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Harris v. Quinn and Freedom of Association: Why Congress Needs to Step in to Expand the Ruling

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HARRIS V. QUINN AND FREEDOM OF ASSOCIATION: WHY CONGRESS NEEDS TO STEP IN TO EXPAND THE RULING

I. INTRODUCTION

Tim works for a public organization.¹ One day in July, Tim and his coworkers held a meeting to discuss a proposed change—the establishment of union representation. Many of the employees looked around in confusion and wondered about the pros and cons of union representation. After further discussion, a vote was held with the majority of people voting for union representation. Tim was upset because he voted against union representation and, as a result of the vote, would have to pay an unwanted union fee.

Weeks later, Tim received a letter informing him that all employees will be represented by a union within his industry for contract administration, grievance adjustment, and collective bargaining issues. In addition, the letter stated that while dues will be enforced, the amount would be disclosed at a later time. Several months later, Tim received a letter in the mail detailing the allocation of costs for joining the union. He believes that payment of compelled membership dues for the union violates his First Amendment right of freedom of association for being forced to support an organization in opposition of his own views.

Currently, if Tim wants to opt out of paying the fee, the public union has the right to terminate his employment. As a result, if Tim wants a job in the public sector, he must support an organization that may have opposing views to his own. The principle of compelling public workers to pay a non-membership fee (“agency fee”) towards the representative union has been recognized and followed since the 1977 case *Abood v. Detroit Board of Education*.² At the time, the primary purpose of the agency fee was to solve the free rider issue—public employees receiving union benefits for free.³ Over the past forty years, the concept of unions compelling agency fees to non-members created a divide between public employees and unions.⁴

¹ This scenario is fictional and solely the work of the author.

² See 431 U.S. 209, 241 (1977) (discussing the significant burden on the employees for compelling dues).

³ See *id.* at 221–22 (“A union-shop arrangement . . . counteracts the incentive that employees might otherwise have to become ‘free riders’—to refuse to contribute to the union while obtaining benefits of union representation.”).

⁴ See *id.* at 222 (discussing the impact on First Amendment rights and the need to protect the unions).

In the summer of 2014, *Harris v. Quinn* changed the long-established principle, but did not overrule *Abood*.⁵ *Harris* bridged the gap between the union's ability to compel an agency fee and the right of public employees to freely associate with any organization they wish to support.⁶ Specifically, *Harris* dealt with quasi-public employees and gave them the right to opt out of the compelled agency fee.⁷ The Supreme Court held that personal assistants, acting as quasi-public employees, can opt out of paying agency fees to support unions, but left open the question of whether all public employees will be able to opt out of agency fees to protect their freedom of association.⁸

The First Amendment right of freedom of association protects employees' rights in the public workforce.⁹ In order for unions to co-exist with employees in the public sector, the courts must ignore the *Abood* standard of permitting agency fees against non-members of the union for grievance-adjustment, collective bargaining, and contract administration purposes.¹⁰ The *Abood* standard is flawed because it incorrectly applied two cases in its analysis regarding the constitutionality of compulsory payments, which makes the re-evaluation of the issue necessary to protect the freedom of association for all public employees.¹¹

Part II of this Note discusses the history and development of the freedom of association in the U.S. workforce.¹² Then, Part III analyzes freedom of association in the context of *Harris v. Quinn* and suggests using the misinterpretation of the two cases used in the analysis to replace the *Abood* standard.¹³ Next, Part IV proposes establishing a new standard

⁵ See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (stating that the judgment of the Court of Appeals is affirmed in part, reversed in part, and remanded for further proceedings).

⁶ See *id.* (acknowledging that collecting an agency fee is prohibited by the First Amendment from employees that do not want to support or join the union).

⁷ See *id.* (“[N]o person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.”).

⁸ See *id.* (holding that the personal assistants who work in the Rehabilitation Program that do not want to support a union cannot be compelled to subsidize their speech by a third party).

⁹ See *id.* at 2628 (establishing that the freedom of association was thought to be protected by the Bill of Rights).

¹⁰ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) (explaining that the Michigan Court of Appeals was correct in its decision to enforce the service charges for non-members applied for collective bargaining, grievance adjustment, and contract administration purposes).

¹¹ See *Harris*, 134 S. Ct. at 2632 (“The *Abood* Court seriously erred in treating [*Railway Employees Department v. Hanson* and [*International Association of Machinists v. Street*] as having all but decided the constitutionality of compulsory payments to a public-sector union.”).

¹² See *infra* Part II (discussing the historical development of freedom of association in the workforce).

