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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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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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INTEREST OF THE UNITED STATES

The principal question presented in this case is whether the First Amendment allows the State of Illinois to require individuals it pays to furnish in-home medical care to remit a fee to a union for their proportionate share of the union's costs of collective bargaining and related activities. The United States pays a portion of the cost of such care under the Medicaid Program, and federal statutes allow comparable union-fee assessments in the private sector. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, at 1a-50a.

STATEMENT

1. a. As originally enacted in 1935, the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, allowed an employer and a union to enter into a "closed shop" agreement requiring the employer to hire only members of the union. See *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 747 (1988). "By 1947, such agreements had come under increasing attack," and Congress outlawed them that year in the Taft-Hartley Act, 29 U.S.C. 141 *et seq.* *Beck*, 487 U.S. at 748. At the same time, however, Congress was concerned "that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Ibid.* The Taft-Hartley Act therefore amended the NLRA to permit employers to enter into "union security" agreements requiring employees to become members of a union soon after being hired, but forbidding their discharge based on the agreement for any reason other than a failure to pay dues. See *id.* at 749; 29 U.S.C. 158(a)(3).

Four years later, citing the "same concern over the resentment spawned by 'free riders' in the railroad industry," *Beck*, 487 U.S. at 750, Congress amended the Railway Labor Act (RLA) to authorize railroads to enter into union-security agreements. 45 U.S.C. 152 (Eleventh). Unlike the NLRA provision, however, the RLA provision preempts state laws banning such agreements. Cf. 29 U.S.C. 164(b).

Soon after that amendment, the Supreme Court of Nebraska held that the RLA provision, by overriding an employee's state-law right not to join a union, violated the First Amendment's guarantee of freedom of expressive association. See *Hanson* v. *Union Pac. R.R. Co.*, 71 N.W.2d 526, 545-547 (1955). In *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), this Court reversed that holding. It first concluded that in States where the RLA preempts state law, the negotiation and enforcement of private-sector union-security agreements constitutes governmental action subject to the First Amendment. *Id.* at 232; see *Beck*, 487 U.S. at 761. The Court then rejected the "wide-rang[ing]" First Amendment arguments that the challengers had presented, including that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Hanson*, 351 U.S. at 236-238. The Court explained that with respect to the payment of fees to support the union's collective-bargaining activities, there was no more of an impairment of First Amendment rights than there is in requiring a lawyer to become a member of an integrated bar. *Id.* at 238. Although the challengers argued that compulsory membership would be used to impair freedom of expression, the record before the Court did not demonstrate that "the exaction of dues, initiation fees, or assessments" had been "used as a cover for forcing ideological conformity." *Ibid.*

In subsequent cases, this Court, applying the canon of constitutional avoidance, has construed the RLA not to authorize unions to exact fees from an employee to fund political or ideological activities, such as sup-

porting candidates for public office, if the employee objects to paying for such activities. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-750, 768-770 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 121-122 (1963); *Ellis* v. *Railway Clerks*, 466 U.S. 435, 447-448 (1984). But it has held that such employees may be required to "pay their fair share of union expenditures 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866, 873 (1998) (quoting *Ellis*, 366 U.S. at 448); see also *Ellis*, 366 U.S. at 448 (holding that employees may be required to defray "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative").

b. In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court applied that framework to a public employer. *Abood* considered the constitutionality of a Michigan statute authorizing state agencies to enter into collective-bargaining agreements containing "agency shop" provisions, which, rather than requiring all employees to join the union, require objecting employees to pay the union a fee equivalent to union dues. *Id.* at 211. Relying on both the RLA cases and prior decisions "prohibit[ing] a State from compelling any individual to affirm his belief in God, or to associate with a political party, as a condition of retaining public employment," the Court held that a public employee may not be required to subsidize a union's political or ideological activities. *Id.* at 234-236 (citations omitted).

As in the RLA cases, however, the Court made clear in *Abood* that public employees may be required to fund a proportionate share of a union's non-ideological activities, *i.e.*, those relating to "collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-226. Those assessments, the Court held, are justified in light of the interests that prompt public and private employers alike to sign union-security agreements: the needs to "promote peaceful labor relations" by avoiding "confusion," "rivalries," and "conflicting demands" that would result from multiple agreements with multiple unions, and to prevent non-union workers from "free riding" on the bargaining activities of the union, which has a legal duty fairly to represent all employees, union and non-union, in the relevant unit. *Id.* at 219-221.

In the 36 years since *Abood*, this Court has reaffirmed the decision's dichotomy between a union's collective-bargaining function and its ideological or political activities, while setting out various requirements for the exaction of fees from public employees. See *Locke* v. *Karass*, 555 U.S. 207, 213-214 (2009); *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302 (1986).

2. a. The State of Illinois has established a Medicaid-funded program, called the Rehabilitation Program, to provide in-home services for individuals who otherwise would face institutionalization due to medical impairment. 20 Ill. Comp. Stat. Ann. 2405/3(f); see 42 U.S.C. 1396n(c) (2006 & Supp. V

2011); see also 42 C.F.R. 440.180, 441.300-441.310.[1] Under the program, each patient, or "customer," has a "personal assistant." Although Illinois could have asserted comprehensive control over the relationship between personal assistants and customers—by assigning particular assistants to specific customers, setting times of service, and the like—the State (like other States with similar programs) has instead chosen to structure the Rehabilitation Program so as to tailor the services provided to each customer's particular needs. See Pet. App. 2a.

To achieve that flexibility, Illinois has given the customer control over certain aspects of the employment relationship with the personal assistant, while retaining control over other aspects. The State's Department of Human Services (DHS) sets and pays the personal assistant's wages (while withholding income tax) and establishes the job's basic qualifications and duties. Ill. Admin. Code tit. 89, §§ 686.10, 686.20, 686.40. It also prescribes the terms of employment contracts entered into between personal assistants and customers. *Id.* § 686.10(h). For each customer, a DHS official, in consultation with the customer's physician, prepares an individual service plan setting forth with specificity which tasks the personal assistant will perform. *Id.* §§ 684.10, 684.40, 684.50, 684.75. DHS also mandates an annual performance review by the customer, based on criteria set by DHS, helps the customer conduct that review, and mediates disagreements between the customer and the personal assistant. *Id.* § 686.30. But given the personal na-

[1] Citations of the Illinois Compiled Statutes Annotated refer to the West 2013 edition or supplement. Citations of the Illinois Administrative Code refer to the 2013 edition.

ture of service provided in one's home, DHS has given the customer control over hiring and firing decisions within the pool of qualified personal assistants, as well as the training, discipline, and day-to-day supervision of the personal assistant. Ill. Admin. Code tit. 89, § 676.30(b).

Illinois has established a similar program, called the Disabilities Program, for mentally disabled individuals. See 405 Ill. Comp. Stat. Ann. 80/2-1 *et seq.*

b. The Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor organizations and to bargain collectively over the terms and conditions of employment. 5 Ill. Comp. Stat. Ann. 315/6(a). If employees in a particular bargaining unit select a labor organization, that organization serves as the unit's exclusive representative in bargaining over "rates of pay, wages, hours and other conditions of employment" and has a duty to fairly represent all employees in the unit. *Id.* 315/6(c) and (d). The PLRA permits any resulting agreement to contain a "fair share" 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).

In the mid-1980s, personal assistants under the Rehabilitation Program sought to unionize. The Illinois State Labor Relations Board, however, concluded that the PLRA did not apply to personal assistants because Illinois was not their "sole employer"; it did not decide whether the State and the customers have "joint employer status." *Service Emps. Int'l Union*,

No. S-RC-115, 1985 IL LRB LEXIS 165, at *2-*3 (Dec. 19, 1985).

The Illinois General Assembly amended the PLRA in 2003 expressly to cover personal assistants in the Rehabilitation Program. Pub. Act No. 93-204, § 5, 2003 Ill. Laws 1930. The amendments deem personal assistants "[p]ublic employee[s]," 5 Ill. Comp. Stat. Ann. 315/3(n), and designate the State as their "public employer," *id.* 315/3(*o*). 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." 20 Ill. Comp. Stat. Ann. 2405/3(f); see 5 Ill. Comp. Stat. Ann. 315/7. The amendments disclaim an employment relationship between the State and personal assistants for other purposes. 20 Ill. Comp. Stat. Ann. 2405/3(f).

A majority of the personal assistants under the Rehabilitation Program designated respondent SEIU Healthcare Illinois & Indiana (SEIU-HCII) as their collective-bargaining representative. Pet. App. 4a-5a. The union and Illinois have negotiated a series of collective-bargaining agreements setting pay rates with annual raises, providing state-funded health insurance, designating a committee to develop training programs, prohibiting the union or its members from striking, and establishing a grievance procedure. *Id.* at 5a; see J.A. 35-60 (agreement effective from January 1, 2008, to June 30, 2012). Each agreement has contained a fair-share clause. J.A. 50-51.

c. In 2009, based on an order issued by the Governor permitting Disabilities Program personal assistants to organize, two rival unions petitioned for an election to determine an exclusive representative for

those personal assistants. Pet. App. 5a. A majority voted against such representation. *Ibid.*

3. a. Petitioners are personal assistants who provide in-home services under either the Rehabilitation Program or the Disabilities Program. In 2010, they filed a putative class action in the District Court for the Northern District of Illinois under 42 U.S.C. 1983 against the Governor, SEIU-HCII, and the two unions that had sought to represent the Disabilities Program personal assistants. See Pet. App. 18a-19a, 23a. Their complaint sought an injunction against enforcement of the fair-share fee requirement and a declaration that it violates the First Amendment. J.A. 32-33.

