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Transgressions of a Timid Judiciary: Our Highest Court's Refusal to Overturn *Abood v. Board of Education*—*Harris v. Quinn*

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**TRANSGRESSIONS OF A TIMID JUDICIARY: OUR
HIGHEST COURT’S REFUSAL TO OVERTURN *ABOOD V.
BOARD OF EDUCATION*—*HARRIS V. QUINN***

Joe E. Ling[†]

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I. INTRODUCTION

In *Harris v. Quinn*, a divided U.S. Supreme Court held that the First Amendment's free speech and free association clauses¹ prohibited an Illinois labor union from collecting agency fees from non-unionized in-home personal care assistants.² To reach this holding, the Court concluded that its landmark case *Abood v. Detroit Board of Education* was not applicable to *Harris* and applied only to cases that involved employees employed solely by the state.³

This Note begins with a brief history of the constitutionality of collective bargaining agency fees in the United States.⁴ It then addresses the key facts of *Harris* and outlines the arguments made in the majority and dissenting opinions.⁵ In analyzing the Court's holdings in *Harris*,⁶ this Note deduces that: (1) *Abood* should have been controlling, and that the *Harris* Court improperly distinguished *Abood*;⁷ (2) the majority's conclusion would have been appropriate in the absence of *Abood*;⁸ (3) instead of distinguishing *Abood*, the Court should have overturned it as unconstitutional and relied instead on *Pickering v. Board of Education*;⁹ and (4) overturning *Abood* would not unduly or unjustifiably aggravate existing agency shop case law.¹⁰ Finally, this Note concludes that the Court's decision in *Harris* was a product of a result-oriented, policy-driven judiciary, and that the decision not to overturn *Abood* serves to further crystalize *Abood*'s unconstitutional holding in common law.¹¹

1. U.S. CONST. amend. I.

2. *Harris v. Quinn (Harris III)*, 134 S. Ct. 2618, 2644 (2014).

3. *Id.* (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977)).

4. *See infra* Part II. For a more detailed look at the history of agency shop provisions in the United States, see Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61 (1983) (illustrating the expansion of agency shop legislation).

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Section IV.A.

8. *See infra* Section IV.B.

9. 391 U.S. 563, 568 (1968), *abrogated in part by* *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *see infra* Section IV.C.

10. *See infra* Section IV.D.

11. *See infra* Part V.

II. HISTORY

American jurisprudence has had a long and turgid history when it comes to agency shop provisions.¹² The Court's decision in *Abood*, the landmark case upon which the *Harris* Court relied, stems from precedent set predominantly by two earlier U.S. Supreme Court cases: *Railway Employees' Department v. Hanson*¹³ and *International Ass'n of Machinists v. Street*.¹⁴ Because *Hanson* and *Street* provide the precedential background for *Abood*, "[a]nalysis of the contemporary boundaries of private sector agency shop provisions must start with those two cases."¹⁵

A. *Railway Labor Act Cases*

The Railway Labor Act, passed in 1926, was one of the United States' first labor laws.¹⁶ Unions and railways alike had grown tired

12. For the purposes of this Note, agency shop provisions are clauses in collective bargaining agreements assessing fees to non-union members. See Rob McKenna & Geoffrey William Hymans, *Other People's Money*, 9 J. FEDERALIST SOC'Y PRAC. GROUPS 111, 111 (2008) ("In an 'agency shop' state, public employees do not have to belong to a union but they must still pay a fee, known as an 'agency shop fee,' to the union to support its collective bargaining activities. In a 'right to work' state, public employees typically are not required to belong to a union or to pay agency shop fees.").

13. *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 238 (1956).

14. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 742 (1961).

15. Cantor, *supra* note 4, at 66. The history of pre-*Abood* agency shop jurisprudence presented here is necessarily brief. The Court's 1977 ruling in *Abood* was its first foray into the uncharted territory of agency shop law; prior to *Abood*, its only related rulings were on union shop clauses. See Milton L. Chappell, *From Abood to Tierney: The Protection of Nonunion Employees in an Agency Shop; You've Come a Long Way*, 15 OHIO N.U. L. REV. 1, 1 (1988) ("In 1977, the Supreme Court ruled for the first time on the constitutionality of agency shop requirements in the public sector.").

16. It is not quite accurate to say that the Act was "[o]ur first national labor law." William E. Thoms, *Collective Bargaining Under the Railway Labor Act*, 20 TRANSP. L.J. 275, 275 (1992). The Act had several unsuccessful predecessors in the Interstate Commerce Act of 1887, the Arbitration Act of 1888, and the Erdman Act of 1898. See Fernando A. Ruiz, *Labor Law—The Railway Labor Act: The Employee's Right to Minority Union Representation at Company-Level Grievance Hearings*, 11 W. NEW ENG. L. REV. 27, 31–33 (1989). It may be more accurate to say that the Railway Labor Act was the first successful labor law, satisfactory both to laborers and to railways. See Herbert R. Northrup, *The Railway Labor Act—Time For Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441, 442 (1990) ("Following a series of laws dating back to the 1880s that neither unions nor carriers found satisfactory, railway management

of the arbitration requirements associated with early federal labor laws, and the nation turned instead to the collective bargaining approach to conflict resolution promulgated by the Railway Labor Act.¹⁷ To facilitate collective bargaining, the Act was amended in 1951 to include a union shop provision,¹⁸ permitting collective bargaining agreements between railway carriers and unions to mandate employee unionization for all area railway employees.¹⁹ *Hanson* and *Street* arose from disputes over this legislation.

In *Hanson*, employees of the Union Pacific Railroad Company brought a suit against a Nebraska labor union, seeking enjoinder of the union's application of a union shop agreement²⁰ enforced via the Railway Labor Act.²¹ The employees claimed that the union shop agreement came into conflict with a provision of the Nebraska Constitution.²² At the time of *Hanson*, the Nebraska Constitution

and unions agreed upon a bill that embodied the collective bargaining system developed prior to World War I. This was . . . the Railway Labor Act of 1926.”).

17. Railway Labor Act, 45 U.S.C. § 152 (1926); Ruiz, *supra* note 16, at 35 (“The Railway Labor Act primarily emphasized collective bargaining for the settlement of labor-management disputes and provided for mandatory mediation only if bargaining failed. The Act invoked arbitration only when both parties agreed.”).

18. Union shop provisions facilitate collective bargaining by eliminating the problem of individuals benefiting from the bargaining process without paying union fees, known as “free ridership.” See W.W.A., Annotation, *Deduction or Collection of Labor Union Dues from Wages of Employees*, 135 A.L.R. 507 (1941) (stating that union shop laws “serve[the] substantial public interest of preventing union[s] . . . from being undermined by tolerating free riders, i.e., those who would enjoy benefits of union negotiating efforts without assuming a corresponding portion of union financial burden”).

19. The 1951 amendment created a schism in the Act's formerly unified devotees. The union shop provision was not popular among smaller unions as it allowed railway workers who move to a new location to maintain their membership of their old union as long as it was “national in scope.” Northrup, *supra* note 16, at 447.

20. The term “union shop agreement” in this Note is used to describe an agreement where “employees of [a] company would be required to become members of the successful union as a condition of retaining their employment” E.H. Schopler, Annotation, *Closed Shops and Closed Unions*, 160 A.L.R. 918 (1946). Union shop agreements differ from agreements with agency shop provisions in that agency fees do not require employees to join a union, but merely require the employee to pay certain union fees. See *supra* note 12 and accompanying text.