¹³ See *infra* Part III (analyzing the reasons why the freedom of association is important and should cover all public employees).

through amending the Employees' Rights statute that will compensate for the inconsistencies in court cases dealing with agency fees and public employees.¹⁴ Finally, Part V concludes how the new standard will improve the public-sector's working conditions.¹⁵

II. BACKGROUND

Ever since the inception of the agency shop provision, the freedom of association issues surrounding the union's ability to compel an agency fee from non-members became more problematic over time.¹⁶ In *Harris*, the Supreme Court raised serious doubts about the future of agency fees for public employees by giving personal assistants the ability to receive union benefits by opting out of the agency fee payments.¹⁷ These serious doubts require immediate action that should result in amending the Employees' Rights statute to give all public employees the right to opt out of agency fees.¹⁸

Part II.A discusses the historical development of unions, including the original purpose for forming unions and the Acts that gave the unions power.¹⁹ Next, Part II.B discusses the cases leading up to *Abood v. Detroit Board of Education*, including *Railway Employees Department v. Hanson* and *International Association of Machinists v. Street*.²⁰ Then, Part II.C discusses the significance of *Abood v. Detroit Board of Education*, including the factual scenario of the case, the purpose behind exclusive representation of employees, and how the Court addressed the free rider issue.²¹ Then, Part II.D discusses *Harris v. Quinn* and the evolution of right to work laws in

¹⁴ See *infra* Part IV (establishing a new standard through a modified statute that all public employees will be given the opportunity to opt out of agency fees).

¹⁵ See *infra* Part V (concluding that the proposed statute is the best solution to protect the freedom of association for public employees).

¹⁶ See *infra* Part II.A (reviewing the formation and historical significance of unions, including creating cohesion in the workplace, preventing free riders from using the services without payment, and relieving the financial burden for employees of bringing claims against the employer).

¹⁷ See *infra* Part II.D (refusing to extend the standard in *Abood* to the quasi-public employees in *Harris* because of the flawed analysis in relying on previous cases).

¹⁸ See *infra* Part IV (proposing an amendment to the Employees' Rights statute by giving all public employees the right to refuse agency fees).

¹⁹ See *infra* Part II.A (providing an overview of *Abood* through the detailed factual scenario, along with the reasoning behind the decisions made throughout the case).

²⁰ See *infra* Part II.B (reviewing the holding and significance of two important cases relied upon in *Abood*, and the evolution of the agency fee system).

²¹ See *infra* Part II.C (examining the holding and reasoning of *Abood*).

the Judicial System.²² Finally, Part II.E discusses the fundamentals of the First Amendment, including an overview of freedom of association.²³

A. *Historical Development of Unions*

State and federal legislation govern the right of public sector employees to organize unions whereas the National Labor Relations Act (“NLRA”) only governs the private sector.²⁴ In 1902, executive orders banned federal employees from petitioning for salary increases in Congress because President Roosevelt intended to decrease congressional oversight of federal departments and restrict the growing political power of civil servant special interest groups.²⁵ In 1912, the Taft administration lifted the ban and advocated for the right of employees to petition Congress for better working conditions.²⁶

²² See *infra* Part II.D (explaining the factual scenario, holding, and reasoning in *Harris v. Quinn*).

²³ See *infra* Part II.E (analyzing the freedom of association as inherently incorporating the freedom to associate from organizations, including unions).

²⁴ See Catherine Phillips, *The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right*, 10 FIRST AMEND. L. REV. 652, 656 (2012) (describing the constitutional framework for public employees as unique compared to other citizens). During 2010, 6.9% of workers in the private-sector were union members, unlike the public sector that had forty percent of workers belonging to unions. *Id.* at 657. During 2011, thirteen states limited or eliminated public-sector bargaining rights. See Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 532 (2013) (listing the states that limited the bargaining rights in some way as being Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Tennessee, and Wisconsin).

²⁵ See Phillips, *supra* note 24, at 657 (considering the ban as the beginning of the public-sector movement that incurred more problems in organizing the public workforce than the private-sector). The executive order broadened the ban on petitioning for improved conditions and terms in Congress. See William Herbert, *Public Sector Labor Law and History: The Politics of Ancient History?*, 28 HOFSTRA LAB. & EMP. L.J. 335, 348 (2011) (discussing the history behind the effort to curtail the right of public employees to seek improvements of working conditions). The following language applied to all federal employees:

All officers and employees of the United States of every description serving in or under any of the Executive Departments and whether so serving in or out of Washington are hereby forbidden either direct or indirect, individually or through associations, to solicit an increase of pay, or to influence or to attempt to influence in their own interest any legislation whatever, either before Congress or its Committees, or in any way save through the heads of the Departments in or under which they serve, on penalty of dismissal from the government service.