The district court dismissed all claims with prejudice. Pet. App. 20a, 39a. The court explained that the Rehabilitation Program petitioners could lawfully be required to pay fees for collective bargaining and related activities, and that they did not claim that their fees had been used for ideological or political purposes. *Id.* at 27a-36a. It also concluded that the Disabilities Program petitioners' claim was not ripe. *Id.* at 37a-38a.

b. The court of appeals affirmed in part and remanded in part. Pet. App. 1a-17a. Turning first to the Rehabilitation Program, the court explained that if "the personal assistants are * * * State employees[,] * * * this case is controlled by *Abood* and the plaintiffs' claims fail." *Id.* at 9a. Observing that "it is not an uncommon situation for a single individual to find himself with more than one employer for the same job," the court found that Illinois and individual customers are joint employers of personal assistants. *Id.* at 10a-11a. It explained that "the State controls all of the economic aspects of employment: it sets sala-

ries and work hours, pays for training, and pays all wages." *Id.* at 11a. In addition, the court noted, Illinois "sets the qualifications" for personal assistants, "approv[es] a mandatory service plan that lays out a personal assistant's job responsibilities and work conditions," and "annually reviews each personal assistant's performance." *Id.* at 10a-11a. "In light of this extensive control," the court of appeals had "no difficulty concluding that the State employs personal assistants within the meaning of *Abood*." *Id.* at 11a.

The court of appeals affirmed the district court's holding that the Disabilities Program petitioners' claim was unripe, but concluded that the claim should have been dismissed without prejudice. Pet. App. 14a-17a.

SUMMARY OF ARGUMENT

I. The fair-share fee requirement for Rehabilitation Program personal assistants is consistent with the First Amendment.

A. This Court correctly held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that the First Amendment permits a public employer to require, as a condition of working for the government, that an employee pay a proportionate share of a union's cost of "collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-226.

1. For over one hundred and fifty years after it was adopted, the First Amendment was not understood to impose any restrictions on the government when it acted as an employer. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006). Thus, for example, it was common for government entities to condition employment on membership in a particular political party. Only in the 1950s did this Court first establish lim-

its on the government's authority to take employment actions based on employees' expressive activities. But the Court's decisions since that time have preserved a broad zone of discretion for public employers so long as they do not attempt to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419.

Under the approach originating in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), a public employer has unfettered authority to make employment decisions based on an employee's speech activities unless the speech relates to a "matter of public concern." If it does, a court evaluating a First Amendment claim must "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

2. The basic dichotomy set forth in *Abood* and subsequent cases parallels the *Pickering* framework. This Court has held that mandatory agency fees represent "a form of compelled speech and association." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012). When an employee is required to subsidize a union's political or ideological activities, the resulting speech and association relate to a matter of public concern, and the government lacks an adequate employment-related justification for that requirement. By contrast, when a government employee is required only to pay a proportionate share of a union's costs incurred in collective bargaining, contract administration, grievance adjustment,

and similar activities, the payment does not relate to a matter of public concern and is a permissible condition of public employment.

Even if a union's bargaining-related activities could properly be characterized as relating to a matter of public concern, the *Abood* dichotomy would readily satisfy the *Pickering* balancing standard. This Court has recognized the government's substantial interests in eliminating the inefficiency that would result if a public employer were required to bargain with more than one union and the potential for objecting employees to "free ride" on the union's legally required efforts on their behalf. On the other side of the balance, a requirement that employees pay their proportionate share of the cost of such activities affects an employee's freedom of speech and association far less than the restrictions at issue in other cases in which this Court has upheld conditions on public employment. An employee remains as free as any other citizen to petition the government for changes to employment policies, to speak out against the union, and to affiliate with anti-union organizations.

3. Although they ask this Court to overrule *Abood*, petitioners have presented no sound reason to disregard *stare decisis*. Their arguments have no support in the original understanding of the First Amendment, lack a principled basis in this Court's established framework for evaluating speech-related conditions on public employment, and risk destabilizing that established framework.

B. Under *Abood*, petitioners' claims fail because the fair-share fees do not fund the union's political or ideological activities. Petitioners contend that *Abood* does not apply here because (i) they do not work on

government property and are not directly supervised by other state employees, and (ii) their salaries are paid from Medicaid funds. Neither of those features of the Rehabilitation Program has anything to do with the basic justifications for the *Abood* rule. Here, it is Illinois that sets and pays the personal assistants' wages, funds their healthcare benefits, and establishes their qualifications and duties. When any of those topics becomes the subject of dispute, it is Illinois, not the individual customers, that will sit down at the bargaining table. It follows that Illinois retains the same constitutionally significant interest in a single bargaining representative as do public employers that manage more typical employment relationships.

II. The Disabilities Program petitioners' claim is not ripe. It is entirely speculative whether they will ever be subject to a collective-bargaining agreement containing a fair-share fee requirement.

ARGUMENT

I. THE FAIR-SHARE FEE REQUIREMENT DOES NOT VIOLATE THE FIRST AMENDMENT

The Rehabilitation Program petitioners contend that the fair-share fee requirement violates their First Amendment rights to petition the government for redress of grievances and freely to choose with whom they will associate. Pet. Br. 13. It is undisputed, however, that the fair-share fees fund only "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment." J.A. 50-51; 5 Ill. Comp. Stat. Ann. 315/6(e). Accordingly, petitioners' claim is foreclosed by *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 232 (1977), and subsequent decisions reaffirming that the First Amendment allows

government entities to enter into collective-bargaining agreements permitting the union to exact a fee from the employees it represents to defray the costs of collective bargaining and related non-ideological activities in which it engages on their behalf. See *Locke* v. *Karass*, 555 U.S. 207, 217-218 (2009); *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301-302 (1986).

Rather than attempting to reconcile their challenge with this Court's well-settled framework for evaluating claims that particular fees violate the First Amendment, petitioners argue that *Abood* should be either overruled or "limited to its facts." Pet. Br. 18, 24. Neither argument has merit.

A. *Abood* Was Correctly Decided And Should Not Be Overruled

Petitioners argue that this Court should overrule *Abood*'s holding that the First Amendment permits a government entity to provide in a collective-bargaining agreement with a union that an employee is required to pay his or her proportionate share of the costs of "collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225-226, that the union must conduct on behalf of all covered employees. This Court should decline that request. Petitioners forfeited that argument by failing to raise it in their certiorari petition. See Sup. Ct. R. 14.1; *Yee* v. *City of Escondido*, 503 U.S. 519, 533-538 (1992). For that reason alone, this is not an appropriate case to reconsider *Abood*.

In any event, *Abood* was correctly decided. Overruling it would require this Court not only to discard sixty years of precedent on the specific issue of agency

fees, see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 236-238 (1956), but also to distort and destabilize the established framework for evaluating claims that a condition of public employment violates the First Amendment, see *Garcetti* v. *Ceballos*, 547 U.S. 410, 417-420 (2006). Petitioners have pointed to nothing in the original understanding of the First Amendment, *Abood*'s practical consequences, or any other relevant *stare decisis* consideration that justifies so radically reshaping First Amendment law.

1. For over a century and a half after the First Amendment was adopted, and nearly a century after ratification of the Fourteenth Amendment, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417 (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). The First Amendment was understood to apply only when the government acted as sovereign with respect to citizens, not when it acted as employer with respect to employees. As Justice Holmes famously put it, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). "For many years, Holmes' epigram expressed this Court's law." *Connick*, 461 U.S. at 144 (citing decisions between 1882 and 1952).

That original understanding of the First Amendment permitted public entities to make employment decisions based not only on what a person said, but also on what associations the person maintained. For example, the requirement that an employee be a member of a particular political party "was, without

any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic." *Rutan* v. *Republican Party*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting); see *id.* at 83 (Stevens, J., concurring). As the D.C. Circuit explained in 1950, "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations." *Bailey* v. *Richardson*, 182 F.2d 46, 59, aff'd by an equally divided Court, 341 U.S. 918 (1951).

This Court first departed from that understanding of the First Amendment "in the 1950's and early 1960's," in cases involving requirements that "public employees * * * swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144; see *ibid.* (citing cases). The Court did so to address the concern that the government could "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

The Court therefore has distinguished between conditions on public employment reflecting legitimate concerns of the sort ordinarily held by private employers and those that exploit the employment relationship to curtail the exercise of public employees' constitutional rights as private citizens. In drawing that line, the Court has emphasized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

To address that imperative, this Court employs the two-step approach originating in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), "in analyzing a claim that a public employee was deprived of First Amendment rights by her employer." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 599-600 (2008). First, if the speech activity does not relate to "a matter of public concern," "the employee has no First Amendment cause of action." *Garcetti*, 547 U.S. at 418. Second, even if the speech relates to a matter of public concern, the employee's claim fails if "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* At that step, a court must not impose "an unduly onerous burden on the State," *Connick*, 461 U.S. at 149, but rather must "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568. That balancing is necessary because "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Engquist*, 553 U.S. at 598 (citation omitted).

The Court has held that the two-step approach applies not only to Speech Clause claims, but also to alleged violations of the freedom of expressive association, at least where the association is "intermixed" with the employee's speech activities. *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715, 719-

720 (1996); see also *id.* at 719 (further explaining that "the inquiry is whether the affiliation requirement is a reasonable one"). It has also held that approach applicable to claims under the Petition Clause, *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2500 (2011), with two Members of the Court expressing the view that the Petition Clause does not apply at all to "petitions [that] are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign," *id.* at 2501-2502 (Thomas, J., concurring in the judgment) (citation omitted); *id.* at 2506 (Scalia, J., concurring in the judgment in part and dissenting in part).

