Re: *Harris v. Quinn*, Summaries of Amicus Curiae Briefs Submitted in Support of SEIU
Date: January 2, 2014

This memorandum summarizes in lay language the arguments made in the 11 "friend of the court," or "amicus curaie," briefs filed in support of the Respondent Unions and the State of Illinois in *Harris v. Quinn*, Supreme Court 11-681. It also provides a brief description of the amicus themselves, their interest in the case, and the names of the counsel representing them.

1. **Amici: United States**
   Counsel of Record: Donald Verrilli (Solicitor General)
   Additional Attorneys: Edwin Kneedler (Deputy SG) and John Bash (Assistant to the SG); Patricia Smith (Solicitor of Labor), Christopher Wilkinson (Associate Solicitor), Radine Legum (Counsel for Civil Rights and Appellate Litigation), and Nora Carroll (Senior Attorney)

   The United States has an interest in this case both because Illinois's homecare program is partially funded by federal Medicaid dollars and also because federal statutes allow fair-share fee assessments in the private sector.

   The United States argues that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) was correctly decided—the Supreme Court correctly held that public employers may require employees to pay their share of a union's cost of collective bargaining, contract administration, and grievance adjustment. *Abood* was correctly decided because the government has broad authority to make employment decisions based on employee speech activities. This authority is unfettered unless the speech relates to a matter of "public concern," and even if it does, the First Amendment only requires the government's interest in promoting the efficiency of public services to be balanced against an employee's interest in commenting upon matters of public concern. The United States argues that as long as fair-share fees are only used to support activities like collective bargaining and contract administration (as opposed to a union's political activities) these fee payments do not relate to matters of public concern. And even if a union's core collective bargaining activities could be characterized as relating to a matter of public concern, the government's interests in bargaining with an exclusive representative and preventing "free riding" would readily satisfy the First Amendment balancing test.

   The United States also argues that overruling *Abood* would risk destabilizing the Supreme Court's established framework for evaluating speech-related conditions on public

employment, and that petitioners have presented no sound reason for the Court to disregard longstanding precedent.

In addition, the United States argues that Illinois' fair-share fee requirement is permissible under *Abood*. The State of Illinois, not the individual customers, sets and pays personal assistants' wages, funds their healthcare benefits, and establishes their qualifications and duties. It follows that Illinois has the same interest in a bargaining with a single representative as any public employer.

Finally, the United States argues that the Disabilities Program petitioners' claim is not ripe because it is entirely speculative whether they will ever be subject to a collective bargaining agreement containing a fair share fee requirement.

2. <u>Amici</u>: California, Connecticut, Maryland, Massachusetts, Oregon, and Washington
<u>Counsel of Record</u>: Laura Watson (Deputy Solicitor General, Washington State)
<u>Additional Attorneys</u>: Noah Purcell (Solicitor General, WA) and Robert Ferguson (Attorney General, WA); Kamala Harris (AG, CA); George Jepsen (AG, CT); Douglas Gansler (AG, MD); Martha Coakley (AG, MA); Ellen Rosenblum (AG, OR)

The amici States (collectively referred to as the "Homecare States") have each enacted homecare systems, similar to that of Respondent State of Illinois, that include collective bargaining, and have already seen enormous benefits from these systems. The Homecare States believe the ability of workers to decide whether to engage in collective bargaining to be a key component of these homecare systems. Together with homecare workers, the Homecare States have negotiated training requirements, referral programs, and optimized wage and benefit packages that have allowed these states to recruit and better retain a talented pool of homecare workers.

The Homecare States argue that as sovereign States and proprietors of homecare programs vital to their residents, they should be allowed the flexibility to structure these programs. Facing shortages of skilled homecare workers to meet the needs of their aging populations, the Homecare States have passed laws that allow for collective bargaining to improve working conditions and training. These laws were passed in justifiable reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which, in holding that public-sector fair share fee requirements are consistent with the First Amendment, recognized that effective collective bargaining is grounded in exclusive representation and fair-share fees.