Id.

²⁶ See Phillips, *supra* note 24, at 657 (explaining the ban as being lifted by the Lloyd-LaFollette Act of 1912). Additionally, the administration attempted to limit the interactions between legislative bodies and public employees on the state level. *Id.* Even though the ban was lifted, various lobbying efforts attempted to ban unions in the public sector outside the federal government. See Herbert, *supra* note 25, at 349 (distinguishing that lobbying for

After 1912, the public sector was still having issues organizing unions, but private sector unions received statutory protections with the passing of the NLRA in 1935.²⁷ Two years later, skepticism continued to exist concerning public workers pursuing collective bargaining or unionization because of the nature of the industry.²⁸ The subsequent court decisions displayed antagonism towards unions and produced greater skepticism until the 1960s.²⁹

In 1962, President Kennedy gave federal public employees limited collective bargaining rights and established union recognition procedures through Executive Order 10988.³⁰ The states used the federal

legislative action to improve working conditions appears at both the state and federal levels). In addition to petitioning Congress, the lifted ban also permitted employees to furnish information to the House of Representatives or the Senate. *Id.* at 349.

²⁷ See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 449-551 (1935) (diminishing labor disputes and creating the National Labor Relations Board (“NLRB”)); see also Phillips, *supra* note 24, at 657-58 (detailing the benefits of the Act as permitting workers to petition, organize, boycott, strike, and collectively bargain). The Act provided the private-sector statutory protection by assuring the right to organize through unions, to bargain collectively through the employers, and to protect other activity related to the collective bargaining process. See Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 114 (2009) (exploring the evidence pointing to the NLRA as promising more than what it can fulfill). One of the downsides of the NLRA is that threats fall outside of it. *Id.*

²⁸ See Phillips, *supra* note 24, at 658 (explaining that Franklin Roosevelt believed that collective bargaining could not fit within the public sector). President Roosevelt reasoned:

The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by . . . laws enacted by their representatives in Congress. Accordingly, administrative officials and employers alike are governed and guided, and in many cases restricted, by laws which establish policies, procedure or rules in personnel matters.

Id.

²⁹ See *id.* at 659 (describing the Court’s holding as giving public employees no right to bargain, strike, or arbitrate disputes). In this time period, employees could be fired for conducting activity that resembled union organization. *Id.* Between the 1930s and 1940s, memberships within unions tripled, and around twenty-five percent of the workforce unionized. See Marisa Benson & Tiffany Nichols, *Labor Organizations and Labor Relations HB 361*, 30 GA. ST. U. L. REV. 191, 191-92 (2013) (analyzing the history of union memberships and the related bills that restricted its growth). Following the growth of union memberships, Congress introduced 250 bills related to unions in 1947. *Id.* at 192.

³⁰ See 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, 1366 (2013) (stating that Executive Order 10988 was considered the Magna Carta for unionism with federal-employees). Even though the discussion on collective bargaining began with Executive Order 10988, organized labor activity occurred as early as the 1830s. See Kenneth Bullock, *Official Time as Form of Union Security in Federal Sector Labor-Management Relations*, 59 A.F.L. REV. 153, 164 (2007) (introducing the first organized labor activity occurring in

government's authority to establish and pass legislation that granted public employees at the local and state level the authority to bargain with unions.³¹ As a result, union memberships for public employees increased 500% between 1956 and 1978.³² As public-sector unions grew, the private-sector unionization rates declined.³³ Currently, the laws have adapted to meet the demand of public-sector unions.³⁴ Part II.A.1 explains the current status of the law for unions, including collective bargaining on behalf of public employees, exclusivity of the union-employee relationship, and

Navy yards to obtain ten-hour workdays without reducing the employee's pay). Between the 1860s and 1880s, the prevailing rate wages were recognized by Congress and eight-hour days were implemented. *Id.* at 164–65.

