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IN THE SUPREME COURT OF THE UNITED STATES

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PAMELA HARRIS, ET AL., :

Petitioners :

v. : No. 11-681

PAT QUINN, GOVERNOR OF :

ILLINOIS, ET AL. :

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Washington, D.C.

Tuesday, January 21, 2014

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Messenger.

ORAL ARGUMENT OF WILLIAM L. MESSENGER

ON BEHALF OF THE PETITIONERS

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

Illinois is forcing Susan Watts and thousands of other home care providers to pay compulsory fees to the SEIU to petition the State about its Medicaid program that pays for their services to persons with disabilities. In Mrs. Watts' case, her daughter Libby. This violates the First Amendment because the purpose of this mandatory association is inherently expressive. Petition the government for a redress of grievances, otherwise, lobby. And also because this program --

JUSTICE GINSBURG: I thought it was to negotiate -- or it's typically negotiated in collective bargaining; that is, wages, is that not so? Wages and benefits?

MR. MESSENGER: The subjects of bargaining here are the reimbursement rates given to the providers

1 and the State now offers or pays money to the SEIU for a
2 health benefit. But that is petitioning the government
3 with regard to those negotiations.

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

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

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

22 MR. MESSENGER: That is our position for why
23 Aboud is distinguishable on that point, is that here the
24 State is not the common law employer or the sole
25 employer of these providers. It simply pays them for

1 their services, much like a health insurer pays for the
2 services of medical professionals.

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

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

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

15 MR. MESSENGER: Would the union attempt to?

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

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

1 that extent.

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

4 MR. MESSENGER: No.

5 JUSTICE SCALIA: Suppose you have a
6 policeman who -- who is dissatisfied with his wages. So
7 he makes an appointment with the commissioner, police
8 commissioner, and he goes in and grouses about his
9 wages. He does this, you know, 10 or 11 times. And the
10 commissioner finally is fed up and tells his secretary,
11 I don't -- I don't want to see this man again. Has he
12 violated the Constitution?

13 MR. MESSENGER: No.

14 JUSTICE SCALIA: He is prevented a petition
15 for a redress of grievances?

16 MR. MESSENGER: No, because in that -- with
17 an individual speaking, it's, sir, a matter of private
18 or internal proprietary matter that under this Court's
19 precedence don't rise to a matter of public concern.
20 However, if you had an organization petitioning a -- a
21 police district for wages across the board for police
22 officers, then that is a matter of public concern and
23 would violate the First --

24 JUSTICE SCALIA: I really don't understand
25 that. When -- when you -- so what if it's 10 policemen

1 who do this? It's still not a matter of public concern?

2 Does it have to be the whole police force?

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

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

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

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

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

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

24 MR. MESSENGER: But in that case under our
25 public concern test, which goes within the Pickering

1 line, that that individual grievance would not rise to a
2 First Amendment petition.

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

6 MR. MESSENGER: But the --

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

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

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

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

1 sanction is the same, right? Somebody grouses about his
2 pay too much, he could get fired. Somebody refuses to
3 support a union that is negotiating about pay, he can
4 lose his job. So it's -- it's really identical across
5 the two situations.

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

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

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

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

18 MR. MESSENGER: Yes, it's an individual
19 employee being forced to support that expressive
20 activity. So the question becomes: What expressive
21 activity are they being forced to support? And when
22 you're speaking of changing an entire government
23 program, for example, Medicaid rates across the board,
24 that is a matter of public concern. That is a matter of
25 lobbying or political --

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

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

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

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

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

23 I thought the issue was whether they could
24 be required to pay for somebody else to go and speak and
25 possibly say things that they disagree with.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: So there's no problem

1 here with the representation. Your problem is with the
2 fair share?

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

6 CHIEF JUSTICE ROBERTS: Are there any -- you
7 suggest, in response to my colleague's question, that
8 they could -- the State could pay health care providers
9 different rates. Are there any limitations? We're
10 talking about Medicaid reimburse. Are there any
11 limitations that would prevent differential rates of
12 pay, reimbursement, under Medicaid for the same
13 services?

14 MR. MESSENGER: There may be statutory. I
15 know that most Medicaid programs are -- across the board
16 set rates. But also, constitutionally, if there was a
17 differential act or degree, it could be considered a
18 penalty for the individual exercising their rights. But
19 as far as I know, most Medicaid programs, in particular
20 the one here, it's always been a fixed rate established
21 across the board.

22 JUSTICE SCALIA: Mr. Messenger, just to
23 clarify what was the purpose of my earlier line of
24 questioning, it was simply to show that if you have a
25 case it doesn't rest on the right to petition the

1 government for redress of grievances. It -- it rests on
2 the First Amendment. You -- you say that there is
3 being -- your -- your people are being required to
4 support speech that they don't agree with.

5 MR. MESSENGER: Yes, Your Honor.

6 JUSTICE SCALIA: Now, that is, you know,
7 that is an arguable position, but I don't -- I don't
8 think it's even arguable that the right to petition the
9 government for redress of grievances is -- is involved
10 here.

11 MR. MESSENGER: It's the expression they're
12 being forced to support, Your Honor. So the violation,
13 as you say, is they're being forced to support
14 expressive activity and that expressive activity --

15 JUSTICE SCALIA: That's a First Amendment
16 violation, not a violation -- not a denial of the right
17 to petition the government.

18 MR. MESSENGER: Yes, Your Honor. They're
19 not being denied the right to petition in the sense that
20 the State is saying they cannot petition. Instead,
21 they're being forced to support petitioning.

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

24 (Laughter.)

