No. 11-681

In the Supreme Court of the United States

PAMELA HARRIS, ET AL., PETITIONERS

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

A "fair-share" provision of a collective-bargaining agreement between the State of Illinois and a union representing certain personal assistants providing in-home care requires personal assistants who are not members of the union "to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." Pet. App. 5a (quoting collective-bargaining agreement). The questions presented are:

1. Whether the fair-share provision is consistent with the requirements of the First Amendment because the personal assistants subjected to it are employees of the State of Illinois.

2. Whether a First Amendment challenge brought by other personal assistants to the possible inclusion of a similar fair-share provision in a future collective-bargaining agreement is ripe even though those personal assistants voted against union representation, no collective-bargaining agreement exists, and the personal assistants are not subjected to any fair-share requirement.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

The First Amendment permits a State to require a public employee to furnish financial support to a union selected by a majority of the employee's co-workers, insofar as the union uses the fees for non-ideological, non-political collective-bargaining activity. The State of Illinois has authorized such a requirement for personal assistants who are paid by the State to provide in-home care on terms specified by the State. Petitioners, who are such personal assistants, brought suit, arguing that they are employees only of the individuals to whom they provide services, not the State,

and that the compelled financial support of the union violates their First Amendment rights. The court of appeals rejected that argument, concluding that the personal assistants are employed jointly by the State and service recipients. The court also held that the claims of other personal assistants are unripe, as those assistants voted against union representation and are not required to support any union.

1. a. In *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), this Court upheld a provision of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, that authorizes collective-bargaining agreements containing "union shop" requirements, which compel union membership as a condition of employment with a private railroad company. See 351 U.S. at 229 n.2 (reproducing 45 U.S.C. 152 Eleventh). Construing the statute to require financial support only for the union's collective-bargaining activities, *id.* at 235, the Court concluded that the statute's authorization of such arrangements did not offend the employees' First Amendment rights, *id.* at 238. Cf. *id.* at 235 (noting that if a collective-bargaining agreement required employees to support union activities "not germane to collective bargaining, a different problem would be presented") (footnote omitted); see *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963) (interpreting the Railway Labor Act as prohibiting union dues collected under a union shop agreement to be used for ideological or political purposes).

b. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that *Hanson* applied in the public-employment context. In *Abood*, the Court considered a state statute authorizing public-sector collective-bargaining agreements containing "agency

shop" provisions, which required employees represented by a union, including non-members, to pay the union a fee equivalent to union dues. *Id.* at 211. The Court recognized that "[t]o compel employees financially to support their collective bargaining representatives has an impact upon their First Amendment interests" because "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union." *Id.* at 222. But the Court concluded that a legislature may reasonably determine that required support for the collective-bargaining activities of an exclusive union representative would "promote peaceful labor relations" by avoiding "confusion," "rivalries," and "conflicting demands" resulting from multiple agreements with multiple unions; and would eliminate the ability of non-union workers to be "free riders," benefiting from the union's representation while refusing to contribute to it. *Id.* at 219, 220, 221, 222. Those legislative assessments, the Court held, justify what "interference as exists" when an employee is required to contribute to the financial support of a union's collective-bargaining activities in either the private or the public sector. *Id.* at 222; see *id.* at 225.

The Court in *Abood* rejected the argument "that in the public sector collective bargaining itself is inherently 'political,' and that to require [government employees] to give financial support to it is to require the 'ideological conformity'" that *Hanson* identified as constitutionally problematic. 431 U.S. at 226. Although there are important differences between collective bargaining in the public and private sectors, *id.* at 227-228, the Court concluded that a public employee has no "weightier First Amendment interest than a

private employee in not being compelled to contribute to the costs of exclusive union representation," *id.* at 229; see *id.* at 230-232. Thus, the Court concluded, like an employee in the private sector, a public employee may not be compelled to pay for a union's political and ideological activities. *Id.* at 234-236; see *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1990). But the First Amendment does not bar a requirement that public employees financially support the collective-bargaining activities of the union that represents their interests, just as it does not bar a similar requirement in the private sector. *Abood*, 431 U.S. at 225-226, 229.

