No. 11-681

IN THE
Supreme Court of the United States

PAMELA HARRIS, et al.,
Petitioners,
v.

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

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

BRIEF OF THE ILLINOIS POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Jacob H. Huebert
Counsel of Record
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1630
Chicago, Illinois 60603
(312) 263-7668
jhuebert@
libertyjusticecenter.org

Paul Kersey
ILLINOIS POLICY
INSTITUTE
190 South LaSalle Street
Suite 1630
Chicago, Illinois 60603
(312) 346-5700
pkersey@illinoispolicy.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Illinois Policy Institute is a nonpartisan, non-profit public-policy research and education organization that promotes personal and economic freedom in Illinois, funded by the voluntary contributions of its supporters. The Institute's work focuses on six key policy areas: budget and tax policy, labor policy, health-care policy, education policy, good government, and jobs and economic growth. Through its affiliated public-interest litigation center, the Liberty Justice Center, the Institute seeks to protect Illinoisans' constitutional rights, focusing especially on First Amendment and economic-liberty rights.

This case concerns the Institute because it affects Illinois citizens' freedom of association and freedom of speech and because the challenged exclusive-representation scheme threatens to distort the marketplace of ideas in Illinois to benefit viewpoints that State officials favor.

SUMMARY OF ARGUMENT

This Court has held that the First Amendment forbids the State from forcing an individual to support union political speech to which he or she is opposed. It has also held that any risk that a dissenting worker's funds will be used for union

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[1] In accordance with Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel for the amicus affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

political speech – for any length of time, in any amount – must be minimized. The exclusive-representation scheme Illinois has imposed on home care providers violates both of these principles.

Because the providers are not State employees, the union's speech to the State on their behalf can only be political – so requiring them to pay even an agency fee will violate their First Amendment rights. Moreover, even if some union speech on providers' behalf were comparable to union negotiations on behalf of true state employees, providers would still lack sufficient protection against the union using their fees for impermissible political activities. Unions have little difficulty hiding political spending amid their "representation" expenses, and nonmembers have great difficulty holding a union accountable for it. This creates an unreasonable risk that union members' First Amendment rights will be violated. The way to eliminate that risk is to allow providers to opt out of paying all union fees.

Illinois' scheme gives providers little choice but to surrender their First Amendment rights. Many have come to depend on the State's Medicaid-waiver program to provide constant home-care to a family member who would otherwise be institutionalized; now they have been told that they must either fund speech they oppose or leave the program. Providers thus have no reasonable means of preserving their rights short of moving to another state that does not force them to make that choice. Even if a majority of providers wanted out of the union, the nature of their work, which does not occur in a traditional workplace, combined with government-imposed

barriers, would make decertifying the union an unrealistic option. Thus, the providers' First Amendment injury is especially severe because it will continue constantly and indefinitely.

Finally, the scheme threatens the First Amendment interests of all Illinois citizens because it distorts the marketplace of ideas in favor of those advocated by State officials and the entities they recognize as exclusive representatives. The First Amendment, which is premised on a mistrust of government and the belief that a multitude of competing voices is best, is incompatible with a scheme under which officeholders can recognize exclusive representatives to speak for groups of citizens and force dissenters to pay for it. The manner in which this scheme came about and Illinois' well-known history of political corruption illustrate the folly of trusting officeholders not to use that power to tilt the political playing field.

ARGUMENT

I. Forcing home care providers to pay fees to SEIU means forcing them to pay for political speech.

Providers in Illinois' Rehabilitation Program who are compelled to pay fees to SEIU will be forced to pay for political speech with which they disagree – not only because the union's so-called collective-bargaining activities consist entirely of quintessential political speech, but also because the union's broad notion of what expenses are chargeable against nonmembers will likely result in providers'

money being spent on political activism that is far removed from representational activities.

Even in traditional public employment, a public-sector union engages in political speech when it provides the representation that nonmembers are forced to pay for; as the Court has noted, a union inevitably "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2289 (2012). That compelled political speech "imposes a significant impingement on First Amendment rights," but the Court has so far tolerated that infringement in the "anomal[ous]" context of the workplace because of the government's interest in maintaining "labor peace." *Id.* at 2289-90 (internal quotation marks omitted).