The Homecare States argue that this case presents none of the special justifications required to abandon longstanding precedent. In addition, the Court traditionally gives great deference to States acting in their proprietary capacities, as they do here—each Homecare State made a proprietary policy decision to authorize collective bargaining to promote a quality and stable homecare workforce. If the Court were to prevent the Homecare States from engaging in collective bargaining, it would undermine their prerogatives to run their own programs and lead to increased institutionalization of elderly and disabled citizens.

3. **<u>Amici</u>: New York, Arkansas, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Missouri, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Vermont, and the District of Columbia**
<u>Counsel of Record</u>: Barbara Underwood (Solicitor General, NY)
<u>Additional Attorneys</u>: Eric Schneiderman (Attorney General, NY), Richard Dearing (Deputy SG, NY), Cecelia Chang (special counsel to the SG, NY), Valerie Figueredo (Assistant SG, NY); Attorneys General of all Amici States.

Amici States (collectively referred to as the "Public Sector Bargaining States") employ a wide range of different public-sector labor schemes, but all Amici States have a common interest in preserving the regulatory flexibility that has been a core feature of public-sector labor relations since *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the government may require its employees to pay a fair share fee to an exclusive bargaining representative. The Public Sector Bargaining States argue that while the variation in state public employment systems is a natural and appropriate result of *Abood*'s flexible framework, the degree of variation in state laws should not be overstated: all States that statutorily authorize collective bargaining by public-sector employees have enacted a system of exclusive representation, and twenty-two of those States and the District of Columbia permit agency fees. *Abood* has appropriately allowed States to adopt the same toolkit for public-sector collective bargaining that Congress has long authorized for private-sector labor relations.

The Public Sector Bargaining States also assert that they have a fundamental interest in avoiding the vast disruption in state and local labor relations that would occur if *Abood*'s framework were now abandoned. They argue that *Abood*'s deference to state judgments about how best to structure their labor relations recognizes the paramount government interest in maintaining labor peace and avoiding public-sector strikes and other labor breakdowns. Because

such disruptions can result in great public harm, the States' interest in achieving labor peace in the public sector is far greater than any government interest in avoiding strikes and work interruptions in private industry.

Finally, the Public Sector Bargaining States emphasize the government's interest, as employer, in structuring collective-bargaining systems to ensure that government operations effectively and efficiently serve the public. They argue that *Abood* accords fully with the traditional leeway granted to States under the First Amendment in controlling the public-employment relationship. The Supreme Court has consistently upheld the government's right to restrict the speech or associational activities of public employees, and it has not prohibited States from adopting rules for managing public workers that are widely accepted as necessary in the private sector.

4. Amici: The Paraprofessional Healthcare Institute (PHI)
Counsel of Record: Pamela S. Karlan (Stanford Law School, Supreme Court Litigation Clinic)
Additional Attorneys: Jeffrey L. Fisher (Stanford Clinic); Kevin K. Russell (Goldstein & Russell)

Founded in 1992, the Paraprofessional Healthcare Institute (PHI) is the nation's leading authority on the direct-care workforce. PHI has offices in New York, Michigan, and Washington, D.C., and works with employers, consumers, labor advocates, and government officials to develop recruitment, training, supervision, and person-centered caregiving practices and policies. PHI is the nation's primary source for direct-care workforce news and analysis, providing up-to-date profiles of the direct-care workforce in all 50 states, including key workforce statistics, information on state initiatives to improve these jobs, and state-by-state information on training requirements.

PHI argues that the Supreme Court has long deferred to states' choices with regard to how to provide public services. In particular, the Court has given states wide latitude to decide how to manage the workforce that provides those services.

In this case, PHI argues, petitioners are part of a workforce paid by the State of Illinois to carry out a vital state function: providing assistance to disabled individuals through the Medicaid program. Illinois has determined that it can often best provide that assistance through home-

based programs in which it delegates significant decisionmaking authority to beneficiaries. But like many states, Illinois faces significant recruitment and retention challenges—it must develop a workforce that is large enough, stable enough, and skilled enough to meet its programmatic needs. PHI argues that Illinois had a strong empirical basis for concluding that collective bargaining can contribute to developing such a workforce.