2. Because this Court's public-sector agency-fee cases grew out of decisions addressing First Amendment limits on private-sector union-security agreements, see pp. 3-4, *supra*, they developed somewhat independently of the cases addressing public-employment conditions more generally.[2] But as petitioners recognize (Br. 28-31), they address the same fundamental First Amendment question: the authority of the government to adopt measures affecting associational and expressive activities "as a condition of retaining public employment," not in its sovereign capacity. *Abood*, 431 U.S. at 234-235 (relying on employment-condition cases); see *Board of County*

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[2] As the United States explained in *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988), it is unclear why *Hanson* and the other RLA cases, which concerned only federal preemption of state laws barring *private* union-shop agreements, raised a First Amendment question at all. See U.S. Amicus Br. at 27-29, (No. 86-637). But to the extent the First Amendment applies, judicial review of an employer-imposed condition on private employment should be at least as deferential as review of a condition on public employment.

Comm'rs v. *Umbehr*, 518 U.S. 668, 674-675 (1996) (situating *Abood* within broader context of restrictions on government employees' speech activities); *Lehnert*, 500 U.S. at 517 (same); see also *Keller* v. *State Bar of Calif.*, 496 U.S. 1, 10 (1990). And the union-fee holdings embody the same core principle that "although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 553 U.S. at 600.

a. This Court has held that mandatory agency fees represent "a form of compelled speech and association." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).[3] But unlike laws requiring citizens to express an ideological message under threat of penalty, see *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977), compelling private expressive associations to include an unwanted person, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 645, 659 (2000), or imposing assessments on private companies primarily for use in generic advertising to the public, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 408 (2001), agency fees are merely a prerequisite to voluntary employment with a particular government entity and are assessed to cover the costs of representing the employees in their employment relationship with that entity. This Court has never subjected employment condi-

[3] Petitioners appear to contend (Br. 30, 37) that the PLRA's requirement that Illinois bargain only with the personal assistants' chosen representative constitutes an additional First Amendment injury. Petitioners' complaint did not seek to enjoin that requirement, see J.A. 32-33, and that argument is in any event foreclosed by *Minnesota Board for Community Colleges* v. *Knight*, 465 U.S. 271, 278-279, 282-283, 288 (1984).

tions to the same exacting scrutiny as free-standing legal obligations, but rather has accorded "a wide degree of deference to the employer's judgment." *Connick*, 461 U.S. at 151-152.

Abood's distinction between a union's ideological and non-ideological activities parallels *Pickering*'s distinction between matters of public and private concern. When an employee is required to contribute financially to a union's political or ideological activities, the resulting speech and association relate to a "matter of public concern" and therefore require a court to "balance the First Amendment interest of the employee against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Guarnieri*, 131 S. Ct. at 2493 (internal quotation marks and citation omitted). *Abood* teaches that a government employer lacks an adequate employment-related justification for requiring an employee "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Abood*, 431 U.S. at 235.

That conclusion is sound. A union's ideological and political activities, such as supporting a candidate for public office, do not advance the efficient operation of a government employer. And the employee's First Amendment interest is especially significant in the context of compelled subsidies for political or ideological activities, because, "unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.). For those reasons, "the constitutional principles that prevent a State from conditioning pub-

lic employment upon association with a political party, or upon professed religious allegiance, similarly prohibit a public employer from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Id.* at 517 (majority opinion) (internal quotation marks and citation omitted); see *Abood*, 431 U.S. at 235. It follows that the procedural mechanisms that employers and unions establish to ensure that objecting employees are not required to subsidize ideological speech must be "carefully tailored to minimize the infringement of free speech rights." *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303).

By contrast, when employees are required only to pay a proportionate share of a union's costs incurred in collective bargaining, contract administration, grievance adjustment, and comparable activities on their behalf, the resulting association with the union and financial support of the union's activities do not relate to a matter of public concern as that concept has been understood in this Court's cases. This Court has made clear that "speech on merely private employment matters is unprotected," *Umbehr*, 518 U.S. at 675, including matters such as "the need for a grievance committee" and "office transfer policy," *Connick*, 461 U.S. at 141. That conclusion reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. Like "[a] petition filed with an employer using an internal grievance procedure," negotiations between the employees' chosen representative and their government employer over the terms and conditions of employment do "not seek to communicate to the public or to

advance a political or social point of view beyond the employment context." *Guarnieri*, 131 S. Ct. at 2501.

Of course, government decisions about the terms and conditions of public employment can in turn have "powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. But such potential consequences do not render issues between a government employer and an employee (or the employees' union) matters of public concern as contemplated in the *Pickering* line of cases. Matters of public concern are generally topics concerning "the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964), for which "free and open debate is vital to informed decision-making by the electorate," *Pickering*, 391 U.S. at 571–572. Negotiations and other interactions *within* the employment relationship concerning basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations," typically do not meet that standard. *Guarnieri*, 131 S. Ct. at 2496.

Accordingly, all employees whom the union has a duty to represent fairly in performing those tasks can be required to pay the costs incurred by the union on their behalf. Insofar as there may be a broader political debate over the consequences of the bargaining, the employees remain free to participate as citizens in that public discussion. See pp. 24-25, *infra*.

b. Even if a union's bargaining-related activities could properly be deemed to relate to matters of public concern, the line drawn in *Abood* would readily satisfy *Pickering*'s balancing standard. This Court has explained that government entities have a "vital" interest in the two justifications identified in *Abood*: "labor peace and avoiding 'free riders.'" *Lehnert*, 500

U.S. at 519. Those interests supply "an adequate justification," *Garcetti*, 547 U.S. at 418, for allowing a union charged with a duty fairly to represent all public employees in the relevant unit to assess a fee on those employees to support collective bargaining and related non-ideological activities undertaken on their behalf.

i. Government employers, like their private counterparts, have a critical interest in bargaining with a single employee representative. As *Abood* explained in the context of public teachers, "confusion and conflict * * * could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224. Providing a mechanism for employees to speak with one voice at the bargaining table can therefore be important to a government entity's "effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and an employer can thereby secure provisions that favor management (*e.g.*, the no-strike clause in the agreement here) and improve the quality and reliability of employee performance. That mechanism can also assure employees that their interests will be forcefully represented, improving workforce morale and making a government job more attractive to the most talented citizens.

Those governmental objectives cannot be achieved, however, unless the union is required to represent the interests of the entire bargaining unit, and therefore to enter into agreements that benefit all employees. See 5 Ill. Comp. Stat. Ann. 315/6(d). And because the union has that state-imposed duty, non-members could

free ride on the union's efforts to secure better terms of employment if they were not required to defray a proportionate share of its costs. The governmental interest at issue is thus not merely the equitable principle "that individuals who may benefit from [a union's] representation should pay for its costs." Pet Br. 34. "What is distinctive * * * about the 'free riders' who are non-union members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). That differs from circumstances in which the representative has no legal duty to represent objectors. See *Knox*, 132 S. Ct. at 2289-2290 (citing examples of such groups provided by law review article).

ii. On the other side of the *Pickering* balance, employees' First Amendment interest in not contributing financially to a union's efforts to secure better employment terms on their behalf is far less substantial than the interests at stake in other contexts where this Court has approved restrictions on public employees' expressive activities. See, *e.g.*, *Guarnieri*, 131 S. Ct. at 2492, 2501 (permitting adverse action against employee for filing of grievance challenging change in duties). Payment by employees of their fair share of such expenses does not prohibit them from saying anything they want, including "petition[ing] their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521. This is thus not a situation in which "the community would be deprived of in-

formed opinions on important public issues" if the employment condition is enforced. *City of San Diego* v. *Roe*, 543 U.S. 77, 82 (2004) (per curiam). Although within the employment relationship the public employer may choose to bargain only with the union, individuals with differing views "have no constitutional right to force the government to listen to their views." *Minnesota Bd. for Community Colleges* v. *Knight*, 465 U.S. 271, 283 (1984).

Nor do agency fees substantially burden an employee's freedom of expressive association. The employee remains free to affiliate with others opposed to the union, as this suit demonstrates. "Surely no one would question the absolute right of the nonunion [personal assistants] to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media." *City of Madison, Joint Sch. Dist. No. 8* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976).

In short, given the long-recognized "vital policy interest[s]" of public employers in requiring all employees who benefit from bargaining to defray its costs, *Lehnert*, 500 U.S. at 519, and the comparatively modest effect on employees' expressive freedom, *Abood* correctly held that fees for non-ideological union activities are permissible under the First Amendment.

3. Petitioners seek to overrule a longstanding First Amendment doctrine this Court has reaffirmed on multiple occasions, but they have presented no sound reason to overcome *stare decisis* in this context. Although that doctrine is not an "inexorable command," this Court has recognized that precedents—

including those involving constitutional questions—should not be overturned absent "some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks and citations omitted).

No such justification exists here. For the reasons discussed above, petitioners' proposed rule finds no support in the understanding of the First Amendment that prevailed for the first one hundred and sixty years of the Nation's history. It would also represent a striking doctrinal anomaly in light of this Court's more recent cases addressing conditions on government employment, which have appropriately afforded public employers broad discretion. Numerous public agencies, moreover, have structured their employment relations and contractual obligations on the understanding that union-security agreements are lawful. As this Court has explained, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights," *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (citation omitted), a concern that should be accorded particular respect when sovereign States are involved.

Petitioners do not argue that factual assumptions undergirding *Abood*'s holding have been undermined by subsequent developments, or that *Abood* has proved unworkable. Instead, petitioners rest their argument for overruling *Abood* on the proposition that the same standard of review applicable to mandatory regulatory impositions—in which the State acts in its sovereign capacity—should apply to conditions on employment. See Pet. Br. 16-18. But that contention ignores the "crucial difference * * * between the government exercising the power to regulate or

license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation," a "distinction [that] has been particularly clear in [this Court's] review of state action in the context of public employment." *Engquist*, 553 U.S. at 598 (internal quotation marks and citations omitted; first pair of brackets in original). Indeed, petitioners' approach would call this established analytical framework into question. And if, as petitioners assert, a union acting as an exclusive representative in collective bargaining is treated like a fully expressive association independently petitioning the government—ignoring both the government's distinct interests as employer and the predominantly economic and contractual nature of the relationship—it is unclear whether the government could constitutionally impose a duty of fair representation on the union, regulate union elections, or impose other forms of regulation that have long been considered lawful.

