited sense
10 that they're hourly wages going to these individuals,
11 yes.

12 JUSTICE BREYER: The question you're being
13 asked, I think, is a broader question. Collective
14 bargaining with any employer, meat packers, hours,
15 safety depends on hours, always can involve public
16 interest questions.

17 MR. SMITH: Yes, Your Honor.

18 JUSTICE BREYER: But I think the question
19 you're being asked is where you have SEIU or AFSCME, and
20 they're government unions, does it have a bigger mix of
21 public policy issues; and therefore, should this Court
22 get into the business -- I'm putting it in a little
23 loaded way because I don't want to suggest the answer.

24 Should this Court make that distinction and
25 get into the business of saying, when the union is too

1 much of a -- wages, hours, and working conditions are
2 too likely to affect public issues, and the other ones
3 less likely, et cetera, you see the distinction that the
4 question that was added suggests?

5 Now, I would like you to think about --
6 that's a philosophical question -- or a very broad First
7 Amendment question. And I'd like to hear what your
8 answer is and the government's.

9 MR. SMITH: My answer, Your Honor, would be
10 that the fact that it is a public employee union,
11 representing public employees, means that, in one sense,
12 everything that is being negotiated could be viewed as a
13 greater matter of public concern.

14 On the other hand, that is not a reason, as
15 Abood held, to up the ante in terms of constitutional
16 scrutiny. To the contrary, this is the government as
17 employer dealing with its employees about the basic
18 terms and conditions of their employment. And --

19 JUSTICE ALITO: Well, let me ask you a
20 question about pensions. Now, that's a very big public
21 policy issue. I think, in Illinois, the legislature
22 recently cut pensions of -- of public employees. That
23 would be a subject -- that could be a subject of -- of
24 collective bargaining, right? So that would be --
25 bargaining on that would be chargeable?

Official

1 MR. SMITH: It would be a subject if the
2 State chose to let -- let it become a subject. The
3 State completely controls what -- what can be a subject
4 of collective bargaining and what can't.

5 JUSTICE ALITO: Well, if the -- if the union
6 spends a lot of money trying to bargain on that issue,
7 that's -- that's a chargeable expense, is it not?

8 MR. SMITH: If the State has chosen to make
9 it part of the contract that can be negotiated, yes.

10 JUSTICE ALITO: All right. Now, what do you
11 say to the young employee who is not very much concerned
12 at this point about pensions, but realizes there's a
13 certain pot of money, and it's either going to go for
14 pensions, or it's going to go for salary at the present
15 time.

16 So that employee who's not a member of the
17 union has to pay for the union to bargain with the --
18 the State to achieve something that's contrary to that
19 person's interest. But you say that person is a free
20 rider.

21 MR. SMITH: Yes, Your Honor. That -- that
22 person, if it's not paying their share of that, then you
23 have two things that happened. The other members -- the
24 other people in the workforce have to pay more to
25 support the process, or the union doesn't have the

1 resources needed to be a -- an adequate partner with the
2 State in producing the outcome that the State has chosen
3 to try to seek, which is an outcome where the mutually
4 beneficial arrangements are made that satisfy the
5 priorities of everybody here, the workers and the State
6 and, indeed, the clients that they serve.

7 JUSTICE KENNEDY: Suppose the young person
8 thinks that the State is squandering his heritage on
9 unnecessary and excessive payments for benefits and
10 wages. Is that not a political belief of the highest
11 order? And -- you know, we talk about free riders,
12 which is an epithetical phrase.

13 Maybe the objecting employee would say that
14 the union is a speech distorter; it is taking views that
15 are not his and making them mandatory subject to
16 bargaining and charging him for it.

17 MR. SMITH: What's missing, I think, in this
18 conversation, Your Honor, is that all of these burdens
19 on people's associational rights or free speech rights
20 or whatever you want to call them arises only because
21 somebody has chosen to come take this job working for
22 the State on the terms the State offers.

23 And as you've said many times --

24 JUSTICE KENNEDY: So your position is that
25 the public employees must surrender a substantial amount

1 of First Amendment rights to work for the government?