2. a. The State of Illinois has established programs, funded under Medicaid (Pet. App. 20a), to provide in-home services for individuals in need of long-term care who otherwise would face institutionalization due to medical impairment or mental disability. 20 Ill. Comp. Stat. 2405/3(f); 405 Ill. Comp. Stat. 80/2-1 *et seq.*; see 42 U.S.C. 1396n(c) (2006 & Supp. V 2011); 42 C.F.R. 440.180, 441.300-441.310. Under the Home Services Program (Rehabilitation Program), Illinois pays "Personal Assistant[s]" to provide specified services to individuals, identified as "Customer[s]." 89 Ill. Admin. Code § 676.30(b) and (p); see *id.* § 686.20 (specifying services). "For purposes of the [personal assistant] services performed" under the program, "the customer is responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant]," including, "without limitation," such things as "locating and hiring," "training," "supervising," and disciplining the personal assistant. *Id.* § 676.30(b). The customer is also authorized to "terminat[e] the employment rela-

tionship between the customer" and the personal assistant. *Ibid.*

At the same time, the State also exercises considerable control over the personal assistant's employment. The State specifies the qualifications necessary for the position. 89 Ill. Admin. Code § 686.10 (identifying, among other things, requirements for age, skill, prior experience, and recommendations from prior employers). A counselor with the Illinois Department of Human Services prepares an individual service plan for each customer (subject to approval by the customer's physician, *id.* §§ 684.10(c), 684.75), identifying the services to be provided by the personal assistant, including "the specific tasks involved, the frequency with which the specific tasks are to be provided, the number of hours each task is to be provided per month, [and] the rate of payment for the service(s)." *Id.* § 684.50. The State also specifies the provisions that must appear in the employment agreement between the personal assistant and the customer. *Id.* § 686.10(h). The State pays the personal assistant's wages directly to the personal assistant, withholding state and federal taxes, *id.* §§ 676.200, 686.10(h)(10), 686.40, and customers may not supplement those wages, *id.* § 677.40(d); see 42 C.F.R. 447.15. The State also mandates an annual review of the personal assistants' performance, helps the customer conduct that review, and mediates any disagreement between the customer and the personal assistant. 89 Ill. Admin. Code § 686.30.

Illinois has adopted a similar program, the Home-Based Support Services Program (Disabilities Program), to provide in-home care for individuals who would otherwise be institutionalized due to mental

disability. See 59 Ill. Admin. Code §§ 117.100 *et seq.*; Pet. App. 3a ("The Disabilities Program functions similarly [to the Rehabilitation Program].").

b. The Illinois Public Labor Relations Act (PLRA) permits state employees to join labor organizations and bargain collectively, through their chosen representative, with their public agency employers over the terms and conditions of employment. 5 Ill. Comp. Stat. 315/6(a). When a public employer enters into a collective-bargaining agreement with an exclusive representative of its employees, the PLRA authorizes the agreement to contain a provision requiring employees who are not members of the union "to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." *Id.* 315/6(e). The public employer deducts such payments from the non-member employees' earnings and pays them to the union. *Ibid.*

In the mid-1980s, personal assistants under the Rehabilitation Program "sought to unionize and, under the [PLRA], collectively bargain with the State." Pet. App. 4a. A hearing officer of the Illinois State Labor Relations Board concluded that the State and "the service recipients were joint employers of the service providers." *Service Employees Int'l Union*, No. S-RC-115, 1985 IL LRB LEXIS 165, *1 (Dec. 19, 1985). But because the service recipients were not public employers, the hearing officer concluded that they were not subject to the PLRA or the Board's jurisdiction. *Id.* at *1-*2. "Without reaching the specific conclusions of the Hearing Officer as to the joint employer status," the Board agreed that the PLRA did not govern the personal assistants' employment.