³¹ See Prokopf, *supra* note 30, at 1366 (recognizing that the states modeled their legislation after the federal government). Following the federal government's first step toward unionism accelerated the enactment of state legislation. *Id.* Up to the 1980s, forty-two states enacted collective bargaining for public employees. *Id.* In 1959, Wisconsin passed the first state public sector labor law, but lacked a foundation for granting public sector unions rights. See Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, AM. CONST. SOC'Y FOR L. & POL'Y 1, 2 (2011), https://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf [<https://perma.cc/FRF9-FP4S>] (establishing the struggle with being the first state to establish the public sector labor law). The Wisconsin law focused on barring strikes through the use of fact-finding, mediation, and binding interest arbitration. *Id.*

³² See Prokopf, *supra* note 30, at 1366 (analyzing the growth of unions within the public sector as growing exponentially between the periods of 1960 to 1978). By 1978, unions represented about forty percent of all public employees. *Id.* During the 1970s, unions appeared to be well-established in the labor markets. See John Pencavel, *The Changing Size Distribution of U.S. Trade Unions and Its Description by Pareto's Distribution*, 67 INDST. & LAB. RELS. REV. 138, 140 (2014) (recognizing the fluctuation in union memberships between the years 1974 to 2007). Around 20 million employees were members of unions, and 8000 union elections occurred each year. *Id.* In 1974, the only union that had substantial representation among employees was the National Education Association. *Id.* However, most unions were not subject to collective bargaining contracts. *Id.* at 141.

³³ See Prokopf, *supra* note 30, at 1366–67 (stating while peak union membership was at 34.8% in 1954, the overall union membership in 2012 was at 11.3%, and the union membership in the private sector was at 6.6% and 35.9% in the public sector). The decline in national private sector unionization is attributable to the NLRB interpreting the NLRA in less favorable ways towards collective bargaining and unionization. See Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J. L. & PUB. POL'Y 735, 743 (2009) (comparing the unionization rates among Illinois and Virginia). The public-sector unionization rates also depend upon the state law, which may be more hostile towards collective bargaining. *Id.*

³⁴ See *infra* Part II.A.1 (discussing the status of current laws in regards to union membership). In 2013, twenty-two states provided arbitration as a resolution procedure for the public employees. See Harry C. Katz, *Is U.S. Public Sector Labor Relations in the Midst of a Transformation?*, 66 INDUS. & LAB. RELS. REV. 1031, 1035 (2013) (distinguishing the state laws as only covering firefighters and police, rather than all state employees). The threat of arbitration alone is enough to reach a negotiation within the collective bargaining process. *Id.*

closed-shop agreements.³⁵ Then, Part II.A.2 discusses the Taft-Hartley Act, including the purpose and importance of the Act.³⁶

1. Current Status of the Law

Under current state and federal law, when a union is selected by a majority of the employees, it will represent all the employees within the bargaining unit for collective bargaining purposes.³⁷ Collective bargaining is the process where unions negotiate the terms of the employees' contracts with the employers.³⁸ Employers prefer the exclusivity of the union because the employer can address one group's stance rather than multiple stances.³⁹ The use of a single representative promotes a state of cohesion among employees and avoids inter-union rivalries.⁴⁰

³⁵ See *infra* Part II.A.1 (examining the current status of law dealing with unions).

³⁶ See *infra* Part II.A.2 (detailing reasons why Section 14(b) was enacted along with the benefits of the Act).

³⁷ See 29 U.S.C. § 159(a) (2012) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining [for] . . . pay, wages, hours of employment, or other conditions of employment."); see also *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (establishing that as long as the majority of employees select union representation, the NLRA permits unions to bargain with employers to make the union membership a condition of employment).

³⁸ See *Collective Bargaining Fact Sheet*, AFL-CIO AMERICA'S UNIONS, <http://www.aflcio.org/Learn-About-Unions/Collective-Bargaining/Collective-Bargaining-Fact-Sheet> [<http://perma.cc/Q2Y3-RWPE>] (describing the terms included in employment contracts during collective bargaining as hours, pay, pensions, benefits, health care, leave, safety policies, and more). The employees, as a collective unit, decide the priorities for bargaining with the employers. *Id.* The union employees will choose the representative that will speak on their behalves for bargaining sessions, with the end result being a contract between the employer and employees. *Id.* Each year, around 30,000 collective bargaining agreements are formed, representing around eight million private employees and 8.5 million public employees. *Id.*

³⁹ See *Emporium Capwell Co.*, 420 U.S. at 62 (examining the benefits of having a union). The problem with this system is that total satisfaction for all is difficult to achieve for those who are represented by a union. *Id.* The use of a single union helps further the goal of promoting peace among the workforce by subordinating the individual interests for the collective interests of every employee within the bargaining unit. See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (reviewing the reasons for a collective bargaining system). The exclusive representative also solves the issue of impartial review through discriminatory or arbitrary union conduct. *Id.*