2 MR. SMITH: When there are substantial
3 interests of the government as employer that are served
4 by the sacrifice. What you've said over and over in
5 *Duryea*, in *Garcetti*, and in a whole line of cases is the
6 government gets to have leeway as an employer when there
7 are real interests at stake, and that, in that
8 situation, the employee could be put to the choice.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 General.

12 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE RESPONDENTS

15 GENERAL VERRILLI: Mr. Chief Justice, and
16 may it please the Court:

17 The line drawn in *Abood* is sound. It has
18 the force of *stare decisis* behind it, it is completely
19 consistent with this Court's First Amendment
20 jurisprudence, and it requires affirmance.

21 If I could, I'd like to turn to the
22 questions that Justice Kennedy has raised because I do
23 think it gets to the key issue in the case. I think the
24 key point -- the key takeaway in this case is that the
25 context we are dealing with here is the government as

1 proprietor and manager of its own operations. And this
2 Court's case law has said, over and over again, that in
3 that context, two things follow.

4 First, the government's interest in the
5 effective and efficient carrying out of its own
6 operations is entitled to very substantial weight, more
7 substantial weight than it would get if you were looking
8 at the government as a sovereign regulating the
9 citizenry.

10 And second, yes, Justice Kennedy, indeed, as
11 Your Honors' opinion in *Garcetti* and Your Honors'
12 opinion in *Borough of Duryea* recognized both times, the
13 employees' First Amendment interests are diminished to
14 the extent that the government has more latitude when
15 the government can show that the obligation it is
16 imposing is in furtherance of the government's
17 legitimate interests as manager of its own operations.

18 CHIEF JUSTICE ROBERTS: General Verrilli,
19 does Medicaid have anything to do with this case?

20 GENERAL VERRILLI: Yes. Let me do my best
21 to try to clear that up, Mr. Chief Justice. I'm going
22 to give you the best answer I can to your question.
23 Remember, Medicaid, of course, is a joint Federal/State
24 program. The Federal government provides funds; the
25 State provides funds.

1 Here, we're operating within a waiver
2 program in which the State is given considerable
3 latitude to set wages and set rates, so long as it is
4 saving money as compared to the institutionalization of
5 this population.

6 My understanding is that HHS will review
7 wage rates set to make sure that they meet very general
8 parameters. They were of the kind described in the
9 Douglas case that was before the Court a couple of years
10 ago.

11 CHIEF JUSTICE ROBERTS: Right, right.

12 GENERAL VERRILLI: That -- are they high
13 enough to make sure the services providing -- they're
14 provided effectively and are they -- and are they
15 constrained enough that you're not wasting money--

16 CHIEF JUSTICE ROBERTS: Right. Your
17 statement of interest -- your statement of interest
18 explaining why you are here today discusses the effect
19 of the Medicaid program.

20 GENERAL VERRILLI: Right, but it's not that
21 the -- but the Federal government isn't approving the
22 specific hourly wage rate as Medicaid reimbursement
23 within this program. That's a judgment that the
24 Medicaid program leaves to the considerable discretion
25 of the State.

1 CHIEF JUSTICE ROBERTS: If the -- if the
2 union wants to talk about Medicaid rates with the State
3 because they would get a higher wage or could get a
4 higher wage if Medicaid reimbursement was higher, is
5 that within the -- their functioning as a union rather
6 than a political group?

7 GENERAL VERRILLI: Not as I understand it.
8 I think applying the line of Lehnert, that that would be
9 on the impermissible side of the line. That would be
10 effectively seeking to change public policy by changing
11 what the legislature or the --

12 CHIEF JUSTICE ROBERTS: Oh, so if the union
13 wants to say, Look, the only way our people are going to
14 get higher wages is if there's a higher Medicaid
15 reimbursement rate for this service, that is not within
16 the scope of collective bargaining?

17 GENERAL VERRILLI: I think -- my
18 understanding is that that would be -- the question
19 there was at which side of the line that the Court drew
20 in Lehnert is that on.