25 JUSTICE SCALIA: What -- what was the

1 question?

2 (Laughter.)

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

12 So you're saying, well, the government can
13 punish somebody for saying something, but the government
14 in the exact same position cannot compel somebody to say
15 something they disagree with. And I want to know what's
16 the basis for that distinction, which it seems to me is
17 just as hard as -- as if you were answering under the
18 petition clause.

19 JUSTICE SCALIA: I want to hear the answer,
20 too, because, contrary to what Justice Kagan suggests,
21 I -- I didn't say your First Amendment argument was
22 valid.

23 (Laughter.)

24 JUSTICE KAGAN: Good, okay.

25 JUSTICE SCALIA: I said at least it was a

1 comprehensible argument.

2 CHIEF JUSTICE ROBERTS: Jump in whenever
3 you'd like.

4 (Laughter.)

5 MR. MESSENGER: The way in which homecare
6 providers petition the State, I submit, is not an
7 internal proprietary matter that the government has free
8 rein to manage. And so the distinction between
9 government acting as proprietor, as you say, the
10 government can tell an employee on work time that you
11 can't engage in certain speech if it interferes with the
12 workplace. But the way in which an individual
13 associates with to lobby or petition the State is not an
14 internal proprietary matter. So for example, here the
15 way in which Susan Watts and other homecare providers
16 petition the State is not internal workplace speech.

17 JUSTICE SCALIA: Why isn't it? I mean, it
18 is for private employers. There are some private
19 employers who think they're better off with a closed
20 shop and they just want to deal with one union and --
21 and they require all the people that they hire to become
22 a member of this union and to pay union dues for
23 representational purposes. They do this as private
24 employers because they think it is in their interest as
25 an employer. Why can't the government have the same

1 interest?

2 MR. MESSENGER: Because when the government
3 is involved the First Amendment interests are much
4 heightened because you're dealing with attempting to
5 influence government policy.

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

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

12 JUSTICE SOTOMAYOR: But what stops the
13 non -- the people who oppose the union policy from
14 sending a letter, asking a meeting, expressing their
15 disapproval in any forum they want and in any way they
16 want to whatever policy a union is advocating? Is there
17 anything that stops them from doing that?

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

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

24 MR. MESSENGER: It's -- Your Honor, it's the
25 compelled speech, and the fact that the individuals have

1 other First Amendment rights is not exculpatory. So
2 it's the -- it's the compulsion to support the SEIU's
3 positions in petitioning the State. That is the First
4 Amendment violation. And the fact that --

5 JUSTICE SCALIA: I suppose -- I suppose the
6 fact that you're entitled to speak against abortion
7 would not justify the government in requiring you to
8 give money to Planned Parenthood?

9 MR. MESSENGER: Exactly, Your Honor.

10 JUSTICE SCALIA: That's the argument you're
11 making.

12 MR. MESSENGER: Yes. And actually, I submit
13 that the fact that providers do remain free to petition
14 the State only shows that the so-called "labor peace"
15 interest hasn't been done here by Illinois, because the
16 interest there is to avoid competing demands from
17 various providers. Here, the fact that each provider
18 does, in fact, remain free to petition the State through
19 organizations other than the SEIU shows that the State
20 has not achieved any sort of labor peace, as the State
21 could potentially achieve within its workplace by --

22 JUSTICE KAGAN: Mr. Messenger --

23 JUSTICE KENNEDY: Well, but I mean, I
24 suppose there could be labor peace if the Respondents
25 were to prevail. I mean, that -- that assumes that your

1 theory of the case is going -- is going to prevail.

2 MR. MESSENGER: Well, no. Even if the
3 scheme here --

4 JUSTICE KENNEDY: I mean, doesn't the --
5 isn't there labor peace -- let's assume that's a valid
6 interest -- isn't there labor peace if one union
7 represents these health care providers and makes and
8 negotiates a contract with the government?

9 MR. MESSENGER: No, I submit that the labor
10 peace interest isn't valid here because in dealing with
11 the Medicaid program, the State doesn't have an interest
12 in avoiding competing demands from rival groups
13 regarding its policies on that. That is, democratic --

14 JUSTICE KENNEDY: Well, why doesn't it?
15 It -- it gets the demand from the union, it recognizes
16 it's reasonable; that's the policy and then it can move
17 forward with the policy.

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

20 JUSTICE ALITO: Mr. Messenger, do you think
21 the issue of exclusive representation is inextricably
22 tied to the issue of the assessment of an agency fee?
23 Can't you have the former without the latter?

24 MR. MESSENGER: Yes, you can. At least two
25 ways. The first of which is that Knox, of course, lays

1 out a two-part test. The second part test -- even if
2 the first is satisfied, that the mandatory association,
3 here exclusive representation, is justified by
4 compelling interest, you still go to the second test of
5 whether or not fees are a necessary incident to that
6 representation, and I submit that Illinois does not
7 satisfy that test.

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

13 MR. MESSENGER: It's not directly challenged
14 in this case, but it becomes relevant under the first
15 Knox test, which asks whether the mandatory association
16 being supported by the compulsory fees is justified by a
17 compelling State interest.

18 JUSTICE GINSBURG: Is the mandatory -- let's
19 take out, as Justice Alito suggested, take out the
20 agency fee or fair-share fee or whatever it is. But
21 there is an exclusive bargaining agent. Workers, your
22 clients, say we don't want to be represented by that
23 union. The union is authorized to represent everybody
24 in the workplace and has to represent even nonmembers as
25 well without any discrimination. And -- and are you

1 taking the position that there cannot be an exclusive
2 bargaining agent if there are any dissenters who don't
3 want to be represented by a union?