Here, however, Petitioners have shown that the "negotiations" with the State that providers are forced to support constitute political speech and that the "labor peace" interest does not apply to their work. Pet. Br. at 24-31, 39-42. By its nature, the SEIU's speech on providers' behalf can only concern the operation of a government program, particularly the money the government will spend on that program – a matter of public concern on which the union, nonmember providers, taxpayers, and other citizens may have a wide range of views.

Moreover, even if some of the union's lobbying on providers' behalf about the programs from which they receive subsidies were analogous to bargaining on behalf of public employees and justified by some compelling governmental interest, providers would still face the unreasonable risk – indeed, the near-

certainty – that some of their funds will be used to support political speech that is outside the scope of any legitimate representation.

To be sure, providers can opt out of paying for the union's political activities. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977). Many do opt out; in fact, Respondent SEIU Healthcare Illinois & Indiana, which represents providers in the Rehabilitation Program and other home care providers, has an unusually high opt-out rate. Of 93,276 individuals in the union local, some 37,351, or 40 percent, have chosen to pay only mandatory agency fees. Paul Kersey, *Thousands of Workers Opted Out of Illinois' Largest Union in 2012-2013*, Illinois Policy Institute, Nov. 26, 2013, http://illinoispolicy.org/thousands-of-workers-opted-out-of-illinois-largest-union-in-2012-2013/. In contrast, the other union locals among the 50 largest in Illinois have an average opt-out rate of just 1.3 percent. *Id.* This suggests an extraordinary lack of support for the SEIU local's speech among the people who have been forced to support it.

In any event, opting out does little to ensure that nonmembers will not be forced to pay for any political speech. As the Court observed in *Knox*, auditors typically do not question unions' determinations of which expenses are chargeable to nonmembers – so if a union says political expenditures are chargeable, its auditors will take the union's word for it and classify them as chargeable. 132 S. Ct. at 2294. And although nonmembers "may . . . contest the union's chargeability determinations, . . . the onus is on

[them] to come up with the resources to mount a legal challenge in a timely fashion. This is . . . a significant burden for employees to bear simply to avoid having their money taken for speech with which they disagree . . . ." *Id.* (internal footnote and citations omitted).

Indeed, it strains credulity to believe, and it is unreasonable to expect, that participants in the Rehabilitation and Disability Programs would spend whatever free time they can find making sure that the union is spending their fees properly. Doing so would require them to review the union's report of its expenditures, determine whether each of the many expenditures is proper, and then, if they believe certain expenditures are improper, take the steps required to challenge them – which could include filing an unfair-labor-practice charge, participating in a hearing on the charge, and, if necessary, pursuing appeals before an Administrative Law Judge and then a court – all to challenge a fraction of fees they pay. See Ill. Admin. Code tit. 80 §§ 1200.135, 1220.10 *et seq*. Even for one who highly values First Amendment rights, the effort would make little economic sense. In some instances, public-interest organizations may help nonmembers vindicate their rights, as Petitioners' counsel of record has in this case, but it is not possible, nor should it be necessary, for those organizations to identify and correct all such First Amendment violations.

If a provider in the Rehabilitation Program did take time to review the LM-2 form that Respondent SEIU HealthCare Illinois & Indiana filed with the U.S. Department of Labor for 2012,[2] he or she would find that the union's expenditures for purported representational activities included, among many others, contributions to "Action Now," "Home Care First, Inc.," and "Missourians Organizing for Reform and Empowerment" ("MORE") – groups whose activities have respectively consisted of running "issue campaigns,"[3] funding a 2012 Michigan ballot initiative campaign,[4] and waging campaigns in Missouri against "an economic system that prioritizes corporations above all else."[5] Of course, this case does not present the question of whether those expenditures were somehow proper despite this Court's longstanding disapproval of a union using nonmembers' fees for "expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, 431 U.S. at 235-36; *see also Knox*, 132 S. Ct. at 2294-95 (union fee for "lobbying the electorate" regarding ballot-issue campaign violated

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[2] U.S. Dep't of Labor Form LM-2 for Service Employees Healthcare IL IN, schedule 15 (2012), available at http://illinoispolicy.org/wp-content/uploads/2013/11/SEIUHII2012LM2.pdf.

[3] Action Now Campaigns, http://www.actionnow.org/campaigns.

[4] Tim Martin, *Proposal 4: SEIU Union Pumps Money Into Michigan's Home Health Ballot Measure*, MLive.com, Oct. 26, 2012, http://www.mlive.com/politics/index.ssf/2012/10/proposal_4_seiu_union_pumps_mo.html.