Id. at *2. The Board stated that "[t]here is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the State of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients)." *Ibid.* The Board believed that the State did "not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the Act, their 'employer' or, at least, their sole employer." *Id.* at *3.

In 2003, the Governor issued an executive order providing that the State would "recognize a representative designated by a majority of personal assistants [in the Rehabilitation Program] as the exclusive representative of all personal assistants" under the PLRA. Pet. App. 46a. A few months later, the Illinois General Assembly amended the PLRA expressly to cover personal assistants in the Rehabilitation Program. Pub. Act No. 93-204, § 5, 2003 Ill. Laws 1930. The amendments included personal assistants as "[p]ublic employee[s]," 5 Ill. Comp. Stat. 315/3(n), and designated the State of Illinois their "public employer," *Id.* 315/3(o), "[s]olely for the purposes of coverage under the [PLRA]," 20 Ill. Comp. Stat. 2405/3(f). As amended, the PLRA requires the State to "engage in collective bargaining with an exclusive representative" of personal assistants "concerning their terms and conditions of employment that are within the state's control." *Ibid.*; see 5 Ill. Comp. Stat. 315/7. The amendments expressly disclaimed an employment relationship between the State and personal assistants for any other purpose, including for purposes of tort

liability or retirement and health insurance benefits. *Id.* 315/3(n) and (o); 20 Ill. Comp. Stat. 2405/3(f).

c. After the PLRA was amended, "a majority of the approximately 20,000" personal assistants working under the Rehabilitation Program designated a union, respondent SEIU Healthcare Illinois & Indiana, "as their collective bargaining representative with the State." Pet. App. 4a-5a. The union and the State negotiated a collective-bargaining agreement setting pay rates with annual raises, establishing a committee to develop training programs, prohibiting the union or its members from striking, and establishing a grievance procedure to resolve disputes concerning the meaning or implementation of the collective-bargaining agreement. *Id.* at 5a; 1:10-cv-02477 Docket entry No. 32, Ex. D (N.D. Ill. June 15, 2010) (Collective Bargaining Agreement (Aug. 1, 2003) (2003 CBA)). The agreement also contained a "fair share" provision, requiring "all Personal Assistants who are not members of the Union . . . to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours, and other conditions of employment." Pet. App. 5a (quoting 2003 CBA Art. X, § 6).

In 2009, two rival unions petitioned for an election to determine an exclusive representative of the personal assistants providing services under the Disabilities Program.[1] Pet. App. 5a. A majority of those per-

[1] Earlier in 2009, the Governor had issued an executive order providing that the State would "recognize a representative designated by a majority of the individual providers in the [Disabilities] Program as the exclusive representative of all such individual providers." Pet. App. 49a.

sonal assistants voted against such representation. *Ibid.* Thus, the conditions of their employment are not governed by a collective-bargaining agreement, and those personal assistants are not subject to any fair-share requirement.

3. a. Petitioners are personal assistants who provide in-home services under either the Rehabilitation Program or the Disabilities Program. Pet. App. 18a-19a. In 2010, they filed a putative class action under 42 U.S.C. 1983 against respondents—the State, the union representing personal assistants under the Rehabilitation Program, and the two unions that had sought to represent the personal assistants under the Disabilities Program. See 1:10-cv-02477 Docket entry No. 1, at 2 (N.D. Ill. Apr. 22, 2010) (Docket entry No. 1). The Rehabilitation Program petitioners claimed that, by compelling them to financially support the union, respondents "are abridging and violating" the personal assistants' First Amendment rights. *Id.* at 16. The Disabilities Program petitioners claimed that, "[b]y threatening to compel" them to financially support a union as their exclusive representative, respondents "are threatening" a similar impairment of their First Amendment rights. *Ibid.*