4 MR. MESSENGER: Not in this case, Your
5 Honor. This case does not present the question of
6 whether exclusive representation alone would constitute
7 a First Amendment injury, because the complaint here is
8 focused towards the compulsory fees. So that particular
9 issue is not here.

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

15 And let me just put it to you this way and
16 ask if you agree with this -- with this statement.
17 Since 1948, since the Taft-Hartley Act, there has been a
18 debate in every State across this country about whether
19 to be a right-to-work State and people have disagreed.
20 Some States say yes, some States say no. It raises
21 considerable heat and passion and tension, as we
22 recently saw in Wisconsin. And -- but, you know, these
23 are public policy choices that States make.

24 And is it fair to say that what you're
25 suggesting here, your argument, is essentially to say

1 that for 65 years, people have been debating the wrong
2 question when they've been debating that, because, in
3 fact, a right-to-work law is constitutionally compelled?

4 MR. MESSENGER: In the public sector, yes,
5 that it is in fact -- well, the first public sector
6 labor law was actually 1959 in Wisconsin, so it's
7 relatively recent when you're involved with government.
8 Yes, our position is, is that in the public sector when
9 government is involved compulsory fees are illegal under
10 the First Amendment.

11 JUSTICE KENNEDY: Suppose the Court were to
12 say that on the issue of salaries there is no First
13 Amendment violation, that -- that Abood should remain
14 applicable to public employee unions. Are there other
15 issues that public employee unions necessarily raise in
16 collective bargaining that raise other concerns about
17 governmental policies that union members might disagree
18 with?

19 MR. MESSENGER: Yes, Your Honor. Speaking
20 of true employees, we're not speaking of Medicaid
21 providers, but speaking of true employees, this was
22 discussed in Abood with respect to public school
23 teachers and all the different aspects that the union
24 petitions over that has to do with class sizes, hours
25 worked. Benefits are a huge issue, of course, in terms

1 of financially for many school districts, health
2 benefits. So there are many issues of the way the
3 school district actually operates.

4 JUSTICE SOTOMAYOR: How about here for your
5 employees? They negotiate health insurance. Do they --
6 they don't negotiate termination because that's up to
7 the individual --

8 MR. MESSENGER: Yes.

9 JUSTICE SOTOMAYOR: -- parties. So there's
10 no grievance committee. Do they negotiate the tasks
11 that will be reimbursed?

12 MR. MESSENGER: No. The tasks that the
13 State will reimburse are set in a service plan. That's
14 not a mandatory --

15 JUSTICE SOTOMAYOR: All right. So you're
16 being asked to have a fair share of how much you're
17 getting from the State for your services and health
18 insurance. What else is negotiated that you're being
19 asked to pay for?

20 MR. MESSENGER: Well, what -- as far as what
21 they're being forced to support is the reimbursement
22 rate. The State is giving money to an SEIU healthcare
23 fund, which many providers may or may not use. The
24 State is giving money to an SEIU member training fund to
25 provide voluntary training to providers, and also to

1 conduct an orientation that new providers will be forced
2 to support.

3 JUSTICE SCALIA: Those things you can argue
4 are not part of the representation for which they should
5 be charged and they should get their money back for
6 those things if they're actually not -- not getting any
7 benefit from them.

8 MR. MESSENGER: Well, I would submit that
9 they shouldn't be forced to pay for any of this
10 petitioning regarding how the State chooses to run this
11 Medicaid program.

12 JUSTICE SCALIA: No, but they're -- I mean,
13 what our cases say is you -- you can be compelled not to
14 be a free rider, to -- to pay for those items of
15 bargaining that benefit you as well as everybody else.
16 But you don't -- you don't have to pay for stuff that --
17 that is not within that description, stuff that doesn't
18 benefit you at all.

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

24 JUSTICE GINSBURG: They receive a salary --
25 I mean, they receive -- it's not a government branch to

1 the -- to the healthcare worker. They receive a
2 paycheck and the government withholds from them. The
3 government makes a FICA contribution for them and
4 withholds the part that's their responsibility. So it
5 looks just like they are an employee of the government,
6 being paid by the government, and the government doing
7 things that an employer does: Withhold income tax, pay
8 in part the FICA tax, withhold the other part. And they
9 are -- they're also covered by workers' compensation,
10 aren't they?

11 MR. MESSENGER: Oh, yes. Under Illinois
12 law, they have --

13 JUSTICE GINSBURG: As -- as employees of the
14 State.

15 MR. MESSENGER: Yes, Your Honor. But the
16 wage -- in fact, defining whether it's wages or a flat
17 reimbursement rate or a grant I don't -- I submit is not
18 constitutionally relevant. So, for example, the Act was
19 recently extended to independent nurses and therapists
20 who provide in-home care. They're paid a flat rate as
21 opposed to an hourly, what do you call it, wage.
22 Constitutionally, there's no difference. The bottom
23 line is it's money from government, from here a Medicaid
24 program, to provide care to other individuals. And I
25 submit that doesn't create an employment relationship

1 any more than a doctor is privately employed by a health
2 insurer -- insurance company merely because they pay for
3 it.

4 JUSTICE GINSBURG: They're not getting a
5 paycheck and the insurance -- insurer is not deducting
6 withholding tax, isn't paying FICA tax?

7 MR. MESSENGER: That is paid, but the State
8 is doing it as pay agent. And so while the money is
9 coming from the State, the State is doing it as pay
10 agent for the person with disabilities, who is truly the
11 employer.