21 I think that's probably on the -- on the
22 impermissible side of the line. But that's where the
23 fight would be. It would be over where that line should
24 be drawn, not over whether the -- whether the State, as
25 manager of its own operations, can use collective

1 bargaining with a fair share, as Justice Scalia
2 mentioned earlier, in a way that private employers
3 routinely do.

4 I mean, I do think that's the fundamental
5 point of Abood, that private -- that the government as
6 employer, as manager of its own operations, ought to be
7 able to make the same kind of choice that private
8 employers make when they think it advances their
9 interests in efficiency and sound operations.

10 JUSTICE ALITO: If the plaintiffs in this
11 case worked in a unionized -- excuse me -- in a unionized
12 Federal workplace, would they be assessed a mandatory
13 agency fee?

14 GENERAL VERRILLI: No, they would not,
15 Justice Alito, and we're not -- we're not here making an
16 argument that, as a matter of policy, States ought to
17 adopt fair share or not. The thing that matters to us
18 is the principle of First Amendment law that's at stake.

19 JUSTICE ALITO: So the Federal government
20 doesn't think that it needs to assess a mandatory agency
21 fee from, let's say, the -- the employees in the Border
22 Patrol, in order to make sure that the Border Patrol has
23 high morale, sufficient salary, sufficient benefits, it
24 can do without the agency fee in that situation?

25 GENERAL VERRILLI: It hasn't, but the key

1 point for us, the point of vital importance for the
2 United States here, is that the Court continue to
3 recognize the context -- the First Amendment context of
4 the government as manager of its own operations. And
5 whatever choice the United States has made, many States
6 have made different choices in their role as manager of
7 their own operations.

8 And under the Court's established case law,
9 which Abood, I think, is a quite good example of, the
10 principle that, when the government is acting to further
11 its operations as manager, they get substantial
12 latitude. Now, there's a limit on that, of course.
13 They can't use that authority to -- they can't leverage
14 that authority to affect the way citizens interact as
15 citizens --

16 JUSTICE SCALIA: Of course, one can be
17 skeptical about whether -- when States do this, they are
18 doing it because it's more -- more efficient as an
19 employer because some States have tried to force private
20 employers to have a closed shop, haven't they?

21 GENERAL VERRILLI: Well, I think --

22 JUSTICE SCALIA: And there's no -- you know,
23 no State government interest in it. There's just State
24 interest in unions.

25 GENERAL VERRILLI: Yes, but, here, we

1 argue --

2 JUSTICE SCALIA: And unions getting a lot of
3 money from people who don't belong in the unions. So
4 one can be skeptical about whether this is really what's
5 going on, that the State really thinks it's going to be
6 a lot easier if it has a closed shop.

7 GENERAL VERRILLI: I guess what I would say
8 about that, Justice Scalia, is that one could speculate
9 about motives of States like Illinois, one could
10 speculate about motives of the right-to-work States, but
11 I would suggest that, under our Federal system, that
12 States get to make those kinds of policy choices.

13 And Illinois has made a policy choice, as
14 many private employers have, that using collective
15 bargaining -- and it is, I want to stress here, very
16 narrowly tailored collective bargaining. By law, it can
17 only be over wages, hours, and conditions of employment,
18 by law.

19 JUSTICE ALITO: Do you think that the
20 specific factual background of what occurred here
21 provides a basis for skepticism about Illinois' reason
22 for adopting this?

23 GENERAL VERRILLI: I don't think so. When
24 the legislation was enacted, it was enacted with a very
25 large bipartisan margin, and I just don't think it would

1 be appropriate, in the context of the government as
2 manager of its own operations, to look behind and try to
3 consider motive.

4 This is a choice that many --

5 JUSTICE ALITO: I thought the situation was
6 that Governor Blagojevich got a huge campaign
7 contribution from the union and virtually, as soon as he
8 got into office, he took out his pen and signed an
9 executive order that had the effect of putting -- what
10 was it, \$3.6 million into the union coffers?