⁴⁰ See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–21 (1977) (discussing the advantages that an exclusive union brings, rather than having multiple employee groups demanding different variant conditions and terms of employment). Congress designed exclusive representation to strengthen the overall union power and decrease the monopoly power of the employer within its own organization. See David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 693 (1990) (providing the basic description behind the necessity of exclusive representation). Exclusive

Even though the union represents all of the employees, employees are not required to join.⁴¹ The exclusivity portion requires that only the union represent every employee for collective bargaining issues, regardless of whether every employee voted for it.⁴² Unions do not have to address every claim, but must utilize the duty of fair representation without any sort of discrimination or bad faith.⁴³ Whether or not the employees are members, they still receive the union benefits, ranging from enforcement of contractual rights to free legal representation in arbitrations.⁴⁴

There are several and often opposing opinions concerning the decision to create a union because the unions represent such a large amount of employees.⁴⁵ For instance, the competing interests of

representation also prohibits employers from dealings between non-union employees and individuals. *Id.* Without the designation of exclusive representation, unions would lose their power to bargain efficiently and effectively by having to compete against other individuals or unions. *Id.*

⁴¹ See 29 U.S.C. § 157 (2012) (detailing the right of employees to join or refrain from joining a union); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1030 (2013) (identifying that represented employees are bound by the union's negotiating decisions even if the employees do not join the union).

⁴² See 29 U.S.C. § 159(a) (2012) (acknowledging the union's duty to be the exclusive representative of the organization). The collective bargaining issues encompass hours of employment, rates of pay, wages, and other employment conditions. *Id.* Furthermore, the employees have the right to present any grievances to the employer and have the grievances adjusted unless the adjustment is inconsistent with the collective bargaining terms in the contract. *Id.*; see also 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 270 (2009) (recognizing that the needs of the larger work force are balanced with the economic interests of employees to negotiate collective bargaining agreements).

⁴³ See 29 U.S.C. § 158(b)(1)-(3) (2012) (implementing the requirement that labor organizations use a duty of fair representation with no discrimination). The labor organization cannot cause an employer to discriminate against an employee for a denied membership resulting from reasons other than non-payment of dues. *Id.* § 158(b)(2). In addition, the union is obligated to confer in good faith in determining hours, wages, and other conditions of employment. *Id.* § 158(d); see *Pyett*, 556 U.S. at 271 (finding that if the union's conduct involves bad faith, discrimination, or arbitrariness, then the union breached the duty of fair representation).

⁴⁴ See 29 U.S.C. § 158(b)(2) (confirming that the labor organization cannot terminate benefits to non-members); see also *Pyett*, 556 U.S. at 271 (holding that unions have a duty to represent employees in negotiation activities); *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) (stating that unions have a duty to represent employees to enforce contractual rights). The benefit shared by non-members do not include ideological or political benefits provided by unions. See Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 486 (2000) (showing that there should be some benefits that only members can receive for paying the extra premium for full access to all the benefits).

⁴⁵ See Fisk & Chemerinsky, *supra* note 41, at 1030 (identifying that every decision the union makes will not be supported by every employee). Opposing opinions are the direct result of differences between members and non-members of unions. See Daniel A. Himebaugh, Note, *Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in Davenport*

increasing health benefits at the cost of decreasing wages, to giving promotions based on quality of work rather than seniority, will disappoint some employees that have opposing viewpoints.⁴⁶ However, differences in employee opinions over the negotiation terms do not make the terms invalid.⁴⁷ To counter the differences, the law requires unions to represent the employees fairly.⁴⁸

Some industries require closed-shop agreements, which force employees to be members of a union as a condition of employment.⁴⁹ To prevent free riders from gaining from the system, union activists determined that all employees must pay to retain benefits produced by

v. Washington Education Association, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 533, 536 (2008) (providing that non-members are compelled to pay agency fees because of the inability to become a member and adopt the union's viewpoints). *Abood* established the ability for employees to object to the ideological viewpoints of unions. *Id.* at 536-37.

⁴⁶ See Fisk & Chemerinsky, *supra* note 41, at 1030-31 (weighing the different scenarios that may disappoint employees). Unions have to make trade-offs that will negatively affect some employees. *Id.* at 1031. The purpose is for the union to make sacrifices to further the efficiency of production for employment security. See Matthew Dimick, *Compensation, Employment Security, and the Economics of Public-Sector Labor Law*, 43 U. TOL. L. REV. 533, 542 (2012) (admitting that risk-averse employees will choose work security over higher wages). The risk-neutral employees provide a different perspective by preferring the competitive market to determine the level of employment protection, thus maximizing the level of the firm's productivity. *Id.* at 543. The political power of public-sector unions could increase both employment security and wages, but this comes at a cost of waiving freedom of association in the workforce. *Id.* at 547.