12 JUSTICE ALITO: I thought the State took the
13 position that these individuals are State employees for
14 one purpose only, collectively bargaining. Isn't that
15 their position.

16 MR. MESSENGER: Yes, that's right in the
17 statute, Your Honor, that's it's solely for purposes of
18 collective bargaining.

19 JUSTICE ALITO: So if one of these
20 individuals commits gross misconduct, causes the death
21 of a patient, the State has no liability?

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

25 JUSTICE BREYER: When you come back, I'd

1 appreciate your thinking about this, but obviously
2 you're asking us to overturn a case that's been the law
3 for 35 years. I count hundreds of citations in the
4 opinion, and I guess there are millions of instances in
5 which employees and employers and others have relied on
6 it in collective bargaining, so I'd appreciate your
7 saying sentence a or two of why we should upset
8 reasonable expectations over so long a period of time.

9 MR. MESSENGER: Sure.

10 I'd like to reserve the remainder of my
11 time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Smith.

14 ORAL ARGUMENT OF PAUL M. SMITH

15 ON BEHALF OF THE RESPONDENTS

16 MR. SMITH: Thank you, Your Honor.

17 Mr. Chief Justice, and may it please the
18 Court:

19 10 years ago, the State of Illinois made a
20 decision about the best way to deliver homecare services
21 to thousands of persons with physical disabilities in
22 the State who without those services would need to live
23 in institutional settings. It made the judgment that
24 working with the union to negotiate and implement a
25 collective bargaining agreement for these workers that

1 it was paying would help meet its service delivery goals
2 for this population, this group of workers, which was --

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

7 MR. SMITH: There is no reimbursement rate
8 for these workers set by the Medicaid program, Your
9 Honor. The amount of money they are paid is an hourly
10 wage set in the collectively bargaining agreement. When
11 the union was first recognized, it was \$7 an hour and
12 there were no benefits. Because the State has chosen to
13 work with its union, it has produced a package of
14 benefits designed to create a solution to the morale
15 problems, the recruitment problems, the retention
16 problems.

17 JUSTICE SCALIA: I don't understand what
18 you're saying. If there were no union, there would be
19 no wages?

20 MR. SMITH: Your Honor, the State's judgment
21 is that it can better make these determinations in
22 partnership with the union and that the process of
23 negotiation gives it both tangible and intangible
24 benefits. The tangible benefit is it figures out what
25 the priority needs of the workers are.

1 JUSTICE SCALIA: So from the outset, it set
2 up the union, right, and the union said, We want 7 bucks
3 an hour. Was that it?

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

7 JUSTICE SCALIA: And who picked that number?

8 MR. SMITH: The State did.

9 JUSTICE SCALIA: The State did. Okay.

10 MR. SMITH: And it gave the workers the
11 opportunity, as it has every right to do, to have a
12 majority of the people in the workforce say, we'd like
13 to be represented, we'd like to have somebody in the
14 room representing us. And, as a result, they not only
15 have substantially increased the wages, but they have
16 paid health care, they have paid training and
17 orientation. There's a grievance system which is a --

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

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

1 CHIEF JUSTICE ROBERTS: If you hire a
2 homecare provider to provide homecare services, isn't
3 how much the person is compensated -- you have a
4 Medicaid program, a cooperative program with the Federal
5 Government. Doesn't it set the rates with which those
6 services are reimbursed?

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

10 CHIEF JUSTICE ROBERTS: Well, right, it's a
11 cooperative State/Federal program. But isn't there --
12 are you saying the wages have nothing to do with how
13 much the -- the Medicaid reimbursement for these types
14 of services?

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

21 CHIEF JUSTICE ROBERTS: But they don't just
22 give you a bunch of money and say, well, here it is, you
23 figure out how much you want to -- I mean, I thought
24 this case had something to do with the fact that
25 Medicaid was used to reimburse these employees, and

1 you're saying it has nothing to do with that at all?

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

5 CHIEF JUSTICE ROBERTS: I just want to know,
6 not what their challenge is. I want to know where the
7 money comes from. It comes from Medicaid, and I assume
8 Medicaid sets some parameters about how much you can
9 reimburse homecare providers.

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

12 CHIEF JUSTICE ROBERTS: So you can negotiate
13 whatever rates you want with the homecare providers
14 regardless of what Medicaid says about those services?

15 MR. SMITH: "You" the State of Illinois, you
16 mean?

17 CHIEF JUSTICE ROBERTS: Yes, yes.

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

22 JUSTICE SOTOMAYOR: Mr. Smith, I think that
23 there's -- I must say that I might have labored under
24 it. From your adversary's statement, it appears as if
25 there's a belief that the Federal Government sets a

1 fixed amount and that's what the State has to pay.
2 Whether the Federal Government pays you a certain
3 amount, however, you seem to be saying the State can go
4 above that amount if it chooses. That's the cooperative
5 nature of this.

6 MR. SMITH: Your Honor, the exact nature of
7 the fund transfer from the Federal Government to the
8 State may well be based on an individual's annual costs
9 with a particular diagnosis. I'm in the realm of
10 speculation here, but it's very clear from this record
11 that these decisions about how these individuals will be
12 paid are made by the State, and that they have the
13 discretion under the program to do that, and that they
14 decided that they would deal with the problems of
15 recruitment and retention and morale in this workforce,
16 which is, of course, scattered to tens of thousands of
17 work sites across the country.

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

1 Why do they need to have the union intervene here?

2 MR. SMITH: The State of Illinois, like many
3 employers, decided that, A, they would get that right
4 more likely if they were dealing with a representative
5 of the workers who told them what they care about,
6 whether it's paid vacation versus higher wages versus
7 less hours during the week or more hours during the week
8 or whatever it might be.