[5] Our Work – Missourians Organizing for Reform and Empowerment (MORE), http://www.organizemo.org/our_work.

nonmembers' First Amendment rights). The problem is that such expenditures are not likely to ever become an issue before any court because the costs to objecting nonmembers of challenging them are prohibitively high.

This Court has held that the First Amendment cannot tolerate forcing individuals to pay for political or ideological speech with which they disagree, no matter how small the amount or how temporarily the funds are held. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986) (dissenters' funds may not be misused even temporarily and "[t]he amount at stake for each individual dissenter does not diminish this concern"); *cf. Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason."). But tolerate it the Petitioners must if Respondents' position prevails.

In light of the Court's acknowledgment in *Knox* that unions can easily use nonmembers' fees for political speech – and in light of the First Amendment's requirement that no one should be forced to pay for political speech he opposes – there can be no justification for making dissenting providers pay union fees. Here, as in *Knox*, the "general rule" that "individuals should not be compelled to subsidize private groups or private speech . . . should prevail." 132 S. Ct. at 2295. Here, as in *Knox*, if one side's interests must be

subordinated to the other's, it should be "the side whose constitutional rights are not at stake." *Id.* Here, if not in all public employment, the best way to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes," *Hudson*, 475 U.S. at 309, is to allow nonmembers to opt out of paying union fees entirely.

II. The State has given providers little choice but to pay for political speech they do not wish to support.

The State has placed home care providers in an untenable situation. It has led them to depend on a program that allows them to take care of their severely disabled family members at home rather than see them institutionalized, and then it has told them that they may only continue to receive this benefit if they pay for union speech with which they disagree. Petitioners have characterized the State's actions as "odious," Pet. Br. 38; they might also be called extortionate. And it is not merely a discrete act of extortion, as an officeholder's demand for a campaign contribution in exchange for an official act might be, but one to which they must submit constantly and in perpetuity. Because providers cannot reasonably be expected to value their First Amendment interests over the care of a family member, they have no reasonable hope of avoiding a violation of their rights short of leaving Illinois for a state that does not make this demand upon providers in Medicaid-waiver programs.

The only other conceivable way out is for providers to decertify the union – but that is not a realistic option. Decertifying a union is notoriously difficult,

even when the union lacks majority support. Probably few who are forced to pay union fees even know of their right to decertify; neither the union nor, especially in this case, the State has any incentive to inform them. *See* Douglas Ray, *Industrial Stability and Decertification Under the National Labor Relations Act*, 1984 Ariz. St. L.J. 257, 263-65 (1984); William A. Krupman & Gregory I. Rasin, *Decertification: Removing the Shroud*, 30 Labor L.J. 231, 233 (1979); *N.L.R.B. v. Drives, Inc.*, 440 F.2d 354, 367 (7th Cir. 1971) (Stevens, J.) ("[W]e wonder how many employees are aware of the existence of this seldom invoked right.").

For individuals who do learn of their right to decertify, the procedure may at first seem simple enough: One must get signatures from 30 percent of a bargaining unit's members, and the state Labor Relations Board will then hold an election. Ill. Admin. Code tit. 80 § 1210.60. But, in fact, it is not that simple because, where the "employer" has voluntarily recognized the union, as the State did for SEIU in this case,[6] a decertification petition may generally only be filed during the 30-day period

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[6] Indeed, Rehabilitation Providers never had an opportunity to vote on whether to join the union. Instead, according to the Illinois Department of Human Services, the union was recognized as a result of the State's determination in March 2003 that a majority of providers wanted to be represented by SEIU, based on the number of providers who, according to payroll records, were already SEIU members and the number of signed membership cards submitted by SEIU. Letter from Benno Weisberg, Illinois Dep't of Cent. Mgmt. Servs., to Justin Hegy, Illinois Policy Institute (Nov. 21, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/Weisberg Letter.pdf.

between 90 and 60 days before a collective-bargaining agreement's expiration or 60 to 90 days before five years will have elapsed, whichever comes first. Ill. Admin. Code tit. 80 § 1210.35. Thus, for example, because Rehabilitation Providers' previous collective-bargaining agreement was in effect from January 1, 2008 through June 30, 2012, J.A. 57, the providers had no opportunity to decertify for nearly four and a half years – and then they only had 30 days.