Petitioners sought to enjoin the State from enforcing the fair-share provision of the collective-bargaining agreement in the Rehabilitation Program; to obtain a declaration that Illinois law is unconstitutional to the extent it compels personal assistants to financially support an exclusive representative; to obtain damages equal to amounts withheld from them under that provision; and to obtain damages for the named Disabilities Program plaintiffs "for any monies that they spent, or spend in the future," to prevent the

respondent unions from becoming their exclusive representative. Docket entry No. 1, at 17-18.

b. The district court granted respondents' motion to dismiss. Pet. App. 20a. Petitioners argued that the State and the Rehabilitation Program personal assistants did not have "an employer-employee relationship." *Id.* at 32a. In the absence of such a relationship, petitioners urged, the fair-share requirement imposed on Rehabilitation Program personal assistants is "nothing short of compulsory political representation," *id.* at 29a (quoting petitioners' brief), amounting to compelled financial support of a union "for purposes of lobbying the State for additional benefits from a government program," *ibid.* The district court rejected petitioners' premise that the personal assistants are not state employees, noting the State's extensive control over the terms and conditions of their employment. *Id.* at 32a. Having recognized the personal assistants as state employees, the district court held that the union's dealings with the State did not cross the "hazy line" identified by *Lehnert* between collective bargaining and lobbying in the public sector. *Ibid.* (discussing 500 U.S. at 518-520).

The district court concluded that the claims of the Disabilities Program personal assistants were not properly before the court. Pet. App. 39a. Those personal assistants voted against union representation, and thus are not under a collective-bargaining agreement containing a fair-share provision. *Id.* at 37a. Petitioners did not allege that another election had been scheduled. *Ibid.* Even if they had, the court noted, the personal assistants again could vote against union representation. *Ibid.* And even if they decided to elect an exclusive representative, it would remain to

be seen whether the union would negotiate a collective-bargaining agreement containing a fair-share provision. *Ibid.* Because the claims of the personal assistants in the Disabilities Program involved "too many future events that may not occur as anticipated, or indeed may not occur at all," the district court dismissed those claims as unripe. *Ibid.* (internal quotation marks and citation omitted).[2]

c. The court of appeals affirmed in part and remanded in part. The court held that the Rehabilitation Program petitioners are state employees and that compelled financial support of collective bargaining is therefore permissible under the First Amendment. Pet. App. 7a-11a. Because the court was analyzing whether the personal assistants are state employees for purposes of the First Amendment, the court of appeals explained that it would "pay no particular heed" to petitioner's employment status under state law. *Id.* at 9a. Relying for purposes of First Amendment analysis on the "ordinary meaning" of "employer" as "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages," *id.* at 10a (quoting *Black's Law Dictionary* 604 (9th ed. 2009)), the court of appeals concluded that the personal assistants are jointly employed by the State and the customers because the State has "significant control over virtually every aspect of a personal assistant's job." *Ibid.*; see *id.* at 10a-11a.

The court of appeals rejected petitioners' additional argument that, even if they are state employees,

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[2] Alternatively, the district court held that the Disabilities Program petitioners had failed to establish any injury in fact, and so failed to demonstrate standing. Pet. App. 37a-39a.

personal assistants cannot be compelled to support the union's collective-bargaining activities because the State has no interest in labor peace where, as here, the employees do not work in a centralized location. Pet. App. 11a-12a. Petitioner's argument, the court concluded, is inconsistent with *Hanson*'s and *Abood*'s recognition that the labor-peace interest includes "stabilized labor-management relations" that result from recognizing an exclusive representative, an interest the State has here. *Id.* at 12a (quoting *Hanson*, 351 U.S. at 234); see *id.* at 12a-13a (discussing *Abood*). The court therefore held that *Abood* is controlling and that the First Amendment rights of Rehabilitation Program personal assistants are not infringed by the requirement to contribute to the financial support of the union's collective-bargaining activities. *Id.* at 13a.

Finally, the court of appeals agreed with the district court's determination that the claims of the Disabilities Program petitioners are unripe. Pet. App. 15a. But because the district court had mistakenly dismissed those claims with prejudice, the court of appeals remanded for correction of that error. *Id.* at 16a-17a.

