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Harris v. Quinn: An End to the Forced Unionization of Home-Care Workers?

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Abstract

On January 21, 2014, the Supreme Court of the United States heard oral argument in Harris v. Quinn*, a challenge to states' authority to require that home-based workers submit to an exclusive representative for collective bargaining—i.e., a labor union. States like Illinois have no legitimate or compelling interest in forcing home-care workers to submit to exclusive representation by a labor union and pay for the privilege. Therefore, the Court should at least vindicate the rights of home-care workers to be free from coerced association, to be free from supporting speech with which they disagree, and to petition the government in their own voices rather than through the unreliable and conflicted intermediary of a labor union.*

On January 21, 2014, the Supreme Court of the United States heard oral argument in *Harris v. Quinn*, a challenge to states' authority to require that home-based workers submit to an exclusive representative for collective bargaining—i.e., a labor union. Organizing home-based workers has been among the labor movement's greatest prospects for adding to its diminishing ranks, and over the past decade, national unions have convinced more than a dozen states to recognize home-care and day-care workers receiving state subsidies as state employees. Consequently, these employees may be unionized and made to pay dues.

But public workers' First Amendment rights of expression and association are compromised when those workers are forced not only to be represented by a union, but also to pay for speech with which they disagree. While the Supreme Court has held that this

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Key Points

- Illinois's and other states' attempts to claim home-care workers as their own employees for collective-bargaining purposes are unsupported by any legitimate state interest and should be rejected as violating dissenting workers' First Amendment rights.
- Illinois's legal rationale—that it has a "labor peace" interest in providing for the exclusive representation of people who merely receive state subsidies—is unconstrained by any limiting principle and would permit governments to force any group of citizens receiving benefits, from welfare to tax credits, to submit to and support a union.
- The Supreme Court should vindicate the rights of home-care workers to be free from coerced association, to be free from supporting speech with which they disagree, and to petition the government in their own voices rather than through the unreliable and conflicted intermediary of a labor union.

burden is justified by states' interest in maintaining "labor peace" among their workers—and the subsidiary need to avoid free-riding by dissenting workers who benefit from collective bargaining—that interest is not implicated when the public "employees" at issue are not hired or fired by the state, are not supervised by the state, and do not work in state facilities.

Attempts by Illinois and other states to claim home-care workers as their own employees for collective-bargaining purposes are a pretext unsupported by any legitimate state interest and should be rejected as violating dissenting workers' First Amendment rights.

Background

Pamela Harris is the primary caregiver for her 24-year-old son Josh. Josh suffers from a rare genetic condition called Rubinstein-Taybi syndrome, which causes severe intellectual and developmental disabilities. To offset the cost of Josh's care and provide an alternative to institutionalization, the Harrises and other families in similar circumstances receive a modest stipend—about $2,100 per month—from the State of Illinois's Disabilities Program for mentally disabled adults.[1]

Pursuant to a 2009 executive order by Governor Pat Quinn, Illinois regards Pamela Harris as an employee of the state—but only for purposes of collective bargaining.[2] State law provides the same for home-care workers who receive subsidies through its Rehabilitation Program, which covers other disabilities.[3] Under both programs, disabled participants or their guardians are responsible for developing plans of care and hiring and supervising their home-based caregivers.[4] Illinois law makes clear that home-care workers are not considered to be state workers for any purpose other than collective bargaining, "including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits."[5]

Illinois has designated SEIU Healthcare Illinois & Indiana, an affiliate of the Service Employees International Union, as the exclusive representative for Rehabilitation Program caregivers in bargaining with the state over reimbursement rates. So far, Disabilities Program participants have turned back attempts by the SEIU and the American Federation of State, County, and Municipal Employees (AFSCME) to represent them before the state.

Illinois's efforts to facilitate the unionization of home-care workers are not unique. Indeed, they are part of a decade-long campaign to organize home-based care workers, including medical assistants and even family child-care providers,[6] and thereby to "reinvigorate organized labor."[7]

More than a dozen states have implemented schemes like Illinois's—in which a state agency is designated as the employer of record for home workers and empowered to recognize a union representative on their behalf—through legislation or (particularly in the family child-care context) executive order. Hundreds of thousands of home-based workers are now covered by collective-bargaining agreements; a decade ago, that number was nearly zero.[8] These workers add to the ranks of organized labor and provide millions of dollars in dues or "fair share" payments.