21. Ry. Emps. Dep't v. Hanson, 351 U.S. 225, 227–28 (1956).

22. *Id.* at 228. At first blush, there is an apparent supremacy problem: the Railway Labor Act is a federal act, and should supersede Nebraska Law. U.S.

had banned union shop agreements.²³ But the Railway Labor Act, as amended in 1951, contained a union shop clause stating that, notwithstanding any state or federal law to the contrary, “[a]ny [railroad carrier] and a labor organization . . . shall be permitted . . . to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class.”²⁴ In response to First Amendment arguments raised by the plaintiff railroad employees,²⁵ the Court held that the Railway Labor Act presented “no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”²⁶ However, the

CONST. art. VI, cl. 2 (stating that the Constitution is “the supreme law of the land”). Employee-plaintiffs circumvented this issue, *inter alia*, by condemning the Railway Labor Act as unconstitutional of the First Amendment. Brief for Robert L. Hanson, et al., Individual Appellees at 22, *Hanson*, 351 U.S. 225 (No. 451), 1956 WL 88889, at *22–24.

23. *Hanson*, 351 U.S. at 228. Nebraska was a “right-to-work” state at the time of *Hanson*, making union shop agreements inherently violative of Nebraska law. See McKenna & Hymans, *supra* note 12, at 111.

24. 45 U.S.C. § 152 (2012).

25. The majority opinion in *Harris* dismissed *Hanson*’s relevance, claiming that *Hanson* “barely mentioned” the First Amendment. *Harris III*, 134 S. Ct. 2618, 2627 (2014). However, it seems that Court’s decision in *Hanson* revolved primarily around the plaintiffs’ First Amendment claim, as the First Amendment was the topic of the bulk of the opinion. See *Hanson*, 351 U.S. at 236–38.

26. *Hanson*, 351 U.S. at 238. In doing so, the Court overturned the Nebraska Supreme Court, which stated that federal enforcement of union shop agreements violated private individuals’ right to work and freedom to contract under the Fifth Amendment due process clause. *Hanson v. Union P.R. Co.*, 71 N.W.2d 526, 541–42 (Neb. 1955). This seemingly Lochnerian opinion is somewhat anachronistic—while the Nebraska Supreme Court gives a nod to *West Coast Hotel v. Parrish*, one of several cases that heralded the end of laissez-faire *Lochner* jurisprudence, the Court still relied on freedom of contract and right-to-work, mainstays of the *Lochner* Era courts. See *id.* at 690 (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)). For background on *Lochner* Era jurisprudence, see Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 3 (1991) (“[I]n the last quarter of the nineteenth century, judges concerned about protecting big business from the nascent regulatory state departed from the norm of restraint and substituted their values for the principles that the Constitution’s framers enshrined and John Marshall enforced. In this deviant period, known as the *Lochner* era, the Court underconstrued the scope of congressional power and overprotected private property.”).

For background on how *Parrish* heralded an end to the *Lochner* Era, see

Court noted the narrowness of the holding, explaining that *Hanson* does not apply where “fee[] . . . assessments [are] used as a cover for forcing ideological conformity or other action in contravention of the First Amendment.”²⁷

International Ass’n of Machinists v. Street, like *Hanson*, involved the application of a union shop clause under authority of the Railway Labor Act.²⁸ The plaintiff-employees in *Street* also filed suit based on First Amendment freedom of speech and free association claims, seeking enjoinder of the enforcement of the union shop agreement.²⁹ Unlike *Hanson*, however, the plaintiff railway employees in *Street* claimed that their union dues were being “used to finance the campaigns of candidates for federal and state offices whom [they] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed.”³⁰ The Court opted out of answering the constitutional

Ronald A. Parsons & Sheila S. Woodward, *The Heart of the Matter: Substantive Due Process in the South Dakota Courts*, 47 S.D. L. REV. 185, 190 (2002) (“The deciding turn from heightened scrutiny may well have occurred with the United States Supreme Court’s decision in *West Coast Hotel Co. v. Parrish*, in which the Court rediscovered its deferential roots in order to uphold a minimum wage law”); *Id.* at 211 (“The United States Supreme Court’s decision in *West Coast Hotel Co. v. Parrish* is largely credited with tossing some of the final shovels of earth down upon the *Lochner* era of heightened scrutiny in federal substantive due process jurisprudence.”).

27. *Hanson*, 351 U.S. at 238. While the Court echoed *Hanson*’s distinction between ideological and non-ideological union spending in *Abood*, the Court in *Harris* posited that it is better to distinguish instead between private and public sector union spending (disallowing agency shop fees in the latter). Compare *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (“[A] union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.”), with *Harris III*, 134 S. Ct. at 2633 (“*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either ‘chargeable’ . . . expenditures for ‘collective-bargaining’ . . . or nonchargeable . . . expenditures for political or ideological purposes.” (quoting *Abood*, 431 U.S. at 232)).

28. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 742 (1961).

29. See *id.* at 742–45; Brief for Appellees, S.B. Street, Nancy M. Looper, Hazel E. Cobb, J.H. Davis, Mrs. Edna Fritschel, Mrs. Elizabeth Ferguson, and Others Similarly Situated at 63, *Street*, 367 U.S. 740 (No. 4), 1960 WL 98527, at *63.

30. *Street*, 367 U.S. at 744. Plaintiffs claimed that the fees were used “for purposes other than the negotiation, maintenance, and administration of agreements concerning rates of pay, rules and . . . other conditions of employment [such as] . . . to support ideological and political doctrines and candidates which

question posed, positing that “[w]hen the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”³¹ Instead, the Court ruled that the Railway Labor Act did not allow unions to spend dues collected through the union shop clause on political activities, and thus avoided answering the constitutional question of whether the Act was in violation of the First Amendment.³²

B. *Abood v. Board of Education*

Street and *Hanson* provided the precedential backdrop that led to the Court’s landmark decision in *Abood v. Detroit Board of Education*. *Abood*, the central authority referenced in *Harris*, involves a Michigan statute that allows a union to enter into an agency shop agreement with the state.³³ Unlike in *Street* and *Hanson*, the union in question in *Abood* represented a group of public employees—school teachers—as opposed to private railway workers.³⁴ However,

plaintiffs . . . are . . . not willing to support voluntarily.” Int’l Ass’n of Machinists v. Street, 108 S.E.2d 796, 800 (Ga. 1959).

31. *Street*, 367 U.S. at 749 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

32. *Id.* at 770. While the Court in *Abood* maintained the doctrine that unions are precluded from spending agency shop and union shop fees on political activities, some scholars dispute the distinction between political and non-political spending. *See, e.g.*, Cantor, *supra* note 4, at 70–71 (“Forced payments to a service organization by all who benefit from the service do not significantly impinge on associational or speech interests, even if the beneficiary organization uses a portion of the extracted fees to support political or ideological causes opposed by some payors. . . . [S]o long as the organization is legally bound to use the funds to promote the related functions and goals of the organization, then the disgruntled fees payor cannot complain any more than the taxpayer whose funds are used by the government for programs ideologically offensive to the taxpayer.”).

33. *Abood*, 431 U.S. at 211. For the purposes of this Note, “agency fees” and “fair share fees” are used interchangeably. There is in reality a minor difference: while the cost of agency fees is generally calculated as a percentage of the cost of union dues paid by members, “[a] fair share provision defines the pro rata costs of the union’s services rather than union dues. This fee can be more or less than dues.” Elizabeth M. Bosek, Annotation, *Agency Shop; Payment of “Fair-Share” by Non-Members*, 18 IND. L. ENCYC. LAB. REL. § 22 (2015). This difference is insignificant enough that the *Harris* court also uses the terms interchangeably. *See Harris III*, 134 S. Ct. 2618, 2633 (2014) (“The PLRA contains an agency-fee provision [l]abeled a “fair share” provision . . .”).