DISCUSSION

The court of appeals correctly determined that the State of Illinois and the individual customers under the Rehabilitation Program are joint employers of personal assistants. That fact-bound determination does not warrant review. Petitioners' argument that personal assistants are not state employees ignores the extensive control the State exerts over details of the personal assistants' work, as well as the other factors relevant to determining whether a hired party is an employee. The court of appeals therefore properly

held that, under *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the personal assistants' First Amendment rights are not infringed by a requirement that they financially support the union's collective-bargaining activities. Because Rehabilitation Program personal assistants are public employees for those purposes, the court had no occasion to—and did not—consider what constraints the First Amendment would apply to a financial-support requirement "outside the employment context." Pet. App. 13a. The court of appeals also correctly held that because the Disabilities Program personal assistants voted against union representation, their challenge to a hypothetical fair share provision in a possible future collective-bargaining agreement is not ripe. The court's rulings do not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. As the court of appeals recognized (Pet. App. 9a), if the personal assistants are state employees, then *Abood* directly controls and the State may allow the union elected as their exclusive representative to require the personal assistants to contribute to the financial support of the union's collective-bargaining activities, even if some personal assistants disagree with the positions the union takes in its negotiations with the State. See *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 517 (1991) ("[A public] employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative."). The court of appeals correctly determined that personal assistants are properly regarded as pub-

lic employees for these purposes. That determination brings this case squarely within the holding in *Abood*.[3]

a. In determining whether a hired party is an employee for these purposes, it is appropriate to apply the general common law of agency. That is the approach the Court has taken in other contexts in determining "whether a hired party is an employee" for purposes of federal law that does not otherwise define the employment relationship. *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751 (1989) (*CCNV*); see *id.* at 751-752 & nn.18-31 (setting out a non-exhaustive list of factors and citing cases).[4] Among the factors this Court considers are

> the hiring party's right to control the manner and means by which the product is accomplished[;] * * * the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of

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[3] Petitioners do not contend that the financial support they provide to the union is used for any purpose other than collective bargaining activities.

[4] A state may choose to limit the consequences of its employment relationship for purposes of state law, as Illinois has done here. See 5 Ill. Comp. Stat. 315/3(n) and (o); 20 Ill. Comp. Stat. 2405/3(f). But a state law defining the scope of an employment relationship does not govern whether an individual may appropriately be considered a public employee for purposes of *Abood*, as the court of appeals correctly concluded. Pet. App. 9a.

> the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751-752 (footnotes omitted) (citing, *inter alia*, Restatement (Second) of Agency § 220(2) (1958) (Restatement)); see *id.* at 752 n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").

b. Consideration of the Rehabilitation Program personal assistants' work in light of those factors shows that the State and customers jointly exercise basic authorities of an employer and exercise others individually. The State and customers are therefore the personal assistants' joint employers.

Both the State and customers exert considerable control over "the manner and means by which" (*CCNV*, 490 U.S. at 751) personal assistants provide home care services. See Restatement § 220 cmt. d ("[C]ontrol or right to control the physical conduct of the person giving service is important and in many situations is determinative."). The State directs personal assistants' work-related activities by identifying the particular services they may provide. 89 Ill. Admin. Code § 686.20 (personal assistants may perform "household tasks, shopping, or personal care," as well as "incidental health care tasks" and health and safety monitoring). The State further directs personal assistants' work by detailing, for each assistant, "the specific tasks" to be performed, "the frequency with which the specific tasks are to be provided," and "the number of hours each task is to be provided per month." *Id.* § 684.50. For their part, customers "supervis[e]" the daily work performed by personal assis-

tants. *Id.* § 676.30(b); see Restatement § 220(2)(c) (identifying as a factor whether "the work is usually done under the direction of the employer"). Thus, the State and customers together exercise "discretion over when and how long" (*CCNV*, 490 U.S. at 741) personal assistants will work.