Petitioners criticize *Abood*'s "rhetorical move" of building on what they perceive as solely a Commerce Clause analysis in *Hanson* for First Amendment purposes. See Pet. Br. 14-15. That is not a fair reading of this Court's precedents. *Hanson* unequivocally rejected a facial First Amendment challenge to a union-security agreement, see pp. 3-4, *supra*, and the subsequent RLA cases would be incoherent as constitutional-avoidance decisions if the statutory construction they adopted were unconstitutional. Petitioners place considerable weight (Pet. Br. 21-23, 39-40) on Justice Powell's separate opinion in *Abood*. But aside from the fact that that opinion did not represent the reasoning of the Court, petitioners omit any mention of Justice Powell's conclusion that, with respect to is-

sues like "salaries and pension benefits" and "[t]he processing of individual grievances," "the case for requiring the [employees] to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment).

B. Because Petitioners Are State Employees, Illinois May Require Them To Defray Their Proportionate Share Of The Union's Costs Of Collective Bargaining And Related Non-Ideological Activities Undertaken On Their Behalf

The court of appeals correctly concluded that because the Rehabilitation Program personal assistants are jointly employed by Illinois and individual customers, the fair-share fee requirement does not violate the First Amendment. See Pet. App. 10a-11a. Petitioners do not argue that a joint-employment relationship cannot satisfy *Abood*, nor would that proposition make sense where, as here, a public employer controls numerous essential terms of employment that might be the subject of bargaining. Instead, petitioners argue that certain characteristics of the Rehabilitation Program render *Abood*'s justifications for agency fees inapplicable. That argument is unfounded.

1. As discussed above, *Abood* rests on the more deferential First Amendment standards applicable when the government acts as an employer rather than as a sovereign, as well as the vital interests of public entities in managing their workforces. The threshold inquiry here under *Abood*, therefore, is whether Illinois is acting as an employer.

Petitioners are correct (Pet. Br. 32) that in determining whether the government is acting as an em-

ployer for these purposes, a court should examine whether the relationship between the public entity and the personnel implicates the governmental interests that justify agency fees. But because the First Amendment has always been understood to impose far less stringent limitations on a government entity acting as an employer, it is also sensible to consult our legal tradition's understanding of what constitutes an employment relationship, an understanding that is expressed in the common law of agency. Under any reasonable application of either of those metrics, Illinois is the personal assistants' employer.

Illinois satisfies the majority of the traditional indicia of an employer, which this Court set out in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751-752 & nn.18-31 (1989) (*CCNV*). Illinois establishes and pays personal assistants' wages and funds their health insurance, and it withholds taxes, consistent with the federal 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); see Ill. Admin. Code tit. 89, §§ 676.200, 684.50, 686.10(h)(1), 686.20, 686.40. It sets the qualifications for the job and prescribes the terms of the contracts between customers and personal assistants. *Id.* § 686.10. Illinois not only establishes the duties of personal assistants generally, but it delineates for each personal 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; see *id.* §§ 684.10, 686.20. It also manages the employee-grievance process, outlines the criteria for annual performance reviews, and pays for training programs.

Id. §§ 684.50, 686.30; J.A. 47, 51-54. As the court of appeals concluded, Illinois exercises "extensive control" over personal assistants. Pet. App. 11a.

That pervasive control is relevant not only because it shows that Illinois fulfills the traditional role of an employer, but because the employment terms within its control are the very issues that would be the subject of bargaining. If a personal assistant wants an increase in pay, more benefits, fewer duties, or a different grievance process, he or she could not ask an individual customer for those changes. Rather, it is Illinois that would sit down at the bargaining table, and the State therefore retains the same constitutionally significant interest in negotiating with a single agent as public entities in more typical employment relationships. In the particular context of *Abood*, therefore, it would make little sense to deem Illinois, which controls so many essential terms of employment, not to be the personal assistants' employer.

It is true that in light of the personalized nature of the services provided under the Rehabilitation Program, Illinois has permitted individual customers to perform functions that are also traditional powers of an employer. Most significantly, customers select the personal assistants to whom they will entrust their care and direct the personal assistants' day-to-day activities, albeit within the detailed framework established by the state-approved service plan. See Ill. Admin. Code tit. 89, § 676.30(b). For that reason, Illinois and the customers are properly classified as joint employers, a well-established status that applies in a variety of legal contexts. See Pet. App. 9a-11a; see, *e.g.*, *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012). But

the sorts of individualized issues within the customers' control are far less likely to be the subject of bargaining—and therefore to implicate the basic rationale of *Abood*—than issues like compensation, benefits, employment duties, contract terms, and the grievance process.

Petitioners place substantial emphasis on the fact that certain provisions of Illinois law deem the customer a personal assistant's employer. See Pet. Br. 6-7, 44-45. Of course, state-law classifications could not control whether Illinois is acting as an employer for First Amendment purposes. Cf. *O'Hare Truck Serv.*, 518 U.S. at 721-722. And in any case, the relevant provisions explain only that the customer is "responsible for controlling all aspects of the employment relationship *between the customer and the* [*personal assistant*]," Ill. Admin. Code tit. 89, § 676.30(b) (emphasis added). Illinois law makes equally clear that there are "terms and conditions of employment that are within the State's control." 20 Ill. Comp. Stat. Ann. 2405/3(f). Those terms and conditions include most of what are traditionally thought of as fundamental employment issues: compensation, qualifications, and job duties. Given that, no basis exists to hold *Abood* inapplicable here.

2. Petitioners argue (Br. 24-26, 39-40) that personal assistants are not public employees because they are not supervised directly by other state employees while on the job and do not work on government property. Although those features are factors in the traditional standard for an employment relationship, here they must be considered in light of the numerous core terms and conditions of employment that Illinois controls. More significantly, those features bear very lit-

tle relation to the central First Amendment justifications for requiring government employees to contribute their fair share toward the cost of a union's efforts on their behalf to secure favorable terms and conditions of employment. Like many other employers, including private-sector home-care providers, see, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 164 (2007), Illinois's "vital policy interest" in bargaining with an exclusive representative over wages, hours, and duties is not diminished because employees work off-site or are supervised by private customers. *Lehnert*, 500 U.S. at 519. It would be arbitrary to categorically exclude from the *Abood* framework all employees who work alone in the field, rather than on government property. Indeed, this Court first developed the pertinent First Amendment principles in the railroad industry, where employees like engineers and trainmen have no centralized workplace.

Petitioners also argue (Br. 39, 51-55) that personal assistants are situated similarly to persons who merely receive government funds or contract with the government. But because of the "extensive control" that Illinois exerts over all aspects of their work—wages, job qualifications, terms of employment, services provided—petitioners are very differently positioned than mere recipients of government funding. Pet. App. 11a. For example, physicians accept reimbursement from Medicare or Medicaid for particular services rendered (Pet. Br. 52-53), just as they do from private insurance companies. But the government does not set or pay their overall wages, fund their healthcare benefits, establish their job qualifications, manage a grievance process, develop their training

regimens, or specify what services they may provide to a patient. All those features are present here.

3. Petitioners argue (Br. 40) that bargaining over the terms and conditions of employment in a Medicaid-funded program relates to a "matter of public concern," presumably in a way that bargaining over the terms and conditions of other public employment does not. But petitioners fail to acknowledge that even if the speech component of contract formation and implementation in the collective-bargaining context relates to a matter of public concern, that would mean only that the public employer must have an "adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. As discussed, Illinois has such an "adequate justification" here. See pp. 22-24, *supra*.

In any event, there is nothing distinctive for these purposes about the fact that personal assistants are paid from funds appropriated for an entitlement program. The citizenry always has a critical interest in how public funds are spent, and how recipients carry out their public duties, regardless of how the funds are earmarked. But if that were sufficient to subject the ordinary give-and-take of employment negotiations to heightened First Amendment scrutiny, it would completely "transform everyday employment disputes into matters for constitutional litigation in the federal courts." *Guarnieri*, 131 S. Ct. at 2501.

Petitioners appear to believe (Br. 40) that because "[i]nterest groups representing medical practitioners"—many of whom are indisputably not public employees—"often lobby government over Medicaid programs," any person paid out of the Medicaid budg-

et cannot be a state employee for First Amendment purposes. That argument is misguided. It is true that the state legislature ultimately controls the organs of state government operating in any capacity—not only as a regulators, but also as employers, contractors, and grant distributors—and therefore that any objection to a public entity's decisions could be the subject of legislative lobbying. But in *Pickering*, *Abood*, *Garcetti*, and numerous other cases, this Court has confirmed a constitutionally significant distinction, rooted in the original understanding of the First Amendment, between the government acting as a sovereign and the government acting as an employer. It would nullify that distinction to hold that the mere fact that "private employment matters" could be changed by the state legislature makes any expressive activity about those matters—even ordinary contract negotiation and performance—the First Amendment equivalent of lobbying. *Umbehr*, 518 U.S. at 675.

Finally, petitioners repeatedly intimate (Br. 6, 38) that Illinois law interferes in familial relationships by requiring an individual who wishes to care for a relative to pay fees to the union. Although a person who meets the job qualifications for a personal assistant could be hired by a relative, the program is not in any way limited to care by family members. And in any event, a person is required to pay fair-share fees only if he or she wishes to receive the wages and healthcare benefits that Illinois has offered to provide—*i.e.*, to be a state employee.

II. THE DISABILITIES PROGRAM PETITIONERS' CLAIM IS NOT RIPE

The Disabilities Program personal assistants voted against union representation, and no collective-bargaining agreement governs their employment. Pet. App. 5a. They therefore are not subject to a fair-share fee requirement. Petitioners nevertheless seek to enjoin the State from enforcing any fair-share fee requirement that might someday be included in a collective-bargaining agreement under the Disabilities Program. J.A. 32.