34. *Abood*, 431 U.S. at 211–12.

unlike the union shop clause in the Railway Labor Act, the agency shop clause in *Abood* does not actually require employees to join the union—it merely requires employees to contribute to the collective bargaining process through the payment of fair share fees.³⁵

Abood arose when Michigan public school teachers filed a class action suit against the union assigned to represent them in collective bargaining.³⁶ The plaintiffs claimed that the union impermissibly infringed upon their First Amendment right to freedom of association³⁷ when it included an agency shop clause in its collective bargaining agreement.³⁸ This agency shop clause required even non-union members to pay collective bargaining fees to the union.³⁹ The *Abood* Court held that the reasoning applied in *Hanson* and *Street* also applied in the case of public employees, stating that “[t]he desirability of labor peace is no less important in the public sector [than in the private sector], nor is the risk of ‘free riders’ any smaller.”⁴⁰ Parroting the reasoning in *Street*, the Court held that union expenditures “on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative” must be “financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of

35. *Id.* at 211. The Court did not actually use the term “fair share fees” in the decision, but noted that non-union members “must pay to the union, as a condition of employment, a service fee equal in amount to union dues.” *Id.*

36. *Id.* at 212. In its examination of collective bargaining rights, this Note relies on *Black’s Law Dictionary’s* definition of collective bargaining: “Negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.” *Collective Bargaining*, BLACK’S LAW DICTIONARY (10th ed. 2014).

37. Plaintiffs’ complaint also charged the union with violating state law prohibiting public-sector agency fees and violating plaintiffs’ state free association rights as incorporated by the Fourteenth Amendment. *Abood*, 431 U.S. at 213. The Court’s discussion of the First Amendment claim subsumes its discussion of the other claims, and thus they are not addressed here in detail.

38. *Id.*

39. *Id.* at 211. The plaintiffs argued that the union participated “in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve” and that “sums required to be paid under [the] Agency Shop Clause are used and will continue to be used for the support of such activities and programs.” *Id.* at 213.

40. *Id.* at 224.

governmental employment.”⁴¹ Nevertheless, the Court determined that agency shop fees are allowable for “collective bargaining activities.”⁴²

C. *The Aftermath of Abood*

While many cases after *Abood* have considered agency shop law, these subsequent cases focus on determining on what unions are allowed to spend agency shop fees, not on determining the legality of the fees overall. But while the law concerning the legality of agency shop provisions did not change significantly between *Abood* and *Harris*,⁴³ it is worth addressing significant agency shop cases following *Abood* to illustrate the complex legal dilemmas precipitated by its holding. Thus, the following is a summary of the case law engendered by *Abood*.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, the Court attempted to delineate some rules regarding allowable and non-allowable expenditures of agency shop fees.⁴⁴ The Court ruled that the test to determine whether an expenditure is allowable is “whether the challenged expenditure[] [is] necessarily or reasonably incurred for the purpose of performing the duties of an

41. *Id.* at 235–36.

42. *Id.* at 236.

43. See Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 861 (1989) (“Because of the procedural posture of the appeal in *Abood*, Justice Stewart declined to define precisely the dividing line between permissible and unconstitutional charges.”); Gerald D. Wixted, *Agency Shops and the First Amendment: A Balancing Test in Need of Unweighted Scales*, 18 RUTGERS L.J. 833, 838 (1987) (“*Abood* thus removed any constitutional barriers to the existence of an agency shop in the public sector Since *Abood*, legislatures and courts have tried several methods in an effort to strike the proper balance between the union and the individual.”).

44. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447 (1984) (noting that the *Abood* Court did not “define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters”). Note that *Ellis* was a Railway Labor Act case, and thus did not directly concern agency shop fees. See *id.* at 435. But because *Ellis* relied so heavily on justification from *Abood* and because the agency shop and union shop agreements are so similar in concept, *Ellis* is often seen as agency shop law. See, e.g., Malin, *supra* note 43, at 868 (“The treatment of litigation expenses in *Ellis* illustrates how the agency shop’s role in reconciling the conflicting first amendment interests of union members and objecting fee payers can justify forcing objectors to subsidize some ideological activities.”).

exclusive representative of the employees in dealing with the employer on labor-management issues.”⁴⁵

But even this seemingly straightforward standard produced disparate, arbitrary results. In *Ellis* for instance, the Court applied the above standard to social activities at union events and ruled that such activities qualified as allowable expenditures, reading the standard of “necessarily or reasonably incurred” expenses broadly.⁴⁶ But just seven years later, the Court ruled in *Lehnert v. Ferris Faculty Ass’n* that union expenditures on public relations were not allowable under the *Ellis* standard, reading the standard far more narrowly.⁴⁷

Problems also arose in determining how unions should consider and resolve claims of non-union members objecting to union spending of agency shop fees. The Court first addressed this issue in *Chicago Teachers Union, Local No. 1 v. Hudson*.⁴⁸ *Hudson* arose from several non-unionized teachers’ claims against their exclusive bargaining representative, the Chicago Teachers Union.⁴⁹ The teachers claimed that the union had adopted an unconstitutional method of responding to non-member objections to union spending of agency fees.⁵⁰ The Court held that “the constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”⁵¹ This standard seems to comport with *Abood’s* requirement that agency fees must prevent “compulsory subsidization of ideological activity by employees who object thereto.”⁵²

45. *Ellis*, 466 U.S. at 448.

46. *Id.* at 449 (“While [social activities] are not central to collective bargaining, they are sufficiently related to it to be charged to all employees.”).

47. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 528 (1991). Note that Justice Marshall, in his dissenting opinion, disagreed with the majority on this point, stating that public relations expenditures should be allowable, providing further evidence that *Ellis’* standard produced varying interpretations. *Id.* at 534 (Marshall, J., dissenting).

48. 475 U.S. 292 (1986).

49. *Id.* at 297.

50. *Id.* at 295.

51. *Id.* at 310.

52. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

The twenty-first century, however, heralded the end of the *Hudson* standard. In *Davenport v. Washington Education Ass'n*, the Court reconsidered the standard.⁵³ While the Court did not explicitly reverse *Hudson*, it indicated that union spending of agency fees is more constitutionally acceptable when non-members are given the opportunity to positively ratify the union's spending choices prior to the spending taking place.⁵⁴ Several years later, in *Knox v. Service Employees International Union*, the Court further called the *Hudson* standard into doubt, ruling that when agency fee dues increase, "the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent."⁵⁵ *Knox* is significant in that it was the first case to require a union to ask non-members to affirmatively "opt-in" to agency fee expenditures instead of merely allowing non-members to "opt-out."⁵⁶

In sum, post-*Abood* agency shop cases have been litigated primarily on two subjects: (1) the constitutionality of particular union expenditures of agency shop fees; and (2) the constitutionality of systems put in place by unions through which dissenting non-members can object to union spending of agency fees. A clear, universally acceptable standard has yet to be found for the adjudication of these issues.⁵⁷

53. 551 U.S. 177 (2007).

54. *See id.* at 184 ("The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive."). The Court also expressed doubts about *Abood* and agency fees in general, stating that it is "undeniably unusual for a government agency to give a [union] the power, in essence, to tax government employees." *Id.*

55. 132 S. Ct. 2277, 2296 (2012). The Court also pointedly expressed its doubts about opt-out spending in general: "Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* at 2290.

56. This ruling was controversial. *See, e.g.,* Deborah Prokopf, *Public Employees at the School of Hard Knox: How the Supreme Court Is Turning Public-Sector Unions into a History Lesson*, 39 WM. MITCHELL L. REV. 1363, 1395 (2013) ("The Supreme Court's decision in *Knox* is a breathtaking display of judicial activism by the far-right wing of the Court, which calls into question the future of public-sector unionism in the United States.") (footnote omitted).