11 GENERAL VERRILLI: Whatever happened --

12 JUSTICE ALITO: That's the sequence; isn't
13 that correct?

14 GENERAL VERRILLI: Well, I think the issue
15 before the Court is the constitutionality of the statute
16 that was enacted subsequent to that by a large
17 bipartisan majority, and I don't think it would be
18 appropriate to look behind the legislature's action to
19 consider and try to evaluate its motives. And I think,
20 under our Federal system, States get to make choices.

21 It's true, not every State does it this way,
22 but many do. They do so for reasons of efficient
23 management of their internal operations, and that's the
24 principle that we think is of critical importance here.

25 JUSTICE SCALIA: They may do so because of

1 that reason. You don't know what their reason is any
2 more than I do. All you can say is that that might be
3 their reason.

4 GENERAL VERRILLI: And they ought to have
5 the discretion to make that choice under this Court's
6 case law. That's our position with respect to that.

7 If I could make a point that I think is an
8 important point about the free rider rationale under
9 Abood. There's been some suggestion that the point of
10 the free rider rationale is to -- is to force the
11 dissenters -- the nonunion members to pay up.

12 I don't think that's the right way to
13 understand the free rider point. That, once the State
14 has imposed a duty of fair representation, then
15 everybody's got an incentive to free ride, whether
16 you're a union supporter or not, because, by operation
17 of law, you're going to get the benefits.

18 It's just a classic logic of collective
19 action problem, and so the -- the fair share requirement
20 really is content neutral, in that it's -- it's designed
21 to ensure that the union has the funds it needs to carry
22 out the responsibilities that the State wants it to
23 carry out and that that could be jeopardized by
24 supporters, as well as dissidents, deciding that they --
25 that they don't want to pay because they don't have to

1 because the law would get them the benefit of the duty
2 of fair representation even if they didn't.

3 Now, with respect to the question of -- of
4 whether Abood should be overruled, I would suggest to
5 the Court that it's got a very powerful stare decisis
6 effect behind it. Abood's not exactly an outlier. It
7 was reaffirmed in Lehnert, in Ellis. It was reaffirmed
8 just in 2009, unanimously, in the Locke case.

9 As Justice Breyer indicated, there is very
10 substantial reliance and contractual reliance throughout
11 the country on the constitutionality of Abood.

12 And as I -- I said, I think the most
13 important point here is that the line the Court drew in
14 Abood and the line that has stood for 40 years is
15 entirely consistent with the Court's First Amendment
16 jurisprudence in the context of government as employer,
17 not as regulator of sovereign.

18 Of course, if the government was acting as
19 sovereign regulating the citizenry, an obligation of
20 this kind would trigger the most exacting scrutiny.

21 JUSTICE ALITO: Is it true that, from --
22 from the beginning, there have been members of this
23 Court who have questioned whether there is any principle
24 basis for distinguishing between the chargeable and the
25 nonchargeable expenses and also have questioned whether

1 as a practical matter that can be done?

2 Justice Marshall made that argument, did he
3 not.

4 GENERAL VERRILLI: Yes, certainly, that
5 question has been raised. But those questions were
6 actually all raised before -- may I please --

7 CHIEF JUSTICE ROBERTS: Please finish your
8 thought.

9 GENERAL VERRILLI: -- before it was
10 reaffirmed in Lehnert, before it was reaffirmed in Ellis
11 and before it was reaffirmed unanimously in Locke.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, General.

14 Mr. Messenger, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF WILLIAM L. MESSENGER

17 ON BEHALF OF THE PETITIONERS

18 JUSTICE BREYER: I suspect you're going to
19 answer my question, so I want to focus it -- and I'm
20 sorry to do this, but I think it's important.

21 All right. I suspect you cannot answer my
22 question about reliance without accepting one of the
23 following three propositions: First, unlike every other
24 employee, government employees have no right to
25 organize.

1 Or, second, they have a right to organize,
2 but they cannot bargain about wages, working conditions
3 and hours, unlike any other, that's the same as the
4 first.

5 Or, third, the courts of the United States
6 are going to fashion, using the First Amendment as their
7 weapon, a new special labor law for government
8 employees. And I'd remind you we have some experience
9 on that in the 1930s, where courts tried to do something
10 analogous.