That claim is "not ripe for adjudication" because "it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). The Disabilities Program petitioners will suffer their claimed injury only if (i) Disabilities Program personal assistants decide to select a collective-bargaining representative; (ii) the representative enters into a collective-bargaining agreement with the State; and (iii) that agreement contains a fair-share fee requirement. "Under these circumstances, where ['this Court has] no idea whether or when'" these events will transpire, "the issue is not fit for adjudication." *Ibid.* (quoting *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 163 (1967)). Moreover, postponing judicial consideration will not impose a hardship on petitioners because they are not required to engage in or to refrain from any conduct in the meantime. See *id.* at 301-302.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. Amend. XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way

abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. 1396n(c) (2006 & Supp. V 2011) provides:

Compliance with State plan and payment provisions

* * * * *

(c) Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants

(1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that—

(A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;

(B) the State will provide, with respect to individuals who—

(i) are entitled to medical assistance for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded under the State plan,

(ii) may require such services, and

(iii) may be eligible for such home or community-based care under such waiver,

for an evaluation of the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

(C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services,

or services in an intermediate care facility for the mentally retarded;

(D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted; and

(E) the State will provide to the Secretary annually, consistent with a data collection plan designed by the Secretary, information on the impact of the waiver granted under this subsection on the type and amount of medical assistance provided under the State plan and on the health and welfare of recipients.

(3) A waiver granted under this subsection may include a waiver of the requirements of section 1396a(a)(1) of this title (relating to statewideness), section 1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community). A waiver under this subsection (other than a waiver described in subsection (h)(2)) shall be for an initial term of three years and, upon the request of a State, shall be extended for additional five-year periods unless the Secretary determines that for the previous waiver period the assurances provided under paragraph (2) have not been met. A waiver may pro-

vide, with respect to post-eligibility treatment of income of all individuals receiving services under that waiver, that the maximum amount of the individual's income which may be disregarded for any month for the maintenance needs of the individual may be an amount greater than the maximum allowed for that purpose under regulations in effect on July 1, 1985.

(4) A waiver granted under this subsection may, consistent with paragraph (2)—

(A) limit the individuals provided benefits under such waiver to individuals with respect to whom the State has determined that there is a reasonable expectation that the amount of medical assistance provided with respect to the individual under such waiver will not exceed the amount of such medical assistance provided for such individual if the waiver did not apply, and

(B) provide medical assistance to individuals (to the extent consistent with written plans of care, which are subject to the approval of the State) for case management services, homemaker/home health aide services and personal care services, adult day health services, habilitation services, respite care, and such other services requested by the State as the Secretary may approve and for day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness.

Except as provided under paragraph (2)(D), the Secretary may not restrict the number of hours or days of

respite care in any period which a State may provide under a waiver under this subsection.

(5) For purposes of paragraph (4)(B), the term "habilitation services"—

(A) means services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings; and

(B) includes (except as provided in subparagraph (C)) prevocational, educational, and supported employment services; but

(C) does not include—

(i) special education and related services (as such terms are defined in section 1401 of title 20), which otherwise are available to the individual through a local educational agency; and

(ii) vocational rehabilitation services which otherwise are available to the individual through a program funded under section 730 of title 29.

(6) The Secretary may not require, as a condition of approval of a waiver under this section under paragraph (2)(D), that the actual total expenditures for home and community-based services under the waiver (and a claim for Federal financial participation in expenditures for the services) cannot exceed the approved estimates for these services. The Secretary may not deny Federal financial payment with respect to services under such a waiver on the ground that, in

order to comply with paragraph (2)(D), a State has failed to comply with such a requirement.

(7)(A) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with a particular illness or condition who are inpatients in, or who would require the level of care provided in, hospitals, nursing facilities, or intermediate care facilities for the mentally retarded, the State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals who are inpatients in, or who would require the level of care provided in, those respective facilities.

(B) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with developmental disabilities who are inpatients in a nursing facility and whom the State has determined, on the basis of an evaluation under paragraph (2)(B), to need the level of services provided by an intermediate care facility for the mentally retarded, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals under the State plan on the basis of the average per capita expenditures under the State plan for services to individuals who are inpatients in an intermediate care facility for the mentally retarded, without regard to the availability of beds for such inpatients.

(C) In making estimates under paragraph (2)(D) in the case of a waiver to the extent that it applies to

individuals with mental retardation or a related condition who are resident in an intermediate care facility for the mentally retarded the participation of which under the State plan is terminated, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals without regard to any such termination.

(8) The State agency administering the plan under this subchapter may, whenever appropriate, enter into cooperative arrangements with the State agency responsible for administering the program for children with special health care needs under subchapter V of this chapter in order to assure improved access to coordinated services to meet the needs of such children.

(9) In the case of any waiver under this subsection which contains a limit on the number of individuals who shall receive home or community-based services, the State may substitute additional individuals to receive such services to replace any individuals who die or become ineligible for services under the State plan.

(10) The Secretary shall not limit to fewer than 200 the number of individuals in the State who may receive home and community-based services under a waiver under this subsection.

4. 5 Ill. Comp. Stat. 315/3 (West 2013) provides in pertinent part:

Definitions

§ 3. Definitions. As used in this Act, unless the context otherwise requires:

(a) "Board" means the Illinois Labor Relations Board or, with respect to a matter over which the jurisdiction of the Board is assigned to the State Panel or the Local Panel under Section 5, the panel having jurisdiction over the matter.

(b) "Collective bargaining" means bargaining over terms and conditions of employment, including hours, wages, and other conditions of employment, as detailed in Section 7 and which are not excluded by Section 4.

* * * * *

(f) "Exclusive representative", except with respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, means the labor organization that has been (i) designated by the Board as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before July 1, 1984 (the effective date of this Act) as the exclusive representative of the employees in an appropriate bargaining unit, (iii) after July 1, 1984 (the effective date of this Act) recognized by an employer upon evidence, acceptable to the

Board, that the labor organization has been designated as the exclusive representative by a majority of the employees in an appropriate bargaining unit; (iv) recognized as the exclusive representative of personal care attendants or personal assistants under Executive Order 2003-8 prior to the effective date of this amendatory Act of the 93rd General Assembly, and the organization shall be considered to be the exclusive representative of the personal care attendants or personal assistants as defined in this Section; or (v) recognized as the exclusive representative of child and day care home providers, including licensed and license exempt providers, pursuant to an election held under Executive Order 2005-1 prior to the effective date of this amendatory Act of the 94th General Assembly, and the organization shall be considered to be the exclusive representative of the child and day care home providers as defined in this Section.

With respect to non-State fire fighters and paramedics employed by fire departments and fire protection districts, non-State peace officers, and peace officers in the Department of State Police, "exclusive representative" means the labor organization that has been (i) designated by the Board as the representative of a majority of peace officers or fire fighters in an appropriate bargaining unit in accordance with the procedures contained in this Act, (ii) historically recognized by the State of Illinois or any political subdivision of the State before January 1, 1986 (the effective date of this amendatory Act of 1985) as the exclusive representative by a majority of the peace officers or fire fighters in an appropriate bargaining unit, or (iii)

after January 1, 1986 (the effective date of this amendatory Act of 1985) recognized by an employer upon evidence, acceptable to the Board, that the labor organization has been designated as the exclusive representative by a majority of the peace officers or fire fighters in an appropriate bargaining unit.

Where a historical pattern of representation exists for the workers of a water system that was owned by a public utility, as defined in Section 3-105 of the Public Utilities Act, prior to becoming certified employees of a municipality or municipalities once the municipality or municipalities have acquired the water system as authorized in Section 11-124-5 of the Illinois Municipal Code, the Board shall find the labor organization that has historically represented the workers to be the exclusive representative under this Act, and shall find the unit represented by the exclusive representative to be the appropriate unit.

(g) "Fair share agreement" means an agreement between the employer and an employee organization under which all or any of the employees in a collective bargaining unit are required 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, but not to exceed the amount of dues uniformly required of members. The amount certified by the exclusive representative shall not include any fees for contributions related to the election or support of any candidate for political office. Nothing in this subsection (g) shall preclude an employee from making vol-

untary political contributions in conjunction with his or her fair share payment.