But this still understates the difficulty providers would face if they sought to decertify the SEIU as their exclusive representative. Communicating with other workers, collecting petition signatures, and conducting a decertification election campaign are costly activities, and for home-care providers, the costs may be especially high. As one pro-union legal scholar has observed, home care providers' jobs "seem completely antithetical to any notion of collective action" because would-be organizers cannot simply "stand at the factory gate and both identify and recruit workers as they enter[] and depart[]" as they can with industrial workers. Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1399 (2008). Providers are "hidden in individual homes [and] fragmented throughout neighborhoods, towns, and cities. Instead of working together in central locations, home-based care workers most commonly work alone in private homes." *Id.* (internal footnote omitted). So a would-be decertification petitioner must bear the unusual costs of finding and communicating with his or her fellow providers – if that is even possible.

The SEIU has been able to overcome this problem not only because of its superior financial resources but also because the State apparently gave SEIU the names and addresses of the providers it wanted to unionize.[7] Whether providers or third parties who wanted to undertake a decertification campaign could also acquire that information is uncertain; the Illinois Department of Human Services has recently declared that it cannot disclose providers' information under the Illinois Freedom of Information Act because doing so would violate the privacy rights of people who receive care in their homes. E-mail from Agostino Lorenzini, Illinois Dep't of Human Servs., to Justin Hegy, Illinois Policy Institute (Oct. 30, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/LorenziniEmail.pdf.

Thus, to escape infringement of their associational and speech rights, Petitioners must overcome a series of difficult, if not impossible, obstacles – all while competing against a union with vast resources and the State's support. Under the First Amendment, they should not have to escape at all; they should not be forced to fund the political speech of an organization they do not wish to support in the first place.

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[7] EO 2009-15 directed the Illinois Department of Human Services to "provide to an organization interested in representing individual providers access to the names and addresses of current individual providers." Pet. App. 50a. The record does not indicate how SEIU received Rehabilitation Providers' information in 2003, but the State is the only apparent possible source.

III. Allowing the State to compel funding for speech by select organizations will distort the marketplace of political ideas.

"The First Amendment creates a forum in which all may seek, without hindrance *or aid* from the State, to move public opinion and achieve their political goals." *Knox*, 132 S. Ct. at 2295 (emphasis added). That "forum" cannot exist if the State can compel subsidy recipients such as Petitioners to pay for unions' lobbying and other political speech. This compelled support harms the First Amendment interests of both dissenting subsidy recipients and the general public by distorting the marketplace of ideas in favor of views advanced by the entities that the State recognizes as exclusive representatives. Unlike other citizens and groups in Illinois, the exclusive representative has the power to force people who disagree with it to help pay for its political speech. Through their power to recognize exclusive representatives, officials can use state funds to indirectly aid the advancement of ideas that they favor and crowd out competing ideas.

And there is no reason to believe that this distortion would be limited to relatively narrow issues affecting home care providers or other subsidy recipients the State chooses to unionize, though that is offensive enough. By forcing subsidy recipients to pay fees to a union, the State also gives the union more funds to achieve its broader political goals, which may include reelecting the State officials who facilitated the unionization and supporting their policies. As discussed above, the burden placed on unionized workers to opt out of political funding and

unions' tendency to take a broad view of what constitute representation expenses leave little doubt that people who do not agree with the union's political speech will end up being made to pay for it. If the scheme is upheld and State officials begin appointing representatives for other groups that receive subsidies, it would put incumbent officials in a position to "tip[] the electoral process in [their] favor" and undermine the "competition in ideas and governmental policies [that] is at the core of our electoral process." *Elrod*, 427 U.S. at 357 (internal marks omitted).

The origins of the executive orders and statute at issue in this case suggest that State officials are well aware of the political opportunities this new tool offers them. Petitioners have alleged that Governors Blagojevich and Quinn issued their respective orders to unionize home care providers "in exchange for [SEIU's] political support and campaign contributions." J.A. 21-22, 26. Whether there was an actual quid pro quo agreement or not, it is certain that the executive orders benefited a top political supporter of both governors. In fact, SEIU was the second largest contributor to Blagojevich's 2002 campaign, giving $821,294, or 3.3 percent of all contributions.[8] Less than two months after taking office, Blagojevich issued the executive order authorizing an exclusive representative for Rehabilitation Providers, and the State recognized SEIU as the Rehabilitation Providers' representative

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[8] Contributions to Rod Blagojevich for 2002 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=3756.