11 All right. Now, answer my question about
12 reliance.

13 MR. MESSENGER: I believe there -- the
14 reliance interests here are insignificant if Abood is
15 overruled because the result will simply be that
16 employees cannot be forced to support union
17 representation. The State --

18 JUSTICE SOTOMAYOR: Why would anybody join
19 a union under those circumstances or pay enough to
20 support the union efforts?

21 MR. MESSENGER: Because the union, first,
22 would control their terms of their economic conditions
23 of employment and have control of their relations with
24 their employer, which creates a strong incentive for an
25 employee to want to be on good terms with that union.

1 And also, usually, the union gains employer
2 assistance with becoming an exclusive -- or with
3 retaining membership, such as access to facilities --

4 JUSTICE SCALIA: But -- but it's only people
5 who -- who disagree with the -- what the union's doing
6 who could refuse to pay, you say? Right?

7 MR. MESSENGER: Yes. I mean, anyone who
8 voluntarily --

9 JUSTICE SCALIA: Why can't people who -- who
10 agree with the union just say, hey, I don't -- I don't
11 have to pay, the union is going to do this stuff anyway,
12 I'm going to ride for free, these other people are
13 riding for free?

14 MR. MESSENGER: People could have different
15 motives, but I submit that the union has --

16 JUSTICE SCALIA: Is there any -- is there
17 any way to decide who's doing it just to save money and
18 who's doing it on principle?

19 MR. MESSENGER: Not that I'm aware of.

20 JUSTICE SCALIA: So -- so you're essentially
21 destroying not just the -- not just the -- the -- closed
22 shop, but you're destroying the ability of the union
23 to -- to get money even from the people who don't agree
24 with what it's doing.

25 MR. MESSENGER: Well, two points. First,

1 exclusive representation, I submit, is not an impediment
2 to gaining membership. It helps the union gain
3 voluntary support for it. It's much easier for a union
4 to ask people to support it, if it has power over their
5 terms of employment.

6 So the free rider problem with an exclusive
7 representative is actually less than it would be if the
8 union was a voluntary organization, not as -- it doesn't
9 make it worse. I mean, there's a reason that unions
10 seek exclusive representation in the Federal government,
11 in the Postal Service, and the nation's 24 right-to-work
12 States because it's --

13 JUSTICE KAGAN: Mr. Messenger, do you doubt
14 that these -- you said that there were no reliance
15 interests, and -- and that's curious to me. There must
16 be thousands and thousands of contracts across the
17 United States with fair share provisions.

18 Do you doubt that these were core central
19 provisions in the making of these contracts; that if
20 these kinds of provisions were prohibited, the -- the
21 agreements would look fundamentally different in many
22 ways?

23 MR. MESSENGER: The main difference is just
24 the compulsory unionism clause in the agreement would be
25 gone. But otherwise, the agreements would be the same.

1 JUSTICE KAGAN: You think that the union
2 would -- would not ask for anything, would not have
3 different -- you know, would not ask for different
4 mechanisms in order to support its own activity?

5 The unions go into these contracts with the
6 understanding that this is what's going to enable them
7 to at once satisfy their universal obligation to
8 employees to fairly represent them and, also, get the
9 funds they need for administrative and other expenses.

10 MR. MESSENGER: I would submit that, with
11 compelled fees off the table, the union would actually
12 have more leverage to get things for employees because
13 the compelled fees clause is leveraged for the employer
14 because that's something the employer -- or the union
15 wants and that the employer doesn't care if it gives it
16 away because, ultimately, that's money out of somebody
17 else's pocket.

18 JUSTICE KAGAN: So you think that if we just
19 strike these provisions, in other words, the -- the
20 contracts would have been negotiated in exactly the same
21 way, nothing else would have changed?

22 MR. MESSENGER: If I may finish, Chief
23 Justice.

24 CHIEF JUSTICE ROBERTS: Please.

25 MR. MESSENGER: I believe that they probably

1 would be very much the same. To the extent they'd be
2 different, they'd be more in the favor of employees,
3 because the employer wouldn't have that leverage over
4 the union with respect to its demand for compulsory
5 fees.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)

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