9 It also said that, because these decisions
10 are going to be made in the process of negotiation,
11 which the workers know they have a place at the table,
12 somebody who was there looking out for their interests,
13 the workers will have a different sense of commitment
14 to --

15 JUSTICE ALITO: Well, that's fine for the
16 workers who want the union to represent them in making
17 these demands.

18 Let me give you this example, which I think
19 gets to what the plaintiffs in this case find
20 disturbing. Let's say this is -- this involves the a
21 teachers union. So the teachers union is negotiating
22 about the issue of tenure and merit pay, and the union
23 is opposed to any change in the tenure system, it's
24 opposed to merit pay.

25 Now, there's a teacher who's not a member of

1 the union who disagrees completely with the union on
2 these issues, but this teacher -- and the teacher is not
3 a member of the union, but still has to pay a pretty
4 hefty agency fee, maybe \$700 a year. So the teacher is
5 paying this money to the union to make an argument to
6 the employer with which the teacher completely
7 disagrees.

8 Now, if this teacher just wants to get back
9 to a neutral position, the teacher is going to have to
10 spend \$700 or maybe \$500 of his or her own money, pay
11 that to another organization that will present that
12 teacher's point of view to the employer.

13 How can that be -- what would you say to
14 that, to that teacher? That, you know, You have a right
15 to be -- You have a right to say whatever you want on
16 these issues, but you don't have a right to be a
17 teacher?

18 MR. SMITH: Well, Your Honor, I would say
19 that the Court has correctly held over a period of more
20 than 30 years that that requirement is an appropriate
21 thing which a public employer is allowed to impose
22 because of the duty of fair representation and because
23 of the benefits of allowing collective bargaining to
24 proceed with the duty of fair representation imposed on
25 the union.

1 As Justice Scalia put it in his Lehnert
2 opinion, this is not a normal sort of free rider
3 argument. This is a free rider argument where the law
4 requires the union to look after that teacher and make
5 sure that they get treated equally.

6 JUSTICE ALITO: Mr. Smith, are you saying
7 that this -- that the unions reluctantly accept the duty
8 of being the exclusive representative for all the
9 employees? They don't really want to do this, but the
10 law requires them to do this, but because the law
11 requires them to do this then they have to get this
12 agency fee? Is that really -- is that realistically
13 what happens?

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

17 JUSTICE ALITO: Seriously, the unions do not
18 want to have the -- they don't want to be given the
19 status of the exclusive bargaining agent for the
20 employees?

21 MR. SMITH: I -- I think there may be
22 variation on that. I imagine there might be some union
23 out there that would want to be able to favor their
24 members over other. But the law doesn't require that,
25 and for a very good reason, including the First

1 Amendment reason.

2 Imagine a world in which that teacher is --
3 would be paid 10 percent less as we were discussing
4 before, because that teacher has chosen not to be a full
5 member of the union. And imagine the pressure on
6 associational rights that would be created for that
7 teacher faced with that choice. You could be paid 10
8 percent less doing the same work, or you can be paid the
9 same as everybody else, but you have to fully join the
10 union and pay for their political speech and pay for
11 everything on the nonchargeable side of the line.

12 And, you know, what this Court has done over
13 the last 30 years is use that distinction between
14 chargeable and nonchargeable items to balance the First
15 Amendment interests of the --

16 JUSTICE KENNEDY: But in talking about First
17 Amendment interests, let me ask you this: Is it not a
18 standard issue in collective bargaining for the
19 employees' union to talk about the size of the
20 workforce?

21 MR. SMITH: Your Honor --

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

24 MR. SMITH: It is -- it is certainly
25 possible that in some situations --

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

4 MR. SMITH: It is certainly not a subject of
5 collective bargaining that could arise in this
6 situation. This situation --

7 JUSTICE KENNEDY: No, I'm talking about --
8 let's say the teachers' union. They're talking about
9 classroom size. They're talking about hours. That
10 necessarily involves the size of the workforce, does it
11 not.

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

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

16 MR. SMITH: Assuming -- Assuming a school
17 district decides to let --

18 JUSTICE KENNEDY: Let's -- let's assume that
19 it's true, that a union's position necessarily affects
20 the size of government. Is not the size of government a
21 question on which there are fundamental political
22 beliefs, fundamental convictions that are being
23 sacrificed if a nonunion member objects to this line of
24 policy? Are there not other union proposals that say --
25 that State employee's salary must be a certain

1 percentage of the total State expenditure? Does this
2 not also involve the size of government, which is a
3 fundamental issue of political belief?

4 MR. SMITH: Any outcome of a negotiation of
5 a collective bargaining agreement involving public
6 employees will involve the expenditure of public money
7 in a variety of ways, and the outcome of that will, in
8 that limited sense, at least, be a matter of public
9 concern every bit as much and -- and no more than when a
10 government contractor --

11 JUSTICE KENNEDY: I'm not talking about a
12 question of public concern. I'm talking about whether
13 or not a union can take money from an employee who
14 objects to the union's position on fundamental political
15 grounds.

16 MR. SMITH: Well, Your Honor, that is what
17 the Abood distinction between chargeable and
18 nonchargeable --

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

21 MR. SMITH: Right. And --

22 JUSTICE KENNEDY: In -- in an era where
23 government is getting bigger and bigger, and this is
24 becoming more and more of an important issue to more
25 people.