57. Though no universal standard has been set, there is a significant trend toward anti-unionization, demonstrable through the cases discussed in this Part. *Abood*, a 9-0 opinion in favor of public-sector agency shop agreements, seems to

III. THE *HARRIS V. QUINN* DECISIONA. *Factual Background*

Medicaid, a federal health care program,⁵⁸ provides funding to several states for state-run, in-home care programs for the elderly and the ill.⁵⁹ States use part of the federal funding to compensate the personal assistants (PAs) who provide care to the customers.⁶⁰ Illinois, one such state funded by Medicaid, operates an in-home care program called the Illinois Department of Human Services Home Services Program (home care program).⁶¹

In 2003, by executive order, Illinois made Service Employees International Union Healthcare Illinois and Indiana (SEIU) the exclusive union representative⁶² for the home care program's employees.⁶³ The SEIU's collective bargaining agreement with the state included an agency shop provision that required non-member

have been the pinnacle of union support in the U.S. Supreme Court. Since *Abood*, rightward movement in the Court and resulting case law have catalyzed a shift away from the public-sector agency shop, toward right-to-work rulings. *See id.* at 1372 ("While *Abood* is representative of the 'new' model of public-sector labor relations prevalent at its time, *Knox* plainly reflects the anti-union backlash of recent years. An examination of the key public-sector union dues cases leading up to *Knox* shows this disturbing evolution in the Court's jurisprudence.").

58. *See About Us, MEDICAID*, <http://www.medicaid.gov/about-us/about-us.html> (last visited May 25, 2016).

59. *Harris III*, 134 S. Ct. 2618, 2623 (2014); *Home & Community Based Services, MEDICAID*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html> (last visited May 25, 2016).

60. *See Harris III*, 134 S. Ct. at 2624.

61. *See id.* at 2623; *Home Services Program, ILL. DEP'T HUM. SERVS.*, <http://www.dhs.state.il.us/page.aspx?item=29738> (last visited May 25, 2016).

62. The Governor of Illinois at the time was Rod Blagojevich, who notably had several dealings with the SEIU. *See, e.g.*, Steven Greenhouse, *Union Is Caught Up in Illinois Bribe Case*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/us/politics/12union.html>; Kris Maher & David Kesmodel, *Illinois Scandal Spotlights SEIU's Use of Political Tactics*, WALL ST. J. (Dec. 20, 2008), <http://www.wsj.com/articles/SB122973200003022963>. For some, this connection between Blagojevich and the SEIU called into question the propriety of the appointment of the SEIU as the exclusive union representative. *See Sean Higgins, New Questions Raised About Decision to Let SEIU Represent Illinois Home Health Care Workers*, ILL. POL'Y (Jan. 27, 2014), <https://www.illinoispolicy.org/news/new-questions-raised-about-decision-to-let-seiu-represent-illinois-home-health-care-workers>.

63. *Harris III*, 134 S. Ct. at 2626.

PAs to pay a fair share fee to contribute to collective bargaining costs.⁶⁴

The Illinois Public Labor Relations Act (PLRA), which authorizes collective bargaining and the collection of fair share fees, applies only to state employees.⁶⁵ Thus, to cover the PAs, the PLRA was amended to specify that the PAs are employees of the state “[s]olely for the purposes of coverage under the Illinois [PLRA].”⁶⁶ Accordingly, under Illinois law, PAs who care for customers through the home care program are employees both of the state and of the customer.⁶⁷ The state compensates the PAs, but the customers are responsible for most other employment-related duties, including the hiring, firing, training, and discipline of the PAs.⁶⁸

In 2010, three home care program PAs, Theresa Riffey, Susan Watts, and Stephanie Yencer-Price (Petitioners), filed a class action on behalf of home care program PAs of the Northern District of Illinois against the Governor of Illinois and the SEIU.⁶⁹ Petitioners contended that the fair share provision unconstitutionally abridged their First Amendment rights⁷⁰ to freedom of association and freedom of speech⁷¹ and sought an injunction against the

64. 5 ILL. COMP. STAT. ANN. 315/6 (West, Westlaw through 2016 Reg. Sess.) (“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.”); *Harris*, 134 S. Ct. at 2625. Note that, in accordance with *Abood*, the provision does not require non-unionized employees to contribute financially to all union activities. *See supra* note 27 and accompanying text.

65. *Harris III*, 134 S. Ct. at 2625.

66. *Id.* at 2649 (citation omitted).

67. *Id.* at 2646.

68. *Id.* at 2624. *But see infra* Section IV.A (discussing evidence of some state control of employment-related duties).

69. *Harris III*, 134 S. Ct. at 2626.

70. U.S. CONST. amend. I.

71. *Harris v. Quinn (Harris I)*, No. 10-cv-02477, 2010 WL 4736500, at *8 (N.D. Ill. Nov. 12, 2010). The First Amendment claims in *Hanson*, *Street*, *Abood*, and *Harris* are similar. Concerning free association, the plaintiffs in these cases contended that forced unionization or forced support of a union “deprives . . . employees of their freedom of association.” *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 230 (1956). In *Abood* and prior agency shop cases, the validity of free speech claims was a more contentious issue. In his concurrence in *Abood*, Justice Powell departed from the majority in his comment that prior cases did not support the conclusion that “withholding of financial support from a union’s political activities

enforcement of the agency shop provision.⁷² The District Court for the Northern District of Illinois, Eastern Division dismissed all counts of the complaint with prejudice,⁷³ and the Seventh Circuit Court of Appeals affirmed in relevant part.⁷⁴ The Seventh Circuit held that precedent set by *Abood* and similar cases allowed state employees to be compelled to financially support collective bargaining representation without running afoul of the First Amendment.⁷⁵ The court further noted that the State of Illinois was properly designated as the PAs' employer, as it holds "extensive control over the terms and conditions of employment."⁷⁶ The U.S. Supreme Court granted certiorari.⁷⁷

B. Majority Opinion

The Court reversed the Seventh Circuit,⁷⁸ addressing several issues brought by Respondents SEIU and Illinois Governor Pat Quinn on appeal. Primarily, the Court stated: (1) *Abood* should not be extended to the instant case; and (2) the employment question in the instant case does not pass the balancing test set out in *Pickering v. Board of Education*.

is a type of 'speech' protected against governmental abridgment by the First Amendment." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977) (Powell, J., concurring). However, in *Harris* and later cases, it is uncontested that withholding financial support from a union is speech, and the issue is not discussed in the holding. *Accord Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2288 (2012) ("Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups.").

72. *Harris III*, 134 S. Ct. at 2626.

73. *Harris I*, 2010 WL 4736500, at *32.

74. *Harris v. Quinn (Harris II)*, 656 F.3d 692, 701 (7th Cir. 2011). The district and intermediate courts also ruled on a ripeness issue. When the case arose, in addition to the plaintiffs in the instant case, a second group of plaintiffs, also PAs, but from a different division of the home services program (the Division of Developmental Disabilities), were a party to the suit. *Harris I*, 2010 WL 4736500, at *1. The district court dismissed their claim with prejudice as unripe, and the court of appeals reversed in part, ruling that the dismissal should have been without prejudice because it did not appear "beyond a doubt that there is no way the plaintiffs' grievance could ever mature into justiciable claims." *Harris II*, 656 F.3d at 701. However, because the disability program PAs are not a party to the instant case, this detail is of little significance.

75. *Harris II*, 656 F.3d at 697.

76. *Id.* at 699.

77. *Harris III*, 134 S. Ct. at 2627.

78. *Id.* at 2644.