The "method of payment," "the tax treatment of the hired party," and "the provision of employee benefits" (*CCNV*, 490 U.S. at 751-752) further support the conclusion that the State is an employer of personal assistants. The State determines the rate at which it will pay personal assistants, 89 Ill. Admin. Code § 684.50; it alone pays the providers' wages, *id.* § 677.40(d), 42 C.F.R. 447.15; and it pays personal assistants directly, 89 Ill. Admin. Code §§ 676.200, 686.40. Like other employers, the State withholds federal (and state) taxes, *id.* § 686.10(h)(10), consistent with the requirement that "every employer making payment of wages shall deduct and withhold upon such wages" appropriate federal taxes, 26 U.S.C. 3402(a)(1). And although personal assistants are not eligible for statutorily mandated benefits, see 5 Ill. Comp. Stat. 315/3(n); 20 Ill. Comp. Stat. 2405/3(f), pursuant to its collective-bargaining agreement with the union, the State provides funding for health benefits. 1:10-cv-02477 Docket entry No. 32, Ex. C, Art. VII, § 2 (N.D. Ill. June 15, 2010) (Collective Bargaining Agreement (Jan. 1, 2008)).

Customers also possess certain authority commonly ascribed to employers, although not to the exclusion of the State. "[T]he location of the work" (*CCNV*, 490 U.S. at 751)—in a customer's home (see 89 Ill. Admin. Code § 676.10(a))—is a factor supporting the conclusion that customers are also employers of personal as-

sistants. Although not expressly stated in the regulatory scheme, customers presumably are the principal "source of the instrumentalities and tools" (*CCNV*, 490 U.S. at 751) used by personal assistants providing care in a customer's home. Yet, through the collective-bargaining agreement, the State has undertaken to provide personal assistants with hygienic gloves, an important means of protecting personal assistants' health and safety, when those are not available at the customer's home. 2003 CBA Art. IX. Customers largely control "the duration of the relationship" (*CCNV*, 490 U.S. at 751) between themselves and the personal assistants, through their authority to hire and fire. 89 Ill. Admin. Code § 676.30(b). But customers may hire only personal assistants who meet the qualifications set by the State, *id.* § 686.10; customers and personal assistants must use an employment agreement containing requirements specified by the State, *id.* § 686.10(h); and the State may effectively fire personal assistants by withholding payment, *id.* § 676.200.

In sum, in their dealings with personal assistants, neither the State nor the customer exclusively exercises the complete range of authority characteristic of an employer. Rather, both exercise core components of that authority. That makes them the personal assistants' joint employers. See Pet. App. 10a.[5] Indeed,

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[5] Federal labor law recognizes that an individual may be an employee of joint employers. See, *e.g., Boire* v. *Greyhound Corp.*, 376 U.S. 473, 475-476 (1964) (discussing National Labor Relations Board decision that, under the National Labor Relations Act, two businesses "were joint employers, because they exercised common control over the employees"); *NLRB* v. *Greyhound Corp.*, 368 F.2d 778, 781 (5th Cir. 1966) (holding that substantial evidence support-

Illinois law reflects the interests of both customers and the State as joint employers. The State recognizes that a customer is "responsible for controlling all aspects of the employment relationship *between the customer and the [personal assistant]*," 89 Ill. Admin. Code § 676.30(b) (emphasis added). At the same time, the State reserves for itself the right to bargain collectively with the exclusive representative of personal assistants concerning those "terms and conditions of employment *that are within the state's control*," 20 Ill. Comp. Stat. 2405/3(f) (emphasis added); see 5 Ill. Comp. Stat. 315/7 (same).

Because personal assistants are appropriately regarded as State employees, the court of appeals correctly held that, under *Abood*, the First Amendment rights of personal assistants who are not union members are not infringed by the collective-bargaining agreement's fair-share provision, requiring those individuals to financially support the union's collective-bargaining activities. Pet. App. 11a ("In light of [the State's] extensive control [over personal assistants' work], we have no difficulty concluding that the State employs personal assistants within the meaning of *Abood*."); see *id.* at 9a-11a; *Abood*, 431 U.S. at 222-223, 229-230; *Lehnert*, 500 U.S. at 517.[6]

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ed NLRB's finding that businesses were joint employers), on remand, *Greyhound Corp.*, 376 U.S. 473 (1964); see also, *e.g., NLRB* v. *Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982) ("[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.") (emphasis omitted).