5. **Amici: 21 Past Presidents of the District of Columbia Bar**
   Counsel of Record: John Nields Jr. (Covington & Burling)
   Additional Attorneys: Robert Lenhard, Leah Pogoriler, and Matthew Berns (Covington & Burling)

Amici are twenty-one former Presidents of the District of Columbia Bar. They submit this brief because Petitioners have asked the Court to "overrule" *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that public-sector fair share fee requirements are consistent with the First Amendment, and which has for many years provided the legal and constitutional underpinning for fee requirements for mandatory bars such as the D.C. Bar. *See Keller v. State Bar of California*, 446 U.S. 1, 12 (1990). Overruling *Abood* would have a profoundly destabilizing impact on mandatory bars all over the country, which have relied on the case in structuring their activities.

The Former Bar Association Presidents argue that, contrary to Petitioners' argument, *Abood* is not an "anomaly" or an "errant exception" to the Supreme Court's First Amendment jurisprudence. *Abood* instead stands at the heart of a well-developed, well-reasoned, body of law that has been refined and reaffirmed in numerous opinions of this Court.

Abood stands for the proposition that where a body such as a union has a statutory duty to perform services for the benefit of a defined group of people, members of that group may properly be required to pay for the costs of those services. This reasoning has been applied by this Court not only to union shops, but to mandatory bars and agricultural cooperatives. A decision overruling this body of law, to which bars throughout the country have conformed their behavior, would create uncertainty and instability injurious to the important work done by mandatory bars both for the legal profession and for the administration of justice.

6. **Amici: American Association of People with Disabilities, Disability Rights Education and Defense Fund, Judge David L. Bazelon Center for Mental Health Law, National Council on Aging, and 23 other disability and senior organizations**
Counsel of Record: Samuel R. Bagenstos (University of Michigan Law School)
Additional Attorneys: Ira A. Burnim and Jennifer Mathis (Judge David A. Bazelon Center for Mental Health Law); Anna Rich (National Senior Citizens Law Center)

Amici are disability rights organizations and organizations of people with disabilities and senior citizens who use personal assistance services to promote independence, integration, and freedom from institutionalization. People with disabilities have participated in the creation of state programs that provide representation and collective bargaining rights to workers who provide personal assistance. Amici Disability and Senior Citizens' Organizations are concerned that a ruling invalidating these collective-bargaining arrangements for personal assistants will undermine the interests and independence of individuals with disabilities.

The Disability and Senior Citizens' Organizations argue that under Illinois's Medicaid program, the State and individuals with disabilities share employer responsibilities with respect to personal assistants. Central to this arrangement is that personal assistants can collectively bargain with the state over key terms and conditions of employment, while remaining subject to the day-to-day supervision, and hiring and firing authority, of individuals with disabilities.

If the Court were to invalidate this arrangement—for example, by holding that the bargaining agent may not collect an agency fee—the state would be left with two choices, both of which would severely undermine the interests and independence of individuals with disabilities. If the state chose to continue providing the program's workers with effective collective bargaining rights, it would be forced to abandon the principle of consumer control over hiring, firing, and day-to-day supervision. Alternatively, if the state abandons collective bargaining and simply treats personal assistants as employees of the individual consumers, it would deprive workers of the opportunity to bargain over terms and conditions of employment that no individual consumer is in a position to set. This would also be harmful to individuals with disabilities, because such collective bargaining has led to increased stability and reduced turnover in the market for personal assistants.

7. **Amici: AFL-CIO**
Counsel of Record: James B. Coppess (AFL-CIO)

Additional Attorneys: Craig Becker and Lynn K. Rhinehart (AFL-CIO); Laurence Gold

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 unions, with a total membership of approximately 12 million working men and women.