1. *Distinguishing Abood*

First, the Court distinguished *Abood* from the instant case, observing that the employees in *Abood* were “full-fledged public employees,”⁷⁹ while employees in the instant case were state employees solely for the purpose of collective bargaining.⁸⁰ To this point, the Court argued that *Abood* does not apply to cases involving employees employed by more than one employer.⁸¹ The Court also noted that extending *Abood’s* holding to cover the instant case would be inefficient; because the state has so little control over the PAs, their potential for achieving results through collective bargaining with the state is greatly diminished.⁸²

Because *Abood* was distinguishable, the Court determined that an independent examination of the law’s consistency with the First Amendment was appropriate.⁸³ The Court applied the strict scrutiny standard and held that the fair share provision in the instant case “does not serve a ‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms,’” and thus, that the provision does not comport with the First Amendment.⁸⁴

2. *The Pickering Balancing Test*

Pickering v. Board of Education established that for matters of public concern, speech of public employees is protected under the First Amendment where the interests of the public employee “in commenting upon matters of public concern” outweigh the interest of the state “in promoting the efficiency of the public services it performs through its employees.”⁸⁵ If the *Pickering* test

79. *Id.* at 2634.

80. *Id.*

81. *Id.* at 2634–35.

82. *Id.* at 2636.

83. *Id.* at 2639.

84. *Id.* (quoting *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2289 (2012)). The *Harris* Court merely demonstrated that “the speech compelled in this case is not commercial speech.” *Harris III*, 134 S. Ct. at 2639. Despite its proclamation that “no fine parsing of levels of First Amendment scrutiny is needed” to decipher the proper standard to apply, it is unclear how the Court arrived at strict scrutiny. *Id.*

85. 391 U.S. 563, 568 (1968), *abrogated in part by* *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Pickering* arose when a public school teacher was fired after he published a letter chastising the local school board for their alleged misallocation

applied here, and if the interest of the state in promoting efficient labor outweighed the interest of the PAs in refraining from association with the union, the PAs' speech would not be protected under the First Amendment. However, the *Harris* Court reasoned that *Pickering* did not excuse the state's use of fair share fees in the instant situation because: (1) *Pickering* only applied to cases where the state takes a "traditional employer role"; and (2) the interest of the employees here outweighed the interest of the state in promoting efficiency.⁸⁶

C. *Dissenting Opinion*

The four member dissent, authored by Justice Kagan, stood with the Seventh Circuit and mirrored its reasoning in several ways. Primarily, the dissent argued that: (1) the majority had no reason to distinguish *Abood* and that *Abood* should control; and (2) even in the absence of *Abood*, the petitioners' claim does not pass the *Pickering* balancing test.

1. *Abood as Controlling Precedent*

Justice Kagan argued primarily that the Seventh Circuit was sound in its conclusion that *Abood* controls in the instant case.⁸⁷ First, the dissent argued, the state, as an employer, held enough control over the PAs that the collective bargaining and fair share fees allowed in *Abood* could logically be extended to the present case.⁸⁸ Second, the dissent rebutted the majority's conclusion that *Abood* cannot be applied in instances where employees have more

of funds. *Id.* at 564. The teacher filed suit, claiming that the First Amendment protected his publication of the letter. *Id.* at 565. The Court established the aforementioned balancing test when it upheld the teacher's claim, finding that the teacher's interest in writing a letter on a matter of public concern outweighed the school's interest in promoting efficiency. *Id.* at 574-75.

86. *Harris III*, 134 S. Ct. at 2642-43. The majority was adamant that *Pickering* does not apply in *Harris*. However, when it states that even if *Pickering* applied, the employees' speech would be protected, the Court fails to address *Garcetti*. *Garcetti* states that First Amendment free speech does not protect employee speech "made pursuant to [the employee's] official responsibilities." *Garcetti*, 547 U.S. at 411. Thus, it is possible that an employee's refusal to support his or her collective bargaining union's activities is "speech" related to the employee's official responsibilities, in which case such speech would be unprotected under *Garcetti*.

87. *Harris III*, 134 S. Ct. at 2644-45 (Kagan, J., dissenting).

88. *Id.* at 2645.

than one employer, contending that there is no precedent indicating “that joint public employees are not real ones.”⁸⁹ While the dissent conceded that the question of whether the state is an actor’s employer is not answered merely by examining the label the state chooses to use for that actor,⁹⁰ the dissent claimed that the state had “sufficient stake in, and control over, the petitioners’ terms and conditions of employment to implicate *Abood*’s rationales and trigger its application.”⁹¹

2. *Pickering as Controlling Precedent*

The dissent next posited that applying *Abood* to the instant case created results that comport with the law set out in *Pickering*. Justice Kagan began her analysis by pointing out that *Abood* gets at largely the same issue as *Pickering*, and that “its core analysis mirrors *Pickering*’s.”⁹² Both *Abood* and *Pickering* address “the extent of the government’s power to adopt employment conditions affecting expression.”⁹³

The dissent then asserted that the line drawn in *Abood* between acceptable and unacceptable infringements on free speech and free association came from *Pickering*. Justice Kagan noted that “[o]n the one side, *Abood* decided, speech within the employment relationship about pay and working conditions pertain[ed] mostly to private concerns and implicate[d] the government’s interests as employer; thus, the government could compel fair-share fees for collective bargaining.”⁹⁴ This followed *Pickering*’s rationale that speech of little public concern can be restricted.⁹⁵ The dissent contrasted this with state employee speech in political campaigns, which “relates to matters of public concern and has no bearing on the government’s interest in structuring its workforce,” observing that “compelled fees for those activities are forbidden.”⁹⁶

89. *Id.* at 2648.

90. *Id.* at 2649; *see also* Bd. of Cty. Comm’rs v. Umbehr, 518 U.S. 668, 679 (1996) (stating that employment status with the state is not “dependent on whether state law labels a government service provider’s contract as a contract of employment”).

91. *Harris III*, 134 S. Ct. at 2649 (Kagan, J., dissenting).

92. *Id.* at 2654.

93. *Id.*

94. *Id.*

95. *See* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

96. *Harris III*, 134 S. Ct. at 2654 (Kagan, J., dissenting).

3. *Necessity of Abood in Current Law*

The dissent, like the majority, expressed its sentiments on *Abood* in extensive dicta.⁹⁷ Justice Kagan came out staunchly in favor of *Abood*, chiding Justice Alito’s “gratuitous dicta critiquing *Abood*’s foundations” and commenting that the majority’s unwillingness to overturn *Abood* is the “one aspect of [the] opinion [that] is cause for satisfaction.”⁹⁸ The dissent commented that *Abood* “is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation,” and that it is a “foundation stone of the rule of law.”⁹⁹ While its comments on *Abood* did not directly inform its holding, the dissent may have used its approval of the case to justify applying it in *Harris*.¹⁰⁰

IV. A DEEPER LOOK INTO *HARRIS V. QUINN*: HOW *HARRIS* HIGHLIGHTS THE FLAWS OF *ABOOD*

This Note will now argue that *Abood* should have been controlling in *Harris*, and that the Court distinguished *Abood* as a pretense to achieve their desired legal outcome. Next, it will show that without *Abood*, the *Harris* majority’s ruling would have been proper under *Pickering*. Finally, it will argue that instead of merely critiquing *Abood* in dicta, the *Harris* Court should have overturned *Abood* as unconstitutional.

A. *Abood is Controlling*

As Justice Kagan flatly stated at the beginning of her dissent, “*Abood* . . . answers the question presented in this case.”¹⁰¹ The majority attempts to distinguish *Harris* from *Abood* in a variety of ways, but ultimately, *Abood* addressed the same issue as *Harris*:

97. For the Court’s criticism of *Abood*, see *id.* at 2632–34. For the dissent’s opinion on *Abood*, see *id.* at 2645–46.