[6] Petitioners remain "free to petition their neighbors and government in opposition to the union which represents them in the workplace," *Lehnert*, 500 U.S. at 521 (plurality opinion), and they

2. The court of appeals' decision does not warrant review by this Court. Petitioners' argument that the decision is inconsistent with this Court's precedent concerning the First Amendment rights of public employees lacks merit, and petitioners identify no circuit split on that question.

Petitioners contend that the personal assistants cannot be public employees "because they are neither managed by the State nor work in State workplaces." Pet. 19. But "whether [an entity] possesse[s] sufficient indicia of control to be an 'employer' is essentially a factual issue," *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), and so not worthy of this Court's review. In any event, petitioners are mistaken in suggesting that the State cannot jointly employ personal assistants with customers because personal assistants work in customers' homes and are supervised by them there. As we have explained, see pp. 14-17, *supra*, day-to-day supervision and the location of work are only two of the factors relevant to determining whether an employer-employee relationship exists. Other factors—including not only the State's direct payment of personal assistants as employees and provision of health care benefits to them, but also the State's control over "the manner and means by which" (*CCNV*, 490 U.S. at 751) they carry out their work—support

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do not allege that the State has retaliated against them for their opposition to the union, see Pet. App. 12a n.5. Thus, petitioners' reliance on cases such as *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011), and *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U.S. 712 (1996), is misplaced. See, *e.g.*, Pet. 9, 20.

the conclusion that the State also is the personal assistants' employer.[7]

Petitioners place particular emphasis on the location of personal assistants' work in asserting that *Abood*'s "labor peace" rationale has no application where individuals "do not work in government workplaces." Pet. 15; see Pet. 15-16. Petitioners' argument misunderstands the nature of the "labor peace" rationale, both doctrinally and conceptually. As a doctrinal matter, this Court first articulated the "labor peace" rationale in a private employment context in which many employees have no centralized workplace. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956); see 45 U.S.C. 152 Eleventh (a) and (c) (authorizing imposition of union-shop requirement on, among others, engineers, conductors, and trainmen) (cross-referencing 45 U.S.C. 153(h)).

Conceptually, there is no reason that the benefits of labor stability are limited to employment in which workers share a common physical worksite. This Court has recognized that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would

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[7] Petitioners contend repeatedly that the State "merely paid" for the personal assistants' services and that customers otherwise control all aspects of the personal assistants' work. See, *e.g.*, Pet. 21; Reply to Unions Br. in Opp. 2, 6, 7. But that assertion ignores the many ways in which the State controls the work performed by personal assistants. Accord Illinois Br. in Opp. 10-11. And petitioners misdescribe the court of appeals' decision in suggesting (Pet. 20; see also Reply to Illinois Br. in Opp. 3) that the court gave "dispositive" weight to the State's payments. See Pet. App. 10a-11a (concluding that personal assistants are employed by State in light of State's "extensive control" of their work).

be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234.

Here, the State has a legitimate interest in using collective bargaining to structure its relationship with the personal assistants in its employ. The State's interest in labor peace includes avoiding "high turnover, low morale, excessive absenteeism, poor training, [and] lack of productivity" (Illinois Br. in Opp. 17), which can undermine the program the State created to assist vulnerable disabled individuals, and which can be addressed effectively through a collective bargaining system that gives personal assistants a greater stake in both the process and the outcome.