1. Ben Yount, *US Supreme Court to Hear Illinois Union Strong-Arm Case*, Illinois Watchdog (Oct. 4, 2013), http://watchdog.org/109220/us-supreme-court-to-hear-illinois-union-strong-arm-case/.
2. Ill. EO 2009–15.
3. 20 Ill. Comp. Stat. 2405/3(f).
4. Ill. Admin. Code tit. 89, § 676.30(b); 20 Ill. Comp. Stat. 2405/3(f).
5. 5 Ill. Comp. Stat. 315/3(n); *see also* EO 2009–15.
6. For example, in 2013, Minnesota designated child-care providers receiving state subsidies as employees of the state and called for the state to certify a labor union as their "exclusive representative" for petitioning the state about its administration of its subsidy program. Family Child Care Providers Representation Act, Minn. Stat. §§ 179A. 50–52. A group of family child-care providers who operate child-care businesses in their homes filed suit challenging the law, and the United States Court of Appeals for the Eighth Circuit enjoined operation of the law pending appeal. Order, Parrish v. Dayton, No. 13-3739 (8th Cir. filed Oct. 15, 2013).
7. Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1390 (2008).
8. Kris Maher, *Unions Target Home Workers*, The Wall Street Journal, June 19, 2013, http://online.wsj.com/news/articles/SB10001424127887324049504578541593593292614.

Home-Care Workers' First Amendment Rights

While recognition of a union under state law typically requires the support of a majority of workers, it also binds workers opposing union representation. Despite this opposition, these workers are required to submit to the union as their exclusive representative in bargaining with the state and to make "fair share" payments to subsidize its speech on their behalf—even though they may disagree with that speech. For that reason, compulsory support of a union intrudes on dissenting workers' First Amendment rights.

The Supreme Court has long recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object."[9] Similarly, the Court has recognized that the freedom of association guaranteed by the First Amendment "plainly presupposes a freedom not to associate."[10] Moreover—and uniquely relevant in the public-employment context—the First Amendment specifically provides that the people have a right "to petition the Government for a redress of grievances."[11]

Yet in a 1977 decision, *Abood v. Detroit Board of Education*, the Court held that any "interference" with dissenting public workers' First Amendment rights caused by forcing them to associate with and support a labor union "is constitutionally justified" by a state's interest in maintaining "labor peace" and, to that end, preventing dissenting workers from "free riding" on collective-bargaining activities funded by workers who chose to support the union.[12] Thus, mandatory representation, the Court explained regarding the teachers' union at issue in that case, serves to suppress the speech of dissenting employees who may hold "quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures."[13] Such suppression, in turn, promotes the state's interest in maintaining labor peace.

It is, however, far from clear that the rationale of *Abood* and of the cases following it supports the appointment of an exclusive representative for workers who are not hired, maintained, or supervised by the state; who do not labor in state facilities; and whom the state does not consider to be its employees for any other purpose. Consistent with the objective of maintaining labor peace, a union may charge dissenting workers only for union "expenditures [that] are 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."[14] Those issues are necessarily absent when the state "employer" does not manage the workers that it seeks to force to submit to a union.

Under Illinois law, as in other states, it is the home-care patient who is responsible for workplace conditions, supervision, and every aspect of the employment relationship but for one: compensation, which is set by law.[15] Because Illinois does not manage personal assistants and takes no responsibility for their labor conditions, it lacks the power to bargain with the SEIU over the terms of their employment that implicate "labor peace."

That is the principal argument of Pamela Harris and the other caregivers who are challenging Illinois's law. In a rather cursory analysis, the Seventh Circuit held that Illinois was a "joint employer" of those receiving subsidies from the state and could therefore mandate that they submit to the exclusive representation of a union.[16] The Supreme Court's choice to review that decision suggests that it may see things differently.

9. United States v. United Foods, 533 U.S. 405, 410 (2001) (citations omitted).
10. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).
11. U.S. Const. amend. I.
12. Abood v. Detroit Board of Education, 431 U.S. 209 (1977).
13. *Id.* at 224.
14. Ellis v. Bhd. of Ry., Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435, 448, 455–56 (1984). See also Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 523 (1991) (adopting *Ellis*'s holding as a matter of First Amendment law).
15. Ill. Admin. Code tit. 89, § 676.30(b).
16. Harris v. Quinn, 656 F.3d 692, 697–99 (7th Cir. 2011).

Taking Down the Whole Façade?