⁴⁷ See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (elaborating that bargaining representatives who serve employees must exercise honesty and good faith in using reasonable discretion). The employees have the option of being members or non-members of a union, but the union continues to have exclusive representation over all employees. *Id.* Differences arise within the terms of the negotiated agreement that affect individual and classes of employees. *Id.* Employers and unions alike do not expect complete satisfaction among every employee. *Id.* For these reasons, the statutory authority governing unions provides for reasonableness in serving employees. *Id.*

⁴⁸ See 29 U.S.C. § 158(b) (2012) (discussing the duty of fair representation required for unions as exclusive representatives of an industry); see also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944) (recognizing a duty imposed on unions to exercise their power fairly among employees, without hostile discrimination); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L.L. REV. 127, 127 (1992) (finding the primary legal duty to hold unions accountable to employees is authorized by the duty of fair representation). But see Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 96 (1985) (concluding that the duty of fair representation fails to protect employees from discriminatory, arbitrary, or perfunctory union conduct).

⁴⁹ See Alvaro Santos, *Three Transnational Discourses of Labor Law in Domestic Reforms*, 32 U. PA. J. INT'L L. 123, 142-43 (2010) (explaining that employers could require financial contributions and union membership to be an employee of that organization). Since the formation of the closed-shop agreements, judicial and legislative action eroded all forms of security agreements. *Id.* The Taft-Hartley Act later prohibited the closed-shop agreement. *Id.* at 143. The Supreme Court holding analyzed the prohibition, stating that unions can only use non-member fees for collective bargaining purposes. *Id.*

unions, resulting in non-members still having to pay fees.⁵⁰ Unions utilized monopolized power over employee interests to ensure high professional standards.⁵¹ Some unions strongly believe in the monopolized power and require employees to be members of the union that are represented in a particular industry.⁵² The Wagner Act originally permitted these closed-shop agreements, requiring union membership for employment purposes.⁵³ The liberty of a party to enter into union contracts is impinged because the arrangements of the constitutional constraints stretch beyond a reasonable interpretation of the freedom of association.⁵⁴

⁵⁰ See Malin, *supra* note 48, at 146 (stating that the fees were necessary for the unions to exclusively represent the employees, as long as the fees do not significantly place any burden on free speech). *Abood* established that non-members of a union can be required to pay a fee for the costs of collective bargaining. See Fisk & Chemerinsky, *supra* note 41, at 1053 (acknowledging that unions could require non-members of a union to pay for collective bargaining activities, but not for ideological purposes). Furthermore, the Court said that the bar could compel similar fees for use of disciplining members or proposing ethical codes. *Id.*

⁵¹ See Nat'l Ass'n for Advancement of Colored People v. Button, 371 US. 415, 438–40 (1963) (highlighting the State's argument to control the employees' exclusive representation in order to protect personal liberty interests). The union restrictions over its employees functions as a monopolized power. See Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 56 (2008) (acknowledging that the restrictions that provide unions the ability for exclusive representation ultimately create a monopolized power for unions over the employees). Unlike most monopolies, nonprofit labor unions are exempt from antitrust laws and regulations. *Id.*

⁵² See Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57–61 (1990) (discussing the ramifications of requiring employment based on union membership). This reasoning goes directly towards the necessity of limitations on union competition. See Bodie, *supra* note 51, at 56 (examining the reasoning behind limiting union competition). Competition between unions wastes union resources. *Id.* In addition, when the union represents a large percentage of the employees within an industry, unions can use the collective worker power more effectively. *Id.*

⁵³ See 29 U.S.C. § 158(a)(3) (2012) (stating that nothing in the statute can preclude an employer from negotiating with a labor organization and conditioning employment based on membership); JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 28 (H. Victoria Hedian et al. eds., 6th ed. 2012) (describing the proposed legislation of the Wagner Act). The Wagner Act gave employees the legally enforceable right to organize. HIGGINS, JR., *supra* note 53, at 28. New requirements were implemented that forced employers to utilize representatives selected by the employees for purposes of collective bargaining between employers and employees. *Id.* The Wagner Act permitted employees to engage in strikes to balance the bargaining power between employees and employers. *Id.* The Wagner Act implemented the NLRB to enforce substantive rights and protect employees from unfair labor practices. *Id.* at 29.