– without giving providers an opportunity to vote on whether to join.[9] In the 2006 election for governor, SEIU was the top contributor to Blagojevich's reelection campaign by a wide margin, giving $908,382, or nearly five percent of the total.[10] In 2009, after Blagojevich's removal from office, Quinn issued the executive order authorizing an exclusive representative for providers in the Disabilities Program. EO 2009-15, Pet App. 48a-51a. SEIU Healthcare Illinois & Indiana, the exclusive representative for Rehabilitation Providers, then became the second-largest donor to Quinn's 2010 election campaign, with contributions of over $1.86 million, or 7.75 percent of the total. Considered together, SEIU-affiliated groups were by far Quinn's largest contributor, giving a total of at least $4.3 million, or approximately 18 percent of all contributions – much more than he received from, for example, all Democratic Party committees combined.[11]

If the governors issued their executive orders in exchange for SEIU's contributions as Petitioners allege, SEIU's investment paid off. Petitioners' complaint filed in 2010 alleges that providers in the Rehabilitation Program pay SEIU more than $3.6 million per year, J.A. 25; public records indicate, however, that from 2009 through 2013, the actual

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[9] See above, page 10 n.6.

[10] Contributions to Rod Blagojevich for 2006 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=79667.

[11] Contributions to Pat Quinn for 2010 Election, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=116445.

annual amount has averaged about $10.4 million in representation fees, plus about $298,285 per year in fees for SEIU's political action committee. E-mail from Agostino Lorenzini, Illinois Dep't of Human Servs., to Justin Hegy, Illinois Policy Institute (Oct. 9, 2013), available at http://illinoispolicy.org/wp-content/uploads/2013/11/LorenziniEmail2.pdf. And a union stands to receive millions more if it succeeds in another attempt to unionize Disability Providers.

Illinois' experience illustrates how the power to compel union support can facilitate a cycle in which a union gives money to political officials; the officials force (or attempt to force) subsidy recipients to give money to the union; and the union, with the benefit of the additional funds, makes more contributions to public officials with the expectation that they will deliver more new dues payers.

Illinoisans in particular have other good reasons to be troubled by the prospect of government officials empowered to coerce contributions for political speech. Their state's history does inspire confidence that officials would show restraint or respect for First Amendment values in exercising that power. For example, their previous governor, Blagojevich, was impeached, removed from office, and sent to federal prison for, among other things, attempting to obtain campaign contributions in exchange for official acts,[12] and his predecessor, George Ryan,

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[12] Illinois General Assembly, Senate Impeachment Tribunal Documents, http://www.ilga.gov/senate/ImpeachDocuments.asp; Bob Secter & Jeff Coen, *Blagojevich Convicted*, Chicago Trib., June 27, 2011, http://articles.chicagotribune.com/2011-06-

went to federal prison for, among other things, issuing state licenses in exchange for political contributions.[13]

Of course, past abuses by former officeholders do not prove that current or future Illinois officials will repeat them. But Illinois history does provide a reminder of why the framers were wise to create a First Amendment premised on a "mistrust of government," *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), that prohibits the state from compelling an individual to support an ideological or political cause he or she opposes, *Abood*, 431 U.S. at 234-36. And it shows why it would be unwise to subordinate citizens' First Amendment rights to Illinois officials' assertion that they have a compelling interest in designating exclusive representatives to speak for groups of citizens on matters of public concern at those citizens' compelled expense.

CONCLUSION

For the reasons set forth above and in the Petitioners' brief, the Seventh Circuit's judgment should be reversed.

27/news/ct-met-blagojevich-verdict-06-20110627_1_political-corruption-crime-spree-abraham-lincoln-roll-jury-convicts.

[13] *See* Claire Suddath, *A Brief History of Illinois Corruption*, Time, Dec. 11, 2008, http://content.time.com/time/nation/article/0,8599,1865681,00.html.

Respectfully submitted,

Jacob H. Huebert
Counsel of Record
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1630
Chicago, Illinois 60603
(312) 263-7668
jhuebert@
libertyjusticecenter.org

Paul Kersey
ILLINOIS POLICY
INSTITUTE
190 South LaSalle Street
Suite 1630
Chicago, Illinois 60603
(312) 346-5700
pkersey@illinoispolicy.org

Counsel for Amicus Curiae