The AFL-CIO argues that Illinois' collective bargaining agreement covering personal assistants does nothing more than set those economic terms of employment that are within the State's control. And the financial support for the collective bargaining representative required by the agreement does not extend beyond the cost of negotiating and enforcing the agreement. That being so, the Supreme Court's decisions in *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225 (1956) and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that employees can be required to pay their share of these costs, dispose of petitioners' First Amendment claims.

In addition, the AFL-CIO argues that far from being "offensive to the First Amendment," as Petitioners contend, *Abood* is the fount of the Court's First Amendment jurisprudence concerning compulsory fees in a wide range of settings beyond that of collective bargaining. The AFL-CIO concludes by emphasizing that public sector collective bargaining and union security are hotly contested issues of state policy and that the political process—not constitutional adjudication—is the appropriate means for resolving this policy dispute.

8. **Amici: National Education Association (NEA), California Teachers Association (CTA), and Change to Win (CTW)**
   Counsel of Record: Alice O'Brien (NEA)
   Additional Attorneys: Jason Walta (NEA); Jeremiah Collins (Bredhoff & Kaiser); Laura P. Juran (CTA); Patrick J. Szymanski (CTW)

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges and universities. CTA is NEA's state affiliate in California, with approximately 300,000 members. NEA affiliates have collective bargaining agreements with more than 10,000 school districts, including more than 900 districts that have agreements with affiliates of CTA. Most of these agreements provide for agency fees. NEA, CTA, and several of

their local affiliates are defendants in *Friedrichs v. California Teachers Association*, an appeal to the Ninth Circuit (No. 13-57095), which challenges a California law allowing school districts to enter into agency shop arrangements.

CTW is a labor federation of three national and international labor unions—the International Brotherhood of Teamsters, the Service Employees International Union and the United Farm Workers of America—which collectively represent approximately 3.5 million workers throughout the United States, including hundreds of thousands who are employed by state and local governments. CTW affiliates have collective bargaining agreements with several thousand state and local governments, most of which provide for agency fees.

Amici NEA and CTW contend that principles of federalism command respect for a State's decision to manage its personnel relations through a system of collective bargaining with an exclusive representative chosen by a majority of the affected employees and to require all employees to pay a share of the costs of representation.

The NEA and CTW first argue that collective bargaining is not a "petition for redress of grievances," and that merely by bargaining with an exclusive representative, a State does not deprive employees of any opportunities to petition the government that otherwise would be available to them. Exclusive representation also does not impair freedom of association because employees are not required to join the union, attend meetings or otherwise act in concert with the union, and their ability to convey their own messages on any subject is not restricted.

In addition, the NEA and CTW argue that an agency fee requirement does not force such an employee to subsidize speech to which he is opposed. This is because collective bargaining and contract administration are *economic activities*, as to which employees are charged a fee, not to support what a union *says*, but to contribute toward what collective bargaining *produces* – an enforceable agreement from which all employees benefit. Even if an agency shop were considered to involve compelled subsidization of speech, there still would be no basis for strict scrutiny. In other "compelled subsidization" cases, the Court has required only that the private speech be connected to a legitimate government purpose. And, where the government is acting as *employer*, pursuing its proprietary interests in managing its operations, strict scrutiny is entirely out of place.

9. <u>Amici</u>: Fraternal Order of Police, International Association of Firefighters, National Association of Government Employees, National Association of Police Organizations,

National Troopers Coalition, California Correctional Peace Officers' Association, and other organizations representing public safety employees
Counsel of Record: Gregg Adam (Carroll, Burdick & McDonough LLP)
Additional Attorneys: Gary Messing and Gonzalo Martinez (Carroll, Burdick & McDonough)

Amici (collectively referred to as the "Public Safety Unions") represent police officers, fire fighters, correctional officers, and supporting public safety employees serving communities across the nation. In their capacity as the collective bargaining representatives for these public safety employees, several amici have successfully sought and obtained work-related rights and safeguards for their members that allow them to better serve and protect their communities. Accordingly, the organizations representing these public safety employees urge this Court to preserve the existing exclusive representation and agency fee structure for public employees developed under *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977).