In fact, Illinois's and labor unions' overreaching in this case may push the Court to go even further. In a 2012 decision, *Knox v. Service Employees Int'l Union, Local 1000*, the Court both acknowledged that much of its approach to labor law "appears to have come about more as a historical accident than through the careful application of First Amendment principles" and specifically called into question the free-rider rationale for compelling dissenting workers to submit to union representation.[17] *Abood*'s recognition of that rationale, it explained, was an "anomaly," because free-riding in all other contexts is "generally insufficient to overcome First Amendment objections."[18] In that respect, *Abood* may "cross[] the limit of what the First Amendment can tolerate."[19]

The *Harris* challengers have picked up the Court's suggestion and have asked it to overrule *Abood*. Public employees' bargaining with the state, they argue, implicates matters of intense public interest and concern—witness the recent controversy in Wisconsin, for example, over public employee benefits—and employees' own voices should therefore not be suppressed in favor of an exclusive representative merely to promote the state's convenience. After all, state officials may not choose to silence any other group of citizens just because it would be easier to take complaints from a single person or organization appointed as their exclusive representative.

A state clearly could not forcibly "organize" recipients of welfare benefits or holders of driver's licenses, because those individuals have a right to bring their concerns directly to state officials. Why should it be any different for state workers? While the Court's cases have distinguished between union speech that is core to collective bargaining (which may be charged to dissenting workers through "fair-share fees") and union speech that is political (which may not be charged to dissenting workers),[20] in the context of a government employer, all speech is political, whether or not it relates to the terms or conditions of employment.

The Court may also reconsider its judgment in *Abood* that "labor peace" is an interest sufficiently compelling to override workers' First Amendment rights. Although purporting to rely on decades-old labor-law precedents, *Abood* actually fashioned a new doctrine of First Amendment law—labor peace as a compelling interest—by repurposing a doctrine that had previously been held only to support Congress's exercise of its Commerce Clause power. Those older cases were decided at a time when the Commerce Clause power was seen as less robust than it is today, and the Court settled on labor peace as justifying Congress's intervention in massive labor disputes, such as railway strikes, that threatened to shut down the whole of interstate commerce.

But that was a low bar: A court evaluating commercial regulation considers only whether Congress had "a rational basis ... for concluding that a regulated activity sufficiently affected interstate commerce."[21] That inquiry is logically irrelevant to whether its action clears the higher bar of First Amendment exacting scrutiny. *Abood*'s bait-and-switch on this point—substituting a Commerce Clause doctrine for any kind of reasoned First Amendment analysis—is unsupportable.

While the government may compel the subsidization of speech when necessary to carry out "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy,"[22] it must have some object in mandating the association beyond the speech itself—lest the exception swallow the general rule. In other words, compelled association must be incidental to some legitimate government interest.[23] Yet, as *Abood* recognized, the very purpose of forcing employees to associate with a labor union is to facilitate its speech on their behalf while suppressing their individual

17. 132 S. Ct. 2277 (2012).
18. *Id.* at 2289–90.
19. *Id.* at 2291.
20. *See supra* n.14.
21. United States v. Lopez, 514 U.S. 549, 557 (1995).
22. *Knox*, 132 S. Ct. at 2289 (citing *United Foods*, 433 U.S. at 414).
23. *United Foods*, 533 U.S. at 413–15 (rejecting "compelled subsidies for speech in the context of a program where the principal object is speech itself").

views and thereby to achieve "labor peace."[24] This circular logic admits no legitimate government interest, much less a compelling one.

A decision that overruled *Abood* would vindicate the fundamental First Amendment rights of all public-sector employees who may dissent from the union line or simply want to speak for themselves. It would also transform public-sector labor relations by forcing unions to compete to win the support of workers by providing services that those workers find to be worth the price of membership. The result would be public-sector labor unions that are more responsive to workers' concerns and greater flexibility and dynamism in the public sector.

Conclusion

States like Illinois have no legitimate or compelling interest in forcing home-care workers to submit to exclusive representation by a labor union and pay for the privilege. Illinois's legal rationale—that it has a "labor peace" interest in providing for the exclusive representation of people who merely receive state subsidies—is unconstrained by any limiting principle and would permit governments to force any group of citizens receiving benefits, from welfare to tax credits, to submit to and support a union.

Whether or not the Supreme Court chooses to reverse *Abood*, it should at least vindicate the rights of home-care workers to be free from coerced association, to be free from supporting speech with which they disagree, and to petition the government in their own voices rather than through the unreliable and conflicted intermediary of a labor union.

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24. 431 U.S. at 224.