* * * * *

(n) "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer, including (i) interns and residents at public hospitals, (ii) as of the effective date of this amendatory Act of the 93rd General Assembly, but not before, personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act,[1] subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act, (iii) as of the effective date of this amendatory Act of the 94th General Assembly, but not before, child and day care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code, (iv) as of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (n), home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, (v) beginning on the effective date of this amendatory Act of the 98th General Assembly and not-

withstanding any other provision of this Act, any person employed by a public employer and who is classified as or who holds the employment title of Chief Stationary Engineer, Assistant Chief Stationary Engineer, Sewage Plant Operator, Water Plant Operator, Stationary Engineer, Plant Operating Engineer, and any other employee who holds the position of: Civil Engineer V, Civil Engineer VI, Civil Engineer VII, Technical Manager I, Technical Manager II, Technical Manager III, Technical Manager IV, Technical Manager V, Technical Manager VI, Realty Specialist III, Realty Specialist IV, Realty Specialist V, Technical Advisor I, Technical Advisor II, Technical Advisor III, Technical Advisor IV, or Technical Advisor V employed by the Department of Transportation who is in a position which is certified in a bargaining unit on or before the effective date of this amendatory Act of the 98th General Assembly, and (vi) beginning on the effective date of this amendatory Act of the 98th General Assembly and notwithstanding any other provision of this Act, any mental health administrator in the Department of Corrections who is classified as or who holds the position of Public Service Administrator (Option 8K), any employee of the Office of the Inspector General in the Department of Human Services who is classified as or who holds the position of Public Service Administrator (Option 7), any Deputy of Intelligence in the Department of Corrections who is classified as or who holds the position of Public Service Administrator (Option 7), and any employee of the Department of State Police who handles issues concerning the Illinois State Police Sex Offender Registry

and who is classified as or holds the position of Public Service Administrator (Option 7), but excluding all of the following: employees of the General Assembly of the State of Illinois; elected officials; executive heads of a department; members of boards or commissions; the Executive Inspectors General; any special Executive Inspectors General; employees of each Office of an Executive Inspector General; commissioners and employees of the Executive Ethics Commission; the Auditor General's Inspector General; employees of the Office of the Auditor General's Inspector General; the Legislative Inspector General; any special Legislative Inspectors General; employees of the Office of the Legislative Inspector General; commissioners and employees of the Legislative Ethics Commission; employees of any agency, board or commission created by this Act; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions except firefighters and peace officers employed by a state university and except peace officers employed by a school district in its own police department in existence on the effective date of this amendatory Act of the 96th General Assembly; managerial employees; short-term employees; legislative liaisons; a person who is a State employee under the jurisdiction of the Office of the Attorney General who is licensed to practice law or whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation; a person who is a State employee under the jurisdiction of

the Office of the Comptroller who holds the position of Public Service Administrator or whose position is otherwise exempt under the Comptroller Merit Employment Code; a person who is a State employee under the jurisdiction of the Secretary of State who holds the position classification of Executive I or higher, whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, or who is otherwise exempt under the Secretary of State Merit Employment Code; employees in the Office of the Secretary of State who are completely exempt from jurisdiction B of the Secretary of State Merit Employment Code and who are in Rutan-exempt positions on or after April 5, 2013 (the effective date of Public Act 97-1172); a person who is a State employee under the jurisdiction of the Treasurer who holds a position that is exempt from the State Treasurer Employment Code; any employee of a State agency who (i) holds the title or position of, or exercises substantially similar duties as a legislative liaison, Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Chief Fiscal Officer, Agency Human Resources Director, Public Information Officer, or Chief Information Officer and (ii) was neither included in a bargaining unit nor subject to an active petition for certification in a bargaining unit; any employee of a State agency who (i) is in a position that is Rutan-exempt, as designated by the employer, and completely exempt from jurisdiction B of the Personnel Code and (ii) was neither included in

a bargaining unit nor subject to an active petition for certification in a bargaining unit; any term appointed employee of a State agency pursuant to Section 8b.18 or 8b.19 of the Personnel Code who was neither included in a bargaining unit nor subject to an active petition for certification in a bargaining unit; any employment position properly designated pursuant to Section 6.1 of this Act; confidential employees; independent contractors; and supervisors except as provided in this Act.

Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be considered public employees for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

Child and day care home providers shall not be considered public employees for any purposes not specifically provided for in this amendatory Act of the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of stat-

utory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

Notwithstanding Section 9, subsection (c), or any other provisions of this Act, all peace officers above the rank of captain in municipalities with more than 1,000,000 inhabitants shall be excluded from this Act.

(*o*) Except as otherwise in subsection (*o*-5), "public employer" or "employer" means the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees. As of the effective date of the amendatory Act of the 93rd General Assembly, but not before, the State of Illinois shall be considered the employer of the personal care attendants and personal assistants working under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, subject to the limitations set forth in this Act and in the Disabled Persons Rehabilitation Act. As of January 29, 2013 (the effective date of Public Act 97-1158), but not before except as otherwise provided in this subsection (*o*), the State shall be considered the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, no matter whether the State provides

those services through direct fee-for-service arrangements, with the assistance of a managed care organization or other intermediary, or otherwise, but subject to the limitations set forth in this Act and the Disabled Persons Rehabilitation Act. The State shall not be considered to be the employer of home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act, for any purposes not specifically provided for in Public Act 93-204 or Public Act 97-1158, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers and who also work under the Home Services Program under Section 3 of the Disabled Persons Rehabilitation Act shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/). As of the effective date of this amendatory Act of the 94th General Assembly but not before, the State of Illinois shall be considered the employer of the day and child care home providers participating in the child care assistance program under Section 9A-11 of the Illinois Public Aid Code, subject to the limitations set forth in this Act and in Section 9A-11 of the Illinois Public Aid Code. The State shall not be considered to be the employer of child and day care home providers for any purposes not specifically provided for in this amendatory Act of

the 94th General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Child and day care home providers shall not be covered by the State Employees Group Insurance Act of 1971.

"Public employer" or "employer" as used in this Act, however, does not mean and shall not include the General Assembly of the State of Illinois, the Executive Ethics Commission, the Offices of the Executive Inspectors General, the Legislative Ethics Commission, the Office of the Legislative Inspector General, the Office of the Auditor General's Inspector General, the Office of the Governor, the Governor's Office of Management and Budget, the Illinois Finance Authority, the Office of the Lieutenant Governor, the State Board of Elections, and educational employers or employers as defined in the Illinois Educational Labor Relations Act, except with respect to a state university in its employment of firefighters and peace officers and except with respect to a school district in the employment of peace officers in its own police department in existence on the effective date of this amendatory Act of the 96th General Assembly. County boards and county sheriffs shall be designated as joint or co-employers of county peace officers appointed under the authority of a county sheriff. Nothing in this subsection (*o*) shall be construed to prevent the State Panel or the Local Panel from determining that employers are joint or co-employers.

5. 5 Ill. Comp. Stat. 315/6 (West 2013) provides:

Right to organize and bargain collectively; exclusive representation; and fair share arrangements

§ 6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements.

(a) Employees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois and employees excluded from the definition of "public employee" under subsection (n) of Section 3 of this Act, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities. Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).

(b) Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of

an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

(c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

(d) Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public

employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

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

(f) Only the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments. Except as provided in subsection (e) of this Section, any such deductions shall only be made upon an employee's written authorization, and continued until revoked in writing in the same manner or until the termination date of an applicable collective bargaining agreement. Such payments shall be paid to the exclusive representative.

Where a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement or the resolution of an impasse under Section 14, the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached including dues deduction or a fair share clause. For the benefit of any successor exclusive representative certified under this Act, this provision shall be applicable, provided the successor exclusive representative:

(i) certifies to the employer the amount constituting each non-member's proportionate share under subsection (e); or

(ii) presents the employer with employee written authorizations for the deduction of dues, assessments, and fees under this subsection.

Failure to so honor and abide by dues deduction or fair share clauses for the benefit of any exclusive representative, including a successor, shall be a violation of the duty to bargain and an unfair labor practice.

(g) Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body of which such employees are members. Such employees may be required to pay an amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise

pay such service fee. If the affected employees and the bargaining representative are unable to reach an agreement on the matter, the Board may establish an approved list of charitable organizations to which such payments may be made.

6. 5 Ill. Comp. Stat. 315/7 (West 2013) provides:

Duty to bargain

§ 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law.

If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act"[1] unless agreed by the parties.

The duty "to bargain collectively" shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification:

(1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Board within 30 days after such notice of the existence of a dispute, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given to the other party or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as or ceased to be the exclusive representative of the employees pursuant to the provisions of subsection (a) of Section 9, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Collective bargaining for home care and home health workers who function as personal care attendants, personal assistants, and individual maintenance home health workers under the Home Services Program shall be limited to the terms and conditions of employment under the State's control, as defined in Public Act 93-204 or this amendatory Act of the 97th General Assembly, as applicable.

Collective bargaining for child and day care home providers under the child care assistance program shall be limited to the terms and conditions of employment under the State's control, as defined in this amendatory Act of the 94th General Assembly.

Notwithstanding any other provision of this Section, whenever collective bargaining is for the purpose of establishing an initial agreement following original certification of units with fewer than 35 employees, with respect to public employees other than peace officers, fire fighters, and security employees, the following apply:

(1) Not later than 10 days after receiving a written request for collective bargaining from a labor organization that has been newly certified as a representative as defined in Section 6(c), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If anytime after the expiration of the 90-day period beginning on the date on which bargaining is commenced the parties have failed to reach an agreement, either party may notify the Illinois Public Labor Relations Board of the existence of a dispute and request mediation in accordance with the provisions of Section 14 of this Act.

(3) If after the expiration of the 30-day period beginning on the date on which mediation commenced, or such additional period as the parties may agree upon, the mediator is not able to bring the parties to

agreement by conciliation, either the exclusive representative of the employees or the employer may request of the other, in writing, arbitration and shall submit a copy of the request to the board. Upon submission of the request for arbitration, the parties shall be required to participate in the impasse arbitration procedures set forth in Section 14 of this Act, except the right to strike shall not be considered waived pursuant to Section 17 of this Act, until the actual convening of the arbitration hearing.

7. 20 Ill. Comp. Stat. 2405/3(f) (West Supp. 2013) provides:

Powers and duties

§ 3. Powers and duties. The Department shall have the powers and duties enumerated herein:

* * * * *

(f) To establish a program of services to prevent the unnecessary institutionalization of persons in need of long term care and who meet the criteria for blindness or disability as defined by the Social Security Act, thereby enabling them to remain in their own homes. Such preventative services include any or all of the following:

(1) personal assistant services;

(2) homemaker services;

(3) home-delivered meals;

(4) adult day care services;

(5) respite care;

(6) home modification or assistive equipment;

(7) home health services;

(8) electronic home response;

(9) brain injury behavioral/cognitive services;

(10) brain injury habilitation;

(11) brain injury pre-vocational services; or

(12) brain injury supported employment.