⁵⁴ See Dau-Schmidt, *supra* note 52, at 131 (concluding that public employees, who are subject to these constitutional constraints, would have their liberty impinged by extending the Constitution beyond a reasonable interpretation). The government, through the utilization of unions, must subject its performance to constitutional scrutiny, or else the Constitution would be undermined. *Id.* at 131–32. Without the constitutional scrutiny, the

2. The Taft-Hartley Act

Congress recognized the need to enforce employment agreements to limit employees from free riding on the provided services and benefits.⁵⁵ The Taft-Hartley Act of 1947 added several rights for employers and employees by giving them both the right to refrain from joining unions and giving the unions the right to require membership within thirty days of employment.⁵⁶ In the union shop arrangement, employees may be fired for failing to pay the required dues.⁵⁷ The Taft-Hartley Act arose from the congressional concern over intimidation from unregulated monopolists over employees.⁵⁸

government could authorize private parties for tax collection, elections, law enforcement, and benefit distribution with none of the required constraints by the constitution. *Id.* at 132.

⁵⁵ See Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 131-32 (2005) (recognizing that making employment conditional on union membership was necessary to combatting the free rider issue). However, employees were not required to pay dues used for purposes other than the cost of operation. See Hutchison, *supra* note 44, at 464 (providing the potential abuses of compulsory unionism). In addition, the collective goods provided by the government are theoretically non-excludable and makes the prevention of free-riding necessary to offset the total costs. *Id.* at 477.

⁵⁶ See Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (equalizing the legal responsibilities of employers and labor organizations, providing additional facilities for mediations concerning labor disputes in regards to commerce, and amending the NLRA). The NLRA transformed labor relations to a more balanced scheme by guaranteeing freedoms of speech among employers and employees, and the NLRA added more restrictions for unions. See 29 U.S.C. § 157 (2012) (“Employees shall have the right . . . to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”); see also HIGGINS, JR., *supra* note 53, at 41 (emphasizing the need for collective bargaining and federal protection of rights of employees to form unions).

⁵⁷ See NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) (noting that union membership could only be conditioned upon payment of fees and could be a condition of employment). In addition to the fee requirement, the union shop agreement requires employees to follow the labor contract by working with the union for any issues concerning the terms of employment. See Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185, 223 (1996) (explaining the requirements and protection provided by Section 8(a)(3)). The union shop agreement also provides for the union to be designated as the exclusive representative for all employees. *Id.* at 224.

⁵⁸ See *supra* note 55, at 130 (stating that the legislatures favored individuals over unions in the new law). The Taft-Hartley Act provided protection to employees from unfair union practices. See 1947 Taft-Hartley Substantive Provisions, NLRB, <http://www.nlr.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions> [http://perma.cc/T6YX-SY88] (focusing on the purpose behind the Taft-Hartley Act). In addition to providing protection to employees, the Taft-Hartley Act prohibited unions from charging dues that were excessive or not performed. *Id.*

The Taft-Hartley Act enacted section 14(b), giving states the ability to entirely disallow union security agreements.⁵⁹ Even though every state has discretion to use Section 14(b), the right to work law prohibits employers and unions from using union membership as a condition for employment.⁶⁰ The right to work law also makes security clauses unenforceable by unions, including agency fee arrangements.⁶¹ Under Section 14(b), unions are still required to provide benefits to non-payers because state law bars unions from compulsory membership.⁶² The

⁵⁹ See 29 U.S.C. § 164(a) (2012) (holding that employers cannot condition employment based on union membership); see also Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, 37 REG. 20, 23 (2014) (describing Section 14(b) as allowing states to mandate the open-shop agreement if the right to work laws passed within the state). The open-shop agreement permits employees to not pay dues or join a union. Wachter, *supra* note 59, at 23. See Jeanne Mirer, *Right-to-Work Laws: History and Fightback*, 70 NAT'L L. GUILD REV. 30, 33 (2013) (noting that unions challenged the law on many different grounds). The unions stated the following as challenges against the right to work laws:

- (1) [T]hat these laws abridged freedom of speech, assembly and the right to petition;
- (2) that they conflicted with Art. I, § 10, of the United States Constitution [because] they impaired the obligation of contracts made prior to their enactment;
- (3) that they denied equal protection of the laws and
- (4) that they denied due process by interfering with liberty of contract.

Id. Each argument failed. *Id.*

⁶⁰ See Fisk & Chemerinsky, *supra* note 41, at 1032 (expressing that the Taft-Hartley Act gave states with right to work laws the ability to prohibit union security and agency fee agreements). In right to work states, employees who are union members are required to subsidize the benefits to coworkers that choose not to join the union. *Id.* at 1033.