Moreover, once the State decided to allow personal assistants to form unions and collectively bargain with the State—a decision the validity of which petitioners do not challenge—the State's interest in recognizing an exclusive representative rested on the very elements of labor peace identified in *Abood*: avoiding the confusion resulting from enforcing multiple collective-bargaining agreements, preventing inter-union rivalries, freeing the employer from conflicting demands, and permitting the employer and union to reach an agreement free from attack by a rival union. 431 U.S. at 221; cf. Reply to Unions Br. in Opp. 3 n.1. Similarly, the recognition of an exclusive representative triggered the legitimate state interest in addressing the free-rider problem that would arise if individual personal assistants could benefit from the union's collective-bargaining activities without contributing to the financial support of those activities. See *Abood*, 431 U.S. at 222.

Finally, petitioners and their amici err in suggesting that "[n]o discernible principle limits" (Pet. 22) the court of appeals' decision. They note related contexts in which personal service providers are subject to fair-share provisions (*ibid.*), and they speculate that the court of appeals' ruling would support extending such a requirement to "physicians and nurses" (*ibid.*), "dentists" and "[a]ttorneys" (Cato Inst. Amicus Br. 23), "government contract[ors]" (Reply to Illinois Br. in Opp. 4), or even to recipients of monetary benefits such as social security (Ctr. for Const. Jur. Amicus Br. 11). Such speculation is misplaced and furnishes no basis for review by this Court.

The court of appeals' decision fits comfortably within *Abood*'s holding that the First Amendment permits States to require public employees to financially support the collective-bargaining activities of the employees' exclusive representative. Its ruling plainly does not apply to individuals who merely receive social security or other monetary benefits from the government. And the court expressly did not consider whether a State could impose financial-support requirements "outside the employment context." Pet. App. 13a; see *ibid.* (reserving question as applied to "[independent] contractors, health care providers, or citizens").[8]

3. In a brief, four-paragraph argument (Pet. 27-28), petitioners urge this Court to grant certiorari to re-

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[8] Highly skilled professionals and government contractors who are "engaged in a distinct occupation or business" (Restatement § 220(2)(b)), are specialists who work "without supervision" (*id.* § 220(2)(c)), provide their own tools (*id.* § 220(2)(e)), and are paid by the job rather than by time (*id.* § 220(2)(g)), are unlikely to be considered government employees.

solve a purported conflict with the Eleventh Circuit that, petitioners claim, was created by the Seventh Circuit's determination that the claims of the personal assistants in the Disabilities Program are not ripe for review. No such conflict exists, and no further review is warranted.

The Disabilities Program personal assistants voted against union representation, no collective-bargaining agreement governs their employment, and they are not subjected to a fair-share requirement. Pet. App. 5a. They nevertheless seek to enjoin the State from enforcing provisions of law that might someday result in the election of a union as their exclusive bargaining representative and the negotiation of a collective-bargaining agreement containing a fair-share provision. Docket entry No. 1, at 16-17. The court of appeals concluded that the Disabilities Program personal assistants' claim is not ripe because it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Pet. App. 14a (quoting *Evers* v. *Astrue*, 536 F.3d 651, 662 (7th Cir. 2008), in turn quoting *Texas* v. *United States*, 523 U.S. 296, 300 (1998)).

Petitioners contend (Pet. 28) that the Seventh Circuit's ripeness decision conflicts with the Eleventh Circuit's conclusion that "probabilistic harm is enough injury to confer standing in the undemanding Article III sense." *Mulhall* v. *UNITE HERE Local 355*, 618 F.3d 1279, 1288 (2010) (citation omitted), petition and cross-petition for cert. pending, No. 12-99 (filed July 20, 2012), and No. 12-312 (filed Aug. 22, 2012). But the court of appeals in this case did not address petitioners' standing or their alleged injury, and petitioners

have identified no other conflict with the Eleventh Circuit's decision.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] By order dated January 14, 2013, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Mulhall*. The questions presented in *Mulhall*—involving the proper interpretation of 29 U.S.C. 186—are entirely distinct from the First Amendment issue in this case. There accordingly is no reason to hold the petition in this case pending the disposition of the petition and cross-petition in *Mulhall*.