The Department shall establish eligibility standards for such services taking into consideration the unique economic and social needs of the population for whom they are to be provided. Such eligibility standards may be based on the recipient's ability to pay for services; provided, however, that any portion of a person's income that is equal to or less than the " protected income" level shall not be considered by the Department in determining eligibility. The "protected income" level shall be determined by the Department, shall never be less than the federal poverty standard, and shall be adjusted each year to reflect changes in the Consumer Price Index For All Urban Consumers as determined by the United States Department of Labor. The standards must provide that a person may not have more than $10,000 in assets to be eligible for the services, and the Department may increase or decrease the asset limitation by rule. The Department may not decrease the asset level below $10,000.

The services shall be provided, as established by the Department by rule, to eligible persons to prevent

unnecessary or premature institutionalization, to the extent that the cost of the services, together with the other personal maintenance expenses of the persons, are reasonably related to the standards established for care in a group facility appropriate to their condition. These non-institutional services, pilot projects or experimental facilities may be provided as part of or in addition to those authorized by federal law or those funded and administered by the Illinois Department on Aging. The Department shall set rates and fees for services in a fair and equitable manner. Services identical to those offered by the Department on Aging shall be paid at the same rate.

Personal assistants shall be paid at a rate negotiated between the State and an exclusive representative of personal assistants under a collective bargaining agreement. In no case shall the Department pay personal assistants an hourly wage that is less than the federal minimum wage.

Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315/), personal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer as of the effective date of this amendatory Act of the 93rd General Assembly, but not before. The State shall engage in collective bargaining with an exclusive representative of personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control. Nothing in this paragraph shall be understood to limit the right

of the persons receiving services defined in this Section to hire and fire personal assistants or supervise them within the limitations set by the Home Services Program. The State shall not be considered to be the employer of personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly, including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971 (5 ILCS 375/).

The Department shall execute, relative to nursing home prescreening, as authorized by Section 4.03 of the Illinois Act on the Aging, written inter-agency agreements with the Department on Aging and the Department of Healthcare and Family Services, to effect the intake procedures and eligibility criteria for those persons who may need long term care. On and after July 1, 1996, all nursing home prescreenings for individuals 18 through 59 years of age shall be conducted by the Department, or a designee of the Department.

The Department is authorized to establish a system of recipient cost-sharing for services provided under this Section. The cost-sharing shall be based upon the recipient's ability to pay for services, but in no case shall the recipient's share exceed the actual cost of the services provided. Protected income shall not be considered by the Department in its determination of the recipient's ability to pay a share of the cost of services. The level of cost-sharing shall be adjusted each year to reflect changes in the "protected income"

level. The Department shall deduct from the recipient's share of the cost of services any money expended by the recipient for disability-related expenses.

To the extent permitted under the federal Social Security Act, the Department, or the Department's authorized representative, may recover the amount of moneys expended for services provided to or in behalf of a person under this Section by a claim against the person's estate or against the estate of the person's surviving spouse, but no recovery may be had until after the death of the surviving spouse, if any, and then only at such time when there is no surviving child who is under age 21, blind, or permanently and totally disabled. This paragraph, however, shall not bar recovery, at the death of the person, of moneys for services provided to the person or in behalf of the person under this Section to which the person was not entitled; provided that such recovery shall not be enforced against any real estate while it is occupied as a homestead by the surviving spouse or other dependent, if no claims by other creditors have been filed against the estate, or, if such claims have been filed, they remain dormant for failure of prosecution or failure of the claimant to compel administration of the estate for the purpose of payment. This paragraph shall not bar recovery from the estate of a spouse, under Sections 1915 and 1924 of the Social Security Act and Section 5-4 of the Illinois Public Aid Code, who precedes a person receiving services under this Section in death. All moneys for services paid to or in behalf of the person under this Section shall be claimed for recovery from the deceased spouse's es-

tate. "Homestead", as used in this paragraph, means the dwelling house and contiguous real estate occupied by a surviving spouse or relative, as defined by the rules and regulations of the Department of Healthcare and Family Services, regardless of the value of the property.

The Department shall submit an annual report on programs and services provided under this Section. The report shall be filed with the Governor and the General Assembly on or before March 30 each year.

The requirement for reporting to the General Assembly shall be satisfied by filing copies of the report with the Speaker, the Minority Leader and the Clerk of the House of Representatives and the President, the Minority Leader and the Secretary of the Senate and the Legislative Research Unit, as required by Section 3.1 of the General Assembly Organization Act, and filing additional copies with the State Government Report Distribution Center for the General Assembly as required under paragraph (t) of Section 7 of the State Library Act.6

8. Ill. Admin. Code tit. 89, § 676.10 (2013) provides:

Program Purpose and Types

a) The Department of Human Services (DHS) Home Services Program (HSP) is a Medicaid Waiver Program (42 CFR 440.180) designed to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State.

b) The Medicaid Waiver for the State of Illinois is administered by the Illinois Department of Public Aid (DPA), as the State's approved Medicaid agency. The operational responsibility for HSP, with the exception of hearings on customer appeals (see 89 Ill. Adm. Code 510), rests with DHS.

c) Although DHS shall be responsible for ensuring that the funds available under the HSP are administered in accordance with all applicable laws, DHS shall not have control or input in the employment relationship between the customer and the personal assistants.

9. Ill. Admin. Code tit. 89, § 676.30 (2013) provides:

Definitions

For the purposes of this Subchapter, unless otherwise stated, the following terms shall have the following meanings.

a) Activities of Daily Living (ADLs) - those tasks an individual must do, or which an individual must have provided for him/her, in order to prevent institutionalization (i.e., bathing, dressing, shopping, cooking, housekeeping, etc.).

b) Customer - anyone who:

1) has been referred to HSP for a determination of eligibility for services;

2) has applied for services through HSP;

3) is receiving services through HSP; or

4) has received services through HSP.

If the customer is unable to satisfy any of his/her obligations under the HSP, including, without limitation, the obligation to serve as the employer of the PA, the customer's parent, family member, guardian, or duly authorized representative may act on behalf of the customer and is included within the definition of "customer", as used throughout this Part.

For purposes of the PA services performed pursuant to the HSP, the customer shall serve as the employer of the PA. In this capacity, the customer is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing (where, in the opinion of the customer, it is appropriate or necessary) disciplinary action against the PA, and terminating the employment relationship between the customer and the PA.

c) Counselor - the DHS-ORS staff person or contractual Case Manager who helps to ensure that the funds available under the HSP are properly distributed in accordance with the Service Plan, any applicable waiver programs, and all applicable laws.

d) Determination of Need (DON) - the assessment tool used to determine an individual's non-financial eligibility for HSP services based on the individual's impairment and need for care. This form measures the level of risk of institutionalization for the individual.

e) DHS - Illinois Department of Human Services.

f) DPA - Illinois Department of Public Aid.

g) Family - any one related by blood, marriage, or adoption to the individual seeking services through HSP or anyone with whom the individual has a close inter-personal relationship and who resides with the individual.

h) Family Unit - for the purposes of determining financial eligibility, the number of persons derived when counting the individual seeking services through HSP and the number of persons in the household who are legally responsible for the individual seeking services and for whom the individual seeking services is legally responsible.

i) HCFA - the federal Health Care Financing Administration.

j) Home Services Program (HSP) - a State and federally funded program designed to allow Illinois residents, who are at risk of unnecessary or premature institutionalization, to receive necessary care and services in their homes, as opposed to being placed in an institution.

k) Home - a private residence where the customer lives which is not an intermediate care or skilled nursing facility as defined at 77 Ill. Adm. Code 300, or a residential program operated by, or for which funding is provided by, the Illinois Department of Human Services, Office of Mental Health and Office of Developmental Disabilities as defined at 59 Ill. Adm. Code 120. For the purposes of this Subchapter, the term "home" shall include domestic violence shelters as defined in Section 1(c) of the Domestic Violence Shelter Act [20 ILCS 2210/1(c)] and publicly or privately administered shelters designed to provide temporary living accommodations for persons who are homeless.

l) Intermediate Care Facility (ICF) - a nursing facility that provides regular health related care to its residents, as well as those services necessary for safe and adequate living.

m) Legally Responsible Family Member - a spouse, parent of a child who is under age 18 or a legal guardian of an individual who is under age 18.

n) Medicaid - the Medicaid program administered by DPA under the Public Aid Code [305 ILCS 5/11].

o) Medicaid Waiver - the waiver allowing HSP to claim federal reimbursement for approved levels of in-home care for individuals who would otherwise be placed in institutions for such care. The Medicaid Waiver is overseen at the federal level by HCFA.

p) Personal Assistant (PA) - an individual employed by the customer to provide through HSP varied services that have been approved by the customer's physician.

q) Personal Assistant Backup Plan - the plan developed by the customer and designed to ensure that the customer receives the necessary care and services under the HSP in the event that his/her regular PA is unavailable or unwilling to perform his/her obligations under the HSP. The customer is responsible for designating the backup personal assistant.

r) Physician - a licensed doctor of medicine (M.D.) or doctor of Osteopathy (D.O.) licensed pursuant to the Medical Practice Act [225 ILCS 60].

s) Prescreening - an assessment to determine an individual's need for institutional care at the ICF or SNF level care, to ensure Medicaid payment for such a placement is appropriate, and the assessment as to whether or not HSP services are an appropriate alternative to institutional care for the individual.

t) Service Cost Maximum (SCM) - the maximum monthly amount which may be expended for HSP services for an eligible individual. This amount is determined based on the individual's DON score and the specific programmatic component of HSP through which the individual is being served.

u) Service Plan - specifically, the Home Services Program Service Plan (IL 488-1049), Home Services Program Service Plan Addendum (IL 488-1050) or the Interim Agreement (IL 488-2344) forms, on which all services to be provided to an individual through HSP are listed.

v) Services - the necessary tasks provided to an individual, in one or more of the areas listed in Section 676.40 and listed on the individual's Service Plan, through HSP with the intent of preventing the unnecessary institutionalization of the individual.

w) Skilled Nursing Facility (SNF) - a facility that provides regular and on-going nursing level care to its residents due to the residents' medical conditions, as well as those services necessary for safe and adequate living.