98. *Harris*, 134 S. Ct. at 2645.

99. *Id.* at 2645, 2651 (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)).

100. In a similar manner, the majority used its disapproval of *Abood* to justify distinguishing it: “Because of *Abood*’s questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situation now before us.” *Id.* at 2638 (majority opinion).

101. *Id.* at 2644–45 (Kagan, J., dissenting) (citation omitted).

whether an agency shop fee could be enforced for non-union public employees.¹⁰² Nonetheless, it is worth addressing some of the majority's major reasons for distinguishing *Abood*.

First, the majority contends that *Abood* is distinguishable because the PAs in *Harris* are only nominally "state-employees."¹⁰³ The majority reasoned that since "the customer has virtually complete control over" the PAs, the bargaining power of the PAs with respect to the state would be diminished.¹⁰⁴ The Court stated that "[i]f we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line."¹⁰⁵ But this conclusion fails both textually and substantively.

In terms of the text of the case, *Abood* was never constrained to "full-fledged" public employees in the first place.¹⁰⁶ It merely held that "a recognized [public] union may seek to have an agency-shop clause included in a collective-bargaining agreement."¹⁰⁷

The conclusion that the PAs are not full-fledged public employees is also substantively inaccurate. While it is true that the Illinois statute defines the PAs as state employees "[s]olely for the purposes of coverage under the [PLRA],"¹⁰⁸ employment status with the state is not defined by "state law labels."¹⁰⁹ The Illinois statute and the majority opinion in *Harris* dramatically understated the role of the state in the PAs' employment;¹¹⁰ Illinois controls the PAs in several meaningful ways. The state "sets all the workforce-wide terms of employment."¹¹¹ It pays wages, benefits, and health insurance; establishes qualifications; sets baseline requirements for

102. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977).

103. See *Harris III*, 134 S. Ct. at 2634–35 ("Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees.").

104. *Id.* at 2637.

105. *Id.* at 2638.

106. In fact, as pointed out earlier, the major point of contention in *Abood* was that the employees required to pay the agency shop fees were public employees, and were thus employed by an intrinsically political organization. *Abood*, 431 U.S. at 227; see *supra* Section II.B.

107. *Abood*, 431 U.S. at 224.

108. 20 ILL. COMP. STAT. ANN. 2405/3 (West, Westlaw through 2016 Reg. Sess.).

109. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

110. See *Harris III*, 134 S. Ct. at 2634 ("[P]ersonal assistants are almost entirely answerable to the customers and not to the State.").

111. *Id.* at 2646 (Kagan, J., dissenting).

service; and structures the relationship between the customer and the PA.¹¹² When the customer and the PA draft a service plan, along with the customer and the PA, a state-employed counselor attends the drafting process.¹¹³ The amalgamation of these factors provides for more than enough state control to make unionization and collective bargaining worth the employees' time.¹¹⁴

The majority also argued that there is a difference between unwillingly funding private speech and unwillingly funding public speech, which is more often political in nature.¹¹⁵ While this may be a strong policy argument, *Abood* expressly addressed and dismissed this point when it stated that “[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.”¹¹⁶ Without explicitly overturning *Abood*, this policy argument holds no precedential weight.¹¹⁷

In sum: (1) the PAs in *Harris* are clearly state employees both substantively and under the text of Illinois law; and (2) the policy arguments the majority made to the contrary lack even a scintilla of precedential support. The reality of the situation, un commented upon by the *Harris* majority, but painfully clear, was that Justice Alito and the Court's four other most conservative justices did not want to rule in favor of collective bargaining, and distinguished *Abood* as a legal veneer for their result-oriented conclusion.¹¹⁸

112. *Id.* at 2646–47.

113. *Id.* at 2647.

114. It seems that a disjointed workforce, such as the one in the instant case, where PAs are working in private homes and do not communicate regularly, would benefit more from collective bargaining, not less, as the majority claims. *See id.* at 2635 (majority opinion); 51 C.J.S. *Labor Relations* § 312, Westlaw (database updated Dec. 2015) (“The ultimate purpose of a collective-bargaining agreement is a *common understanding* on the terms and conditions of labor.” (emphasis added)).

115. *Harris III*, 134 S. Ct. at 2632.

116. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

117. *Stare decisis* dictates that the Court's prior rulings—and not its policy arguments provided in dicta—on a given question of law form legal precedent. E.H. Schopler, Annotation, *Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2d 1126 (1961); *see also* *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“While *stare decisis* is not an inexorable command, particularly when . . . interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.”) (internal citations and quotations omitted).

118. The advancement of unionization and collective bargaining is generally

B. *The Majority's Ruling Is Sound in the Absence of Abood*

Without *Abood* as controlling precedent, the majority's ruling is correct. Absent a case like *Abood* that specifically rules on the constitutionality of the infringement of public employees' First Amendment rights, determinations of the First Amendment rights of public employees are made using the *Pickering* balancing test.¹¹⁹ For matters of public concern, an employee's "interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services."¹²⁰

The *Pickering* analysis begins with a determination of whether the speech in question pertains to a matter of public concern.¹²¹ A public employee "must accept certain limitations on his or her freedom,"¹²² and, as the Court has stated, "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the

seen as a liberal agenda in American politics. See, e.g., Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 BERKELEY J. EMP. & LAB. L. 450, 455 (1981) ("[T]he development of collective bargaining law is paradigmatic of all public policy in liberal capitalism."); *The Battle to Bring Entitlements Under Control*, 28 NO. 11 EMP. ALERT 3 (2011) ("A prominent manifestation of the . . . switch from liberal Democrats to conservative Republicans . . . is the move . . . to end collective bargaining by public employees."). More specifically, Justice Alito, author of the *Harris* majority, has stated that the "aggressive use of power by the SEIU to collect fees from nonmembers is indefensible." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2288, 2291 (2012).

119. Note that *Pickering* does not specifically address free association, but in the instant case it is enough to merely address the issue of free speech, as the association in question—association with a labor union—is only contested as it relates to compelled speech. Free speech and free association rights "are interrelated, because First Amendment rights of freedom of association derive from constitutional rights of freedom of speech," and thus, "there is no First Amendment right to associate in order to engage in forms of speech that are not protected by the First Amendment." Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 566 (2006).

120. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). There always exists the possibility that *Pickering* could be found not to protect speech under *Garcetti*. See *supra* note 86 and accompanying text. But as neither the Court nor the union mentioned *Garcetti* in the above context, it is not useful for this Note to consider the matter thoroughly.

121. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

122. *Id.*

most unusual circumstances, a federal court is not the appropriate forum.”¹²³ Public concern is determined by considering the “content, form, and context of a given statement.”¹²⁴

The speech of unions in the collective bargaining process is a matter of public concern.¹²⁵ The mere fact that a government employee is speaking on an issue that may implicate public spending does not mean the speech itself is a matter of public concern.¹²⁶ The public spending, in this case, is spending on Medicaid. In a 2014 study, only 1% of Americans had “no opinion” on whether they were satisfied with Medicaid.¹²⁷ As of 2009, expenditures for Medicaid constituted 2.7% of the United States’ gross domestic product, and Medicaid enrollment consisted of “about one of every five persons in the [United States].”¹²⁸ Clearly, Medicaid spending is an issue that affects numerous Americans in significant ways and is a matter of great public concern.¹²⁹ Thus,

123. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

124. *Id.* at 147–48.