1 MR. SMITH: But I think it's important to
2 understand that while there is an impingement on the
3 First Amendment interest on any employer -- employee
4 required to pay the fair share fee, this isn't any --
5 the government employee context in which the government
6 has the ability when it serves its important interest as
7 employer to demand that its employees --

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

11 MR. SMITH: Well, Your Honor, look at --
12 look at --

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

15 MR. SMITH: Look at what the union is --
16 what the -- what the money is being spent on in this
17 case. It's being spent on negotiating a contract, which
18 has produced a package of benefits and wage increases
19 that have been extremely important to everybody in -- in
20 this workforce. It's being spent on a call center that
21 allows people to call to their union and get answers to
22 questions about problems, a grievance system that makes
23 sure their paychecks don't go missing and helps them
24 address that problem, training, gloves that they need
25 for their personal safety in the workplace, and

1 healthcare benefits.

2 Now, there are -- may be people who think
3 it's political controversial to have to contribute to a
4 union that does those things and nothing else. But I
5 submit to you that balance that against the interests of
6 the State as employer and say we want to have this
7 partnership with this union. This will help us do a
8 better job delivering services to this vulnerable
9 population and save us a lot of money keeping the
10 matter --

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

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

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

25 CHIEF JUSTICE ROBERTS: Teacher -- teacher

1 union, okay?

2 MR. SMITH: Yes, sir.

3 CHIEF JUSTICE ROBERTS: They have a
4 political position on Medicaid rates. They spend money
5 to advance that position. If you're a teacher, but
6 you're not a member of the union, do you have to pay for
7 that expenditure?

8 MR. SMITH: It would seem to me, Your Honor,
9 something that's not within the chargeable expenses that
10 a teachers' union could charge.

11 CHIEF JUSTICE ROBERTS: Right. Same -- same
12 public -- same expenses for Medicaid --

13 MR. SMITH: Yes.

14 CHIEF JUSTICE ROBERTS: -- but you're a home
15 care provider. Your union spends to get higher Medicaid
16 rates. You're not a member of the union. Do you have
17 to pay for their political activity to raise Medicaid
18 rates?

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

23 CHIEF JUSTICE ROBERTS: So one -- I'm sorry.
24 If I could just finish the thought. So the same speech
25 with respect to one union is a speech on a matter of

1 public concern, but with respect to another union, it's
2 not?

3 MR. SMITH: It's on the chargeable side of
4 the line when it has to do with the -- the terms and
5 conditions of employment of the -- of the members of the
6 union or the nonmembers of the union.

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

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

15 CHIEF JUSTICE ROBERTS: I mean Medicaid
16 reimbursement rates. That's what I mean by Medicaid
17 reimbursement rates.

18 MR. SMITH: Well, if that's what you mean,
19 then it seems to me very clear that they should be
20 allowed to charge the dissident nonmember because that
21 person is going to get all the benefit of it.

22 CHIEF JUSTICE ROBERTS: So in this case --
23 in this case, if this union negotiates over Medicaid
24 reimbursement rates, it is chargeable.

25 MR. SMITH: Yes, Your Honor, to the

1 extent --

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

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

10 JUSTICE ALITO: What about the issue of --

11 CHIEF JUSTICE ROBERTS: And that includes
12 Medicaid reimbursement rates.

13 MR. SMITH: In the -- in the limited sense
14 that they're hourly wages going to these individuals,
15 yes.

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

21 MR. SMITH: Yes, Your Honor.

22 JUSTICE BREYER: But I think the question
23 you're being asked is where you have SEIU or AFSCME, and
24 they're government unions, does it have a bigger mix of
25 public policy issues; and therefore, should this Court

1 get into the business -- I'm putting it in a little
2 loaded way because I don't want to suggest the answer.
3 Should this Court make that distinction and get into the
4 business of saying when the union is too much of a
5 labor -- wages, hours, and working conditions are too
6 likely to affect public issues, and the other ones less
7 likely, et cetera, you see the distinction that the
8 question that was added suggests?

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

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

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

23 JUSTICE ALITO: Well, let me ask you a
24 question about pensions. Now, that's a very big public
25 policy issue. I think in Illinois, the legislature

1 recently cut pensions of -- of public employees. That
2 would be a subject -- that could be a subject of -- of
3 collective bargaining, right? So that would be --
4 bargaining on that would be chargeable?

5 MR. SMITH: It would be a subject if the
6 State chose to let -- let it become a subject. The
7 State completely controls what -- what can be a subject
8 of collective bargaining and what can't.

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

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

14 JUSTICE ALITO: All right. Now, what do you
15 say to the young employee who is not very much concerned
16 at this point about pensions, but realizes there's a
17 certain pot of money, and it's either going to go for
18 pensions or it's going to go for salary at the present
19 time. So that employee who's not a member of the union
20 has to pay for the union to bargain with the -- the
21 State to achieve something that's contrary to that
22 person's interest. But you say that person is a free
23 rider.

24 MR. SMITH: Yes, Your Honor. That -- that
25 person, if it's not paying their share of that, then you

1 have two things that happened. The other members -- the
2 other people in the workforce have to pay more to
3 support the process, or the union doesn't have the
4 resources needed to be a -- an adequate partner with the
5 State in producing the outcome that the State has chosen
6 to try to seek, which is an outcome where the mutually
7 beneficial arrangements are made that satisfy the
8 priorities of everybody here, the workers and the State
9 and, indeed, the clients that they serve.