10. Ill. Admin. Code tit. 89, § 676.200 (2013) provides:

Vendor Payment

Because HCFA regulations (42 CFR 447.10(d)) prohibit re-assignment of provider claims, no payment will be made directly to any customer of the HSP. In order to ensure that HSP funds are administered properly, no payment, on behalf of any customer, will be made to any vendor unless the services for which the payment is to be made were approved by DHS-HSP. No payment, on behalf of any customer, shall be made until after service has been rendered and verified.

11. Ill. Admin. Code tit. 89, § 677.40 (2013) provides:

Freedom of Choice

Under the HSP, a customer has the following rights; however, the choices made by the customer may affect the services available through HSP for which the customer is eligible or which might otherwise be available.

a) A customer shall have the right to apply for and, if eligible, receive services under the program of the customer's choice. Therefore, a customer eligible for both institutional care and HSP services has the right to choose one or the other, but may not receive both at the same time. Institutional care is not available through HSP and, if the customer chooses HSP services, DHS-ORS shall have the right to determine the waiver under which the customer will be served and the level of the provider of services.

b) At any time, a customer has the right not to accept those HSP services that he/she has been determined eligible to receive. However, if the customer chooses to terminate services, he/she may have to reapply for services and undergo another determination of eligibility if he/she later desires services through HSP.

c) A customer has the right to choose his/her living arrangement, including the physical dwelling and persons residing in the dwelling. However, such choices may impact the amount or scope of the services received by the customer.

HSP will not impose a living arrangement on any customer.

d) A customer applying for, or receiving, services through HSP shall have the right to choose medical and non-medical service providers. However, payment may only be made to those service providers which meet the standards established by DHS as found at 89 Ill. Adm. Code 686 and who will accept DHS' fees for a specific service approved by DHS, if DHS is to issue payment for the service.

12. Ill. Admin. Code tit. 89, § 684.10 (2013) provides:

Service Plan

a) All services to be provided to a customer through HSP must be necessary to meet an unmet care need of the individual or to provide relief to the caregiver for customers eligible for respite care services and listed on a HSP Service Plan which is developed for the customer, agreed to and signed by the customer and counselor.

b) Services provided through HSP to a customer must be:

1) safe and adequate;

2) cost effective; and

3) the most economical in terms of the customer's needs, unless a service is not available at the most economical level. In such in-

stances, the next higher service level may be used as long as services remain within the SCM established for the customer. Documentation of an ongoing effort to locate services at the appropriate level must be in the customer's case file.

c) The initial HSP Service Plan for a customer must be submitted with all other necessary forms to the customer's physician during the eligibility determination phase of the case (89 Ill. Adm. Code 682.100(g)) for the purpose of review and approval of the plan for care by the physician.

13. Ill. Admin. Code tit. 89, § 684.40 (2013) provides:

Distribution of the Service Plan

A copy of the approved HSP Service Plan for the customer must be given to the customer and each service provider, and a copy must be retained for the case file.

14. Ill. Admin. Code tit. 89, § 684.50 (2013) provides:

Service Plan Content

The HSP Service Plan shall include the type of service(s) to be provided to the customer, 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, the rate of payment for the service(s), and, if the customer is receiving PA services, the customer's plan for backup if the usual

PA is not available to provide the services and the next planned date for redetermination.

15. Ill. Admin. Code tit. 89, § 684.75 (2013) provides:

Required Physician's Certification of HSP Service Plan

a) A Physician's Certification (IL 488-1780) shall be obtained from the customer's physician when:

   1) the customer's initial service plan is developed (Section 684.10); and

   2) at least every two years during the redetermination of eligibility.

b) The services provided to the customer shall not be interrupted while the new Physician's Certification is being secured by DHS-DRS/HSP

16. Ill. Admin. Code tit. 89, § 686.10 (2013) provides:

Personal Assistant (PA) Requirements

In order to be employed by a customer as a PA (89 Ill. Adm. Code 676.30(q)), an individual must:

a) have a Social Security number and provide DHS with documented verification of this number;

b) be a minor between 14 and 16 years of age who is not employed during school hours, has an employment certificate and meets all other requirements of the Child Labor Law [820 ILCS 205] and has an adult who is at least 21 years of

age and who is legally responsible for the customer who will supervise the PA; be 16 years of age or older, enrolled in school and not employed during school hours; or be 17 years of age or older and not enrolled in school;

c) have provided to the customer at least two written or verbal recommendations from present or former employers, the recommendation of a Center for Independent Living (CIL), or, if never employed, references from at least two non-relatives;

d) be able to communicate with the customer to the satisfaction of the customer and counselor;

e) be able to follow directions to the satisfaction of the customer and counselor;

f) have previous experience and/or training that is adequate and consistent with the specific tasks required for safe and adequate care of the customer;

g) if the customer has a contagious infectious disease, have a physician, health care institution (i.e., hospital, nursing home, home health agency), or CIL certify, in writing, that he/she has the knowledge of precautionary procedures for the control of contagious infectious diseases, if it is anticipated that he/she will come into contact with bodily fluids, or be evaluated by a Registered Nurse licensed pursuant to the Illinois Nursing and Nursing Practices Act of 1987 [225

ILCS 65] to determine that he/she has knowledge of such procedures;

h) complete an EMPLOYMENT AGREEMENT between the customer and PA that certifies the PA:

1) shall provide services to the individual in accordance with his/her SERVICE PLAN (IL 499-1049) (89 Ill. Adm. Code 676.30(u));

2) shall submit a bi-monthly calendar listing actual hours worked each pay period (1-15; 16-last working day of the month), as verified by the customer and in accordance with the number of hours authorized by DHS. The PA shall not claim more hours than approved by DHS unless prior approval has been granted by the counselor to address a temporary increased service need;

3) shall make available to DHS and other designated agencies those records described in subsection (h)(2);

4) shall maintain all customer information as confidential and not for release, either in writing or verbally, to anyone other than those designated by DHS in writing;

5) shall not subcontract to any other person, any of the services he/she has agreed to provide;

6) shall provide services only while the individual is in his/her home or during the pe-

riod covered by Section 684.60 (Provision of Services);

7) shall agree that the customer is responsible for locating, choosing, employing, supervising, training, and disciplining as necessary the PA. Further, that the State of Illinois does not provide paid vacation, holiday, or sick leave; however, such absences shall be reported to the DHS counselor per the HOME SERVICES TIME SHEET (IL 488-2251) only for the purposes of processing payment;

8) understands that DHS reports all payments made to a PA to the Illinois Department of Employment Security (DES) and that the PA may apply for unemployment benefits, but DES, not DHS, makes the determination as to whether the PA shall receive benefits;

9) understands that he/she may apply for Workers' Compensation benefits through DHS and that some customers may carry such insurance coverage; however, DHS maintains that the customer, not DHS, is the employer for these purposes; and

10) understands that DHS will withhold Social Security tax (FICA) from payments made to him/her. Federal and State income tax shall be withheld if the PA completes and returns to DHS two separate W-4 forms;

i) complete an I-9 Immigration form, which must be retained by the customer;

j) for PAs starting on or after April 13, 1992, complete a PA STANDARDS (IL 488-2112) to be returned to DHS;

k) as of April 13, 1992, at the time of redetermination of eligibility of the customer by which he/she is employed, have completed by the customer, a PERSONAL ASSISTANT EVALUATION (IL 488-2089); and

l) if requested by the customer, give permission and the necessary information for the customer to request a conviction background check from the Illinois State Police. This permission will require the prospective PA to sign the appropriate form provided by the customer.

17. Ill. Admin. Code tit. 89, § 686.20 (2013) provides:

Services Which May Be Provided by a PA

A PA may perform or assist with:

a) household tasks, shopping, or personal care;

b) incidental health care tasks which do not require independent judgment, with the permission of the customer's physician, customer, and/or family; and

c) monitoring to ensure the health and safety of the customer.

18. Ill. Admin. Code tit. 89, § 686.30 (2013) provides:

Annual Review of PA Performance

a) Pursuant to 686.10(k), annually, at the time of redetermination of the individual's eligibility, a Personal Assistant Evaluation (IL 488-2089) shall be completed, by the customer with assistance of the counselor, for each PA providing services through HSP.

b) PAs shall be evaluated based upon:

1) accuracy of work (e.g., ranging from making many errors to few errors);

2) cleanliness of working area (e.g., ranging from very untidy to exceptionally clean);

3) use of work time (e.g., ranging from very wasteful to very efficient);

4) responsibility (e.g., ranging from irresponsible to responsible);

5) attendance (e.g., ranging from frequently absent or late to always prompt); and

6) attitude towards the customer (e.g., ranging from disrespectful to respectful).

c) The outcome of the evaluation shall be mediated by the counselor between the PA and the customer regarding any unresolved issues, up to and including replacement of the PA by the customer, if necessary.

19. Ill. Admin. Code tit. 89, § 686.40 (2013) provides:

Payment for PA Services

a) PAs shall be paid at the hourly rate set by law, but never less than the current federal minimum wage.

b) PAs shall be paid twice each month for services rendered. The first payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the first day of the month through the fifteenth day of the month. The second payment shall be for any services rendered by the PA, pursuant to the customer's Service Plan, from the sixteenth day of the month through the last day of the month.

c) No PA shall be reimbursed by DHS-DRS for services rendered to one or more HSP customers for more than 16 hours in a 24-hour period. The counselor may grant an exception should an emergency occur that results in the loss of a paid or unpaid primary caregiver who resides with the customer, and there is imminent danger to the health, safety and well being of the customer. When this occurs, the additional hours may not exceed the annual service cost maximum (SCM). The 16-hour limitation does not apply to PAs providing respite services.