125. The dissent in *Harris* takes the opposite stance: that collective bargaining is not a matter of public concern. *Harris III*, 134 S. Ct. 2618, 2642 (2014). However, the majority notes: “This argument flies in the face of reality . . . [as] the category of union speech that is germane to collective bargaining unquestionably includes speech in favor of increased wages and benefits for personal assistants.” *Id.*

126. *Id.* at 2655 (Kagan, J., dissenting) (“[T]he Court has never come close to holding that any matter of public employment affecting public spending . . . becomes for that reason alone an issue of public concern.”).

127. Frank Newport, *Most Americans Remain Satisfied with Healthcare System*, GALLUP (June 16, 2014), http://www.gallup.com/poll/171680/americans-remain-satisfied-healthcare-system.aspx?g_source=Medicaid&g_medium=search&g_campaign=tiles.

128. CHRISTOPHER J. TRUFFER ET AL., 2010 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID i–iii (2010), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/downloads/MedicaidReport2010.pdf>.

129. The concept that congressional spending is a matter of public concern is so fundamentally ingrained in U.S. democracy that it is difficult to provide authority for the statement other than polling data. Chief Justice Roberts attempted a trim definition of “public concern” in *Snyder v. Phelps*, writing that “speech is of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of general interest and of value and concern to the public.’” *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)). Chief Justice Roberts noted in his definition that “[a] statement’s arguably ‘inappropriate or controversial character . . . is irrelevant to the question whether it deals with a matter of public

having established public concern, it is appropriate to proceed with the *Pickering* balancing test.

The next step is determining how the public employees' interest, as citizens, in making public comment balances against the state's interest in promoting the efficiency of its employees' public services.¹³⁰ While the state normally has a strong interest in enforcing the agency fee provisions—as exclusive union representation promotes labor stability—the instant case is slightly different.¹³¹ Labor stability is not a major concern because, as the *Harris* Court mentioned, “the [PAs] do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their own.”¹³² The PAs' interest in speaking on a matter of public concern is great when measured against the government's meager interest in promoting labor stability amongst PAs who never see each other. If the PAs were private employees, the only compelled speech of public concern would be the support of collective bargaining. However, since the PAs are compensated through federal Medicaid funding, by forcing PAs to contribute to collective bargaining for increased wages, for instance, the state compels the PAs to support the expansion of Medicaid.¹³³

concern.” *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 378 (1987)).

130. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

131. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–21 (1977) (citing *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 67–70 (1975); S. REP. NO. 573, at 13 (1935)) (asserting that use of a single representative “avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment,” which “prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization” and “frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations”) (citation omitted).

132. *Harris III*, 134 S. Ct. 2618, 2640 (2014) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983)).

133. *See id.* at 2642 (“Increased wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program.”).

C. *The Harris Court Should Have Overturned Abood*

Despite the majority's extensive critique of *Abood*, the Court failed to overturn *Abood* in *Harris*.¹³⁴ This was a mistake, as: (1) *Abood* unconstitutionally infringes on public employees' right to First Amendment free speech; and (2) the enforcement of *Abood* creates myriad administrative difficulties.

1. *Abood Is Unconstitutional*

The key difference between *Abood* and *Pickering*, and the reason that *Pickering* is justified under the First Amendment while *Abood* is not, is *Pickering's* use of a balancing test.¹³⁵ While *Abood* did not utilize a balancing test, opting for a universal declaration that "the government's own interests 'constitutionally justified' the interference" with state employees' free speech,¹³⁶ *Pickering* required that the government's interest in efficient labor actually outweigh the employees' interest in free speech.¹³⁷ Thus, when situations like that in *Harris* arise where a balancing test determines that constraints on free speech violate the First Amendment, *Abood*, as precedent, unconstitutionally waives the balancing test.

Beyond *Harris*, there are numerous other situations where *Abood* unconstitutionally infringes on free speech. Part of the reason why *Abood* runs into so many constitutional problems is that it deals with public employees. Public employees are employed by the government and any collective bargaining deals intrinsically with political speech. Both *Abood* and the dissent contend that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional

134. The Court certainly considered overturning *Abood*. According to the dissent, "The petitioners devoted the lion's share of their briefing and argument to urging us to overturn that nearly [forty]-year-old precedent. . . . Today's majority cannot resist taking potshots at *Abood* . . . but it ignores the petitioners' invitation to depart from principles of *stare decisis*." *Id.* at 2645 (Kagan, J., dissenting).

135. See *supra* Section III.B.2.

136. *Harris III*, 134 S. Ct. at 2646 (Kagan, J., dissenting) (quoting *Abood*, 431 U.S. at 222).

137. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (balancing public employees' interest, as citizens, in making public comment against the State's interest in promoting the efficiency of its employees' public services); see also *supra* Section III.B.2.

inquiry.”¹³⁸ This assertion is, frankly, astonishing. The U.S. Supreme Court has held numerous times that this is not true. In the seminal case *Boos v. Barry*, the Court invalidated legislation proscribing political speech, holding that the United States has a “‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’”¹³⁹

2. *Abood Creates Administrative Concerns*

In addition to its constitutional issues, *Abood* establishes precedent that is rife with administrative difficulties. These difficulties come primarily from the unclear standard that *Abood* sets out.

The majority covered many of the public policy issues in its opinion; primarily, the policy goal, as stated earlier,¹⁴⁰ is to ensure that agency fees do not create “compulsory subsidization of ideological activity.”¹⁴¹ But this is, administratively, a difficult standard to enforce.

Abood allows agency fees to go toward “union expenditures that are made for collective-bargaining purposes,” but not toward expenditures “made to achieve political ends.”¹⁴² In cases of private employees, it would be easy to distinguish these two goals because funding for collective bargaining would go to the employer, while political funds would go to the state. But in cases of public employees, the state is the employer, and making the distinction is much more difficult.¹⁴³

138. *Abood*, 431 U.S. at 232; *Harris III*, 134 S. Ct. at 2644–45 (Kagan, J., dissenting) (“*Abood* . . . answers the question presented in this case.”).

139. *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) (suggesting that among the forms of speech to which “the constitutional guarantee [of free speech] has its fullest and most urgent application” are “the discussion of political policy generally [and] advocacy of the passage or defeat of legislation”), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley*, 424 U.S. at 16 (summarizing a party’s argument that constraints on political speech “constitute restraints on First Amendment liberty that are both gross and direct”).

140. See *supra* note 52 and accompanying text.

141. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

142. *Harris III*, 134 S. Ct. at 2632.

143. See *id.* at 2632–33 (“In the private sector, the line is easier to see.

As the majority points out, many courts have struggled with this issue.¹⁴⁴ The Court in *Ellis* took an expansive view of the *Abood* standard by stating that agency fees could go toward “the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.”¹⁴⁵ But in *Lehnert v. Ferris Faculty Ass’n*, just seven years later, the Court narrowed the holding again, stating that fees could not go to “lobbying activities [that] relate not to the ratification or implementation of a dissenter’s collective-bargaining agreement, but to financial support of the employee’s profession or of public employees generally.”¹⁴⁶ Not only do these cases demonstrate disparate interpretations of *Abood*, they also fail to clarify its holding. What expenses can be “reasonably employed to implement or effectuate the duties” of a union? The Court’s inability to clarify the *Abood* standard speaks further to the imprecision of this standard in the first place.

Thus, as demonstrated, the Court had two reasons to overturn *Abood*. First, *Abood* unconstitutionally infringes on First Amendment rights. Second, *Abood* is immensely difficult to administratively enforce.

D. Abood Can Be Overturned Because It Is Not “Super Precedent” and Its Absence Will Not Harm Present Law

In response to the majority opinion’s criticism of *Abood*, the dissent argued that the majority’s reluctant decision to let *Abood* stand was correct, and that *Abood* cannot be overturned because of extensive union reliance on its holding.¹⁴⁷ While it is true that many states and unions have relied on *Abood* in collective bargaining agreements,¹⁴⁸ this argument is not persuasive.