10 JUSTICE KENNEDY: Suppose the young person
11 thinks that the State is squandering his heritage on
12 unnecessary and excessive payments or benefits and
13 wages. Is that not a political belief of the highest
14 order? And, you know, we talk about free riders, which
15 is an epithetical phrase. Maybe the objecting employee
16 would say that the union is a speech distorter; it is
17 taking views that are not his and making them mandatory
18 subject to bargaining and charging him for it.

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

1 JUSTICE KENNEDY: So your position is that
2 the public employees must surrender a substantial amount
3 of First Amendment rights to work for the government?

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

11 Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 General.

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

17 GENERAL VERRILLI: Mr. Chief Justice, and
18 may it please the Court:

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

23 If I could, I'd like to turn to the
24 questions that Justice Kennedy has raised because I do
25 think it gets to the key issue in the case. I think the

1 key point, the key takeaway in this case, is that the
2 context we are dealing with here is the government as
3 proprietor and manager of its own operations. And this
4 Court's case law has said over and over again that in
5 that context, two things follow.

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

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

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Right, right.

13 GENERAL VERRILLI: Are they high enough to
14 make sure the services providing -- they're provided
15 effectively and are they -- and are they constrained
16 enough --

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

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

1 of the State.

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

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

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

18 GENERAL VERRILLI: I think -- my
19 understanding is that that would be -- the question
20 there was at which side of the line that the Court drew
21 in Lehnert is that on. I think that's probably on the
22 --on the impermissible side of the line. But that's
23 where the fight would be. It would be over where that
24 line should be drawn, not over whether the -- whether
25 the State, as manager of its own operations, can use

1 collective bargaining with a fair share, as Justice
2 Scalia mentioned earlier, in a way that private
3 employers 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 were to be 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 employees in the Border Patrol.
22 In order to make sure that the Border Patrol has high
23 morale, sufficient salary, sufficient benefits, it can
24 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. And under this Court's
8 established case law, which Abood, I think, is a quite
9 good example of, the principle that when the government
10 is acting to further its operations as manager they get
11 substantial latitude. Now, there's a limit on that, of
12 course. They can't use that authority to -- they can't
13 leverage that authority to affect the way citizens
14 interact as citizens --

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

20 GENERAL VERRILLI: Well, I think --

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

24 GENERAL VERRILLI: Yes, but here we argue --

25 JUSTICE SCALIA: And unions getting a lot of

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

5 GENERAL VERRILLI: I guess what I would say
6 about that, Justice Scalia, is that one could speculate
7 about motives of States like Illinois, one could
8 speculate about motives of the right to work States, but
9 I would suggest that under our Federal system that
10 States get to make those kinds of policy choices. And
11 Illinois has made a policy choice, as many private
12 employers have, that using collective bargaining -- and
13 it is, I want to stress here, very narrowly tailored
14 collective bargaining. By law, it can only be over
15 wages, hours, and conditions of employment, by law.

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

20 GENERAL VERRILLI: I don't think so. When
21 the legislation was enacted, it was enacted with a very
22 large bipartisan margin, and I just don't think it would
23 be appropriate in the context of the government as
24 manager of its own operations to look behind and try to
25 consider motive. This is a choice that many --

1 JUSTICE ALITO: I thought the situation was
2 that Government Blagojevich got a huge campaign
3 contribution from the union and virtually as soon as he
4 got into office he took out his pen and signed an
5 executive order that had the effect of putting, what was
6 it, \$3.6 million into the union covers?

7 GENERAL VERRILLI: Whatever happened --

8 JUSTICE ALITO: That's the sequence; isn't
9 that correct?

10 GENERAL VERRILLI: Well, I think the issue
11 before the Court is the constitutionality of the statute
12 that was enacted subsequent to that by a large
13 bipartisan majority, and I don't think it would be
14 appropriate to look behind the legislature's action to
15 consider and try to evaluate its motives. And I think
16 under our Federal system States get to make choices.
17 It's true not every State does it this way, but many do.
18 They do so for reasons of efficient management of their
19 internal operations and that's the principle that we
20 think is of critical importance here.

21 JUSTICE SCALIA: They may do so because of
22 that reason. You don't know what their reason is any
23 more than I do. All you can say is that that might be
24 their reason.

25 GENERAL VERRILLI: And they ought to have

1 the discretion to make that choice under this Court's
2 case law. That's our position with respect to that.

3 If I could make a point that I think is an
4 important point about the free rider rationale under
5 Abood. There's been some suggestion that the point of
6 the free rider rationale is to -- is to force the
7 dissenters, the nonunion members to pay up. I don't
8 think that's the right way to understand the free rider
9 point. That once the State has imposed a duty of fair
10 representation, then everybody's got an incentive to
11 free ride, whether you're a union supporter or not,
12 because by operation of law, you're going to get the
13 benefit.

14 It's just a classic logic of collective
15 action problem. And so the -- the fair share
16 requirement really is content neutral in that it's --
17 it's designed to ensure that the union has the funds it
18 needs to carry out the responsibilities that the State
19 wants it to carry out and that that could be jeopardized
20 by supporters as well as dissidents, deciding that
21 they -- that they don't want to pay because they don't
22 have to, because the law would get them the benefit of
23 the duty of fair representation even if they didn't.

24 Now, with respect to the question of -- of
25 whether Abood should be overruled, I would suggest to

1 the Court that it's got a very powerful star in decisis
2 effect behind it. Abood's not exactly an outlier. It
3 was reaffirmed in Lehnert, in Ellis. It was reaffirmed
4 just in 2009 unanimously in the Locke case. As Justice
5 Breyer indicated, there is very substantial reliance,
6 and contractual reliance throughout the country on the
7 constitutionality of Abood.