Amici Public Safety Unions argue that there is no reason to revisit Abood and its progeny because *Abood*'s distinction between chargeable and nonchargeable expenses provides adequate protection for nonmembers' First Amendment rights, while avoiding the free rider problem that would ensue if nonmembers (who receive all the benefits of a collective bargaining agreement) did not have to pay for any of the union's costs.

In addition, the Public Safety Unions argue that if a public employer can require its employees to contribute to pension funds (including privately-managed pension plans) without any assurances those contributions will not be used for political purposes, it should also be able to require agency fee agreements—which *Abood* and its progeny have ensured will not be used for political purposes.

The Public Safety Unions also argue that abolishing the existing exclusive representation and agency fee system would have devastating consequences for the entire machinery of state-law based collective bargaining and the labor contracts that are their product. States and localities across the country have built labor relations systems and bargaining relationships, including with public safety bargaining units, in reliance upon the rules established by *Abood*. States and local governments rely on the exclusive representation system because allowing multiple bargaining agents could lead to differences in salaries or employment arrangements, fostering claims of favoritism damaging to employee morale. Further, abolishing exclusive

representation would impose administrative burdens on government agencies, including public safety agencies, because they would have to expend their already limited time and resources to negotiate and enter into contracts with more than one collective bargaining agent.

10. Amici: Homecare Historians Eileen Boris and Jennifer Klein
Counsel of Record: Charles A. Rothfeld (Mayer Brown)
Additional Attorneys: Eugene R. Fidell (Yale Law School Supreme Court Clinic); Paul W. Hughes and Michael B. Kimberly (Mayer Brown)

Professors Eileen Boris and Jennifer Klein (referred to as the "Homecare Historians") are historians who have studied and written about the history of homecare in the United States. They co-authored the 2012 book *Caring for America: Home Health Workers in the Shadow of the Welfare State*. Eileen Boris is Professor of History at the University of California, Santa Barbara and Jennifer Klein is Professor of History at Yale University.

The Homecare Historians argue that since the early twentieth century, states have increasingly directed, regulated and managed the provision of homecare in crucial ways—and continue to do so to this day. In addition, the Homecare Historians describe how unionization has helped produce better outcomes for homecare workers, homecare clients, and for States as employers. In particular, the unionization of homecare workers has facilitated labor peace, while encouraging the development of a more stable and productive workforce.

11. Amici: Labor Law Professors
Counsel of Record: Charlotte Garden (Center for Law and Equality, Seattle University School of Law)
Additional Attorneys: Fred Korematsu (Center for Law and Equality); Matthew Bodie (Saint Louis University School of Law)

Amici Labor Law Professors are over thirty law professors and scholars who teach, research, and write about labor relations and labor law, and have expertise in the issues in this case.

The Labor Law Professors argue that states have a well-established interest in effectively and efficiently managing their employment relationships, including by adopting a system of collective bargaining with an exclusive representative supported by agency fees. Exclusive

representation—as opposed to a "minority-union" system—serves the interest of both private-sector and government employers because it enables the employers to negotiate with a single union and reduces the likelihood of workforce disruptions. And agency fees are, in turn, critical to solving the free-rider problem that would otherwise unravel or weaken many exclusive representation arrangements. Illinois has a particularly strong interest in adopting such a system of collective representation for its homecare program—managing the provision of care across thousands of homes requires a system that can balance customer privacy and control with the state's interests in recruiting, training, and retaining a workforce that can provide quality care.

The Labor Law Professors also argue that both the exclusive representation and agency fee arrangements at issue in this case are fully consistent with the First Amendment. The Labor Law Professors contend that the First Amendment is not even implicated by Illinois's choice of the exclusive representation system, because states are free to select nearly any process—including bargaining with an elected union—before determining state policy, including regarding terms and conditions of employment. In addition, the Court has repeatedly held that governments are permitted to solve collective problems by requiring fee payments to private actors, as long as these fees are part of a comprehensive regulatory scheme.