Collective bargaining concerns the union’s dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.”).

144. See *supra* Section III.B.

145. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984).

146. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520 (1991); see *supra* Section II.C.

147. See *supra* Section III.C.3.

148. *Harris III*, 134 S. Ct. at 2645 (“The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between

This idea of incontrovertible precedent is aptly termed “super precedent” in the academic community.¹⁴⁹ Super precedent consists of “those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time.”¹⁵⁰ They are decisions that “are deeply embedded into our law and lives through the subsequent activities of the other branches.”¹⁵¹

The dissent’s argument is unpersuasive, partially because the debate over whether super precedent is a valid legal concept is far from over; many legal scholars disapprove of a heightened level of precedential value.¹⁵² The debate over the value of super precedent is a complex topic, and the intricacies of the argument cannot be contained within the scope of this Note. Thus, this Note will address the primary flaw in the dissent’s reasoning: *Abood* is not entrenched deeply enough into the legal system to be construed as super precedent.

“A case that can credibly be characterized as a super precedent is distinctive in part because it is so deeply engrained in constitutional law that it cannot be reconsidered—much less overturned—without considerable excavation.”¹⁵³ An obvious example is *Marbury v. Madison*, perhaps the first case to which every new constitutional law student is exposed.¹⁵⁴ *Abood* is plainly not such a case that can be characterized as “super precedent.” The dissent stated that *Abood* is the source of authority for “thousands of contracts between unions and governments across the Nation.”¹⁵⁵

unions and governments across the Nation.”).

149. See, e.g., Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006).

150. *Id.* at 1205.

151. *Id.*

152. For some common arguments, see Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006).

153. Gerhardt, *supra* note 149, at 1222.

154. 5 U.S. 137 (1803). *Marbury* established judicial review, hinted at the political question doctrine, and is bound to the very fabric of American jurisprudence as we know it. *Id.* at 154. Like *Abood*, *Marbury* has not been without its fair share of controversy. See Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 329 (“*Marbury v. Madison* has come to draw argument as a cornflower draws bees.” (internal quotation omitted)). Unlike *Abood*, however, *Marbury* is part and parcel of American common law.

155. *Harris III*, 134 S. Ct. 2618, 2645 (2014).

The dissent did not provide support for this figure, but even if it is accurate, the statistic does not provide the rootedness that is necessary to establish super precedent.¹⁵⁶ The vast majority of contracts the dissent cited would be valid even without *Abood* under *Pickering*.¹⁵⁷

The jurisprudential discord *Abood* left behind is also evidence that *Abood* does not have the unifying precedential effect necessary to proclaim it super precedent.¹⁵⁸ In *Abood*'s wake lies a string of divergent decisions, both over when union spending of agency fees is allowed and over methods of contesting the spending of such fees.¹⁵⁹ The standard for qualification as super precedent is lofty, requiring a fairly unified stream of case law relying on the original case.¹⁶⁰ Surely a case producing such discrepant results as *Abood* does not qualify.¹⁶¹ Overturning *Abood* would undoubtedly cause some turbulence, likely inducing non-union employees to sue their unions on the premise that their agency fee contracts were unconstitutional.¹⁶² But mere fear of political or legal turbulence does not justify super precedent treatment: super precedent, as shown, is reserved for those pinnacles of institutional reliance that *Abood* does not yet reach.¹⁶³

156. Gerhardt, in his discussion of super precedent, regales readers with an explanation of why even a monumentally significant case like *Miranda v. Arizona* does not rise to the level of super precedent. Gerhardt, *supra* note 149, at 1218. (“The difficulty with characterizing *Miranda* as a super precedent is that the Supreme Court has recognized a number of exceptions weakening (some say, eviscerating) *Miranda*. While the decision endures symbolically in the public consciousness, it does not endure with the same robustness it first had.”).

157. *Harris* is an unusual case in that the group of workers attempting to unionize is made up almost exclusively of PAs that work from home, causing a situation where the government has a diminished interest in labor peace, swinging the *Pickering* balancing test more in favor of individuals. See generally *Harris III*, 134 S. Ct. 2618. Because of this, supporting agency shop fees in *Harris* via the *Pickering* analysis is more difficult than it would be in cases concerning unified workforces where the government has a stronger interest in labor peace. See *supra* Section III.B.2.

158. See *supra* Section II.C.

159. See *supra* Section II.C.

160. Gerhardt, *supra* note 149, at 1205–06.

161. See *supra* note 156 and accompanying text.

162. See *supra* Section III.B.

163. Gerhardt, *supra* note 149, at 1205.

V. CONCLUSION

In sum, this Note draws three primary conclusions. First, the majority erred in distinguishing *Abood* from *Harris*. *Abood* plainly covers within its scope the situation in *Harris*, and *Harris* is not distinguishable. Second, this Note concludes that in the absence of *Abood*, under the *Pickering* balancing test, the majority's argument is solid, and the Illinois law is unconstitutional under the First Amendment. Finally, this Note concludes that the majority erred in failing to overturn *Abood*. *Abood*, in its failure to use a balancing test, unconstitutionally infringes upon public employees' First Amendment rights.

The negative outcomes of this decision are twofold. First, the manner in which the *Harris* decision was made is in and of itself a negative outcome. The outcome of *Harris* was determined by the political leanings of Justices, backed not by the letter of the law, but by a loose, policy-based analysis of cases.¹⁶⁴ *Abood* clarified that the role of determining the merits of collective bargaining belonged to Congress, and not to the judiciary. While the *Abood* Court recognized that “[m]uch might be said pro and con’ about the union shop as a policy matter,” it reaffirmed in its opinion that “it is Congress that is charged with identifying ‘[t]he ingredients of industrial peace and stabilized labor management relations.’”¹⁶⁵ *Abood* should have been controlling, but a result-oriented court distinguished it in a *sui generis* manner.¹⁶⁶

The second, more significant consequence is that by criticizing *Abood* in dicta but not overturning it, the Court is giving further unwarranted credence to *Abood* as super precedent and making it

164. See *Harris III*, 134 S. Ct. 2618, 2644 (2014). The fact that political interests were involved is made apparent in the 5-4 split. The five-member majority comprised the conservative core of the Court: Justices Alito, Roberts, Scalia, Thomas, and Kennedy. Justice Kagan's dissent was joined by her left-leaning judicial compatriots, Justices Ginsburg, Sotomayor, and Breyer.

165. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 (1977) (quoting *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 233-34 (1956)).

166. The majority's motivation for distinguishing *Abood* is clear, given the torrential deluge of criticism Justice Alito leveled at *Abood* in both *Harris* and *Knox*. See *supra* Section III.C.3; see also *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2290-91 (2012) (complaining that “*Abood* . . . assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter”).

yet more difficult to overturn.¹⁶⁷ *Abod* was an unconstitutional judicial decision, and the Court—as a result of timidity and unwillingness to overturn what they perceived to be a deeply rooted judicial decision—allowed the bad precedent set by *Abod* to stand.

If super precedent is a false concept, then *Abod* should be overturned on its merits; as demonstrated, *Abod* is an unconstitutional decision that serves no present purpose other than to spawn ever more incomprehensible legal standards.¹⁶⁸ And if super precedent indeed exists, if *stare decisis* is truly “an inexorable command in constitutional adjudication,” the Court should heed its own words. It is high time to reverse *Abod*, lest it be borne inexorably into the annals of common law.¹⁶⁹

167. See *supra* Section IV.D.

168. See *supra* Section II.C.

169. Gerhardt, *supra* note 149, at 1204.