8 And as I -- I said, I think the most
9 important point here is that the line the Court drew in
10 Abood and the line that has stood for 40 years is
11 entirely consistent with the Court's First Amendment
12 jurisprudence in the context of government as employer,
13 not as regulator of sovereign. Of course, if the
14 government was acting as sovereign regulating the
15 citizenry, an obligation of this kind would trigger the
16 most exacting scrutiny.

17 JUSTICE ALITO: Is it true that from -- from
18 the beginning, there have been members of this Court who
19 have questioned whether there is any principle basis for
20 distinguishing between the chargeable and the
21 nonchargeable expenses and also have questioned whether
22 as a practical matter that can be done? Justice
23 Marshall made that argument, did he not?

24 GENERAL VERRILLI: Yes. Certainly, that
25 question has been raised. But those questions were

1 actually all raised before --

2 CHIEF JUSTICE ROBERTS: Please finish your
3 thought.

4 GENERAL VERRILLI: -- before it was
5 reaffirmed in Lehnert, before it was reaffirmed in Ellis
6 and before it was reaffirmed in Adamsley and Locke.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, General.
9 Mr. Messenger, you have four minutes
10 remaining.

11 REBUTTAL ARGUMENT OF WILLIAM L. MESSENGER
12 ON BEHALF OF THE PETITIONERS

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

16 All right. I suspect you cannot answer my
17 question about reliance without accepting one of the
18 following three propositions: First, unlike every other
19 employee, government employees have no right to
20 organize. Or second, they have a right to organize, but
21 they cannot bargain about wages, working conditions and
22 hours unlike any other. That's the same as the first.
23 Or, third, the courts of the United States are going to
24 fashion, using the First Amendment as their weapon, a
25 new special labor law for government employees. And I'd

1 remind you we have some experience on that in the 1930s
2 where courts tried to do something analogous. Now
3 answer my question about reliance.

4 MR. MESSENGER: I believe there -- the
5 reliance interests here are insignificant if Abood is
6 overruled because the result will simply be that
7 employees cannot be forced to support union
8 representation. The State --

9 JUSTICE SOTOMAYOR: Why would anybody join
10 the union under those circumstances or pay enough to
11 support the union efforts?

12 MR. MESSENGER: Because the union first
13 would control their terms of their economic conditions
14 of employment and have control of their relations with
15 their employer, which creates a strong incentive for an
16 employee to want to be on good terms with that union.
17 And also, usually, the union gains employer assistance
18 with becoming an exclusive or with retaining membership,
19 such as access to facilities --

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

23 MR. MESSENGER: Yes. I mean, anyone who
24 voluntarily --

25 JUSTICE SCALIA: Why can't people who -- who

1 agree with the union just say, hey, I don't -- I don't
2 have to pay. The union is going to do this stuff
3 anyway. I'm going to ride for free. These other people
4 are riding for free.

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

7 JUSTICE SCALIA: Is there any -- is there
8 any way to decide who's doing it just to save money and
9 who's doing it on principle?

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

11 JUSTICE SCALIA: So -- so you're essentially
12 destroying not just the -- not just the -- the -- shop,
13 but you're destroying the ability of the union to -- to
14 get money even from the people who don't agree with what
15 it's doing.

16 MR. MESSENGER: Well, two points. First,
17 exclusive representation, I submit, is not an impediment
18 to gaining membership. It helps the union gain
19 voluntary support for it. It's much easier for a union
20 to ask people to support it if it has power over their
21 terms of employment. So the free rider problem with an
22 exclusive representative is actually less than it would
23 be if the union was a voluntary organization, not as --
24 it doesn't make it worse. I mean, there's a reason that
25 unions seek exclusive representation in the Federal

1 government, in the Postal Service and the nation's 24
2 right-to-work States because it's --

3 JUSTICE KAGAN: Mr. Messenger, do you doubt
4 that these -- you said that there were no reliance
5 interests, and -- and that's curious to me. There must
6 be thousands and thousands of contracts across the
7 United States with fair share provisions. Do you doubt
8 that these were core central provisions in the making of
9 these contracts? That if these kinds of provisions were
10 prohibited, the -- the agreements would look
11 fundamentally different in many ways?

12 MR. MESSENGER: The main difference is just
13 the compulsory unionism clause in the agreement would be
14 gone. But otherwise, the agreements would be the same.

15 JUSTICE KAGAN: You think that the union
16 would -- would not ask for anything, would not have
17 different -- you know, would not ask for different
18 mechanisms in order to support its own activity? The
19 unions go into these contracts with the understanding
20 that this is what's going to enable them to at once
21 satisfy their universal obligation to employees to
22 fairly represent them and also, get the funds they need
23 for administrative and other expenses.

24 MR. MESSENGER: I would submit that with
25 compelled fees off the table, the union would actually

1 have more leverage to get things for employees because
2 the compelled fees clause is leveraged for the employer.
3 Because that's something the employer -- or the union
4 wants and that the employer doesn't care if it gives it
5 away, because ultimately, that's money out of somebody
6 else's pocket.

7 JUSTICE KAGAN: So you think that if we just
8 strike these provisions, in other words, the -- the
9 contracts would have been negotiated in exactly the same
10 way, nothing else would have changed?

11 MR. MESSENGER: If I may finish, Chief
12 Justice.

13 CHIEF JUSTICE ROBERTS: Please.

14 MR. MESSENGER: I believe that they probably
15 would be very much the same. To the extent they'd be
16 different, they'd be more in the favor of employees,
17 because the employer wouldn't have that leverage over
18 the union with respect to its demand for compulsory
19 fees.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

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

24

25

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