⁶¹ See Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 61 (1983) (stating that there is a union security agreement between the NLRA and Railway Labor Act ("RLA") that requires all employees represented by a union to contribute an equivalent amount of initiation fees and periodic dues that are required by full members). The workers who choose not to be union members are still bound by the security arrangement, known as an agency shop. *Id.* at 61-62. The agency shop fees are used for the union's activities ranging from contract functions to institutional costs. *Id.* at 62. See Kenneth Glenn Dau-Schmidt et al., *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428-29 (2012) (discussing the basis behind right-to-work and the agency fees). The following is a break-down of the number of states with right to work laws from 2012:

There are currently twenty-three states that have "right to work" laws either by state or via constitutional provision. Eleven states passed right to work laws either before or contemporaneously with the passage of the Taft-Hartley amendments in 1947. Seven states passed right to work laws in the 1950s. . . . Despite spirited opposition and a boycott by Democrats, the House and Senate Republicans passed the legislation, and Governor Daniels signed it on February 1, 2012, making Indiana the twenty-third right to work state.

Id. at 429-30.

⁶² See Hughes Tool Co., 104 N.L.R.B. 318, 328-29 (1953) (holding that right-to-work laws prohibit unions from enforcing compulsory membership dues on non-members, and the statutory duty still requires the unions to provide the benefits to non-members).

current member dues subsidize services for non-members that opt out of the agency fee system.⁶³ Subsidizing dues from current members decreases the amount of money for unions to spend on collective bargaining.⁶⁴ Some states utilize fee for service agreements where non-members are charged only for the services that directly impact them within the industry.⁶⁵ In addition, cases and statutes exist that permit unions to charge non-members for a small list of services, such as utilizing arbitration and filing grievances.⁶⁶ The unions and employers, for both right to work states and states that recognize union security, can only enforce agency fees on non-members to facilitate the administering and negotiating of the employment contract.⁶⁷ Several suits were filed and the case law began to develop after the Taft-Hartley Act passed.⁶⁸

⁶³ See Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL'Y J. 277, 294 (2013) (describing that in the absence of an agency shop agreement, union membership will decrease and the member dues used to subsidize representation of non-members will increase).

⁶⁴ See *id.* at 292 (explaining that the union is required to represent all employees within the bargaining unit, so the members must subsidize the non-members that are employed within the same unit). Overall, funds for collective bargaining will decrease with an absence of a security fee provision because employees will choose the rational decision to not join a union. *Id.* Improved working conditions and wages sought by the union are considered collective goods and cannot be withheld from non-members of the union. *Id.*

⁶⁵ See Fisk & Chmerinsky, *supra* note 41, at 1033 (expressing that unions utilize fee for service agreements in right to work states). Even in states that have not adopted right to work laws, unions and employers cannot force an employee to join a union. *Id.* at 1034. The unions can only require non-members to pay an agency fee. *Id.*

⁶⁶ See, e.g., *Cone v. Nevada SEIU Local 1107*, 998 P.2d 1178, 1182 (Nev. 2000) (holding that the service fee requirement for arbitrations does not violate the right to work laws of Nevada because the fee is not a condition of employment); *United Ass'n of Journeymen Local Union No. 81*, 237 N.L.R.B. 207, 209-10 (Nev. 1978) (stating that for use of union hiring halls, the unions can charge non-members fees). *But see* *United Ass'n of Journeymen Local Union No. 141 v. NLRB*, 675 F.2d 1257, 1259, 1262 (D.C. Cir. 1982) (examining that right to work laws in Louisiana, Florida, Mississippi, and Arkansas prohibit fair share fees); *Am. Fed'n of State, Cty. & Municipal Emps., AFL-CIO, Local 2384 v. City of Phoenix*, 142 P.3d 234, 245 (Ariz. 2006) (determining that the union's fair share agreement violates Arizona's right to work law); *Florida Ed. Ass'n/United v. Public Emps. Relations Comm'n*, 346 So.2d 551, 553 (Fla. Dist. Ct. App. 1977) (identifying that the right to work law in Florida prohibits fair share fees).

⁶⁷ See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 737 (1963) (acknowledging that conditional employment can require payment of monthly dues and initiation fees). The agency fees cover union expenditures for retirement and educational benefits, union promotional activities and publications, and for strike benefits. *Id.* However, being a non-member of a union eliminates the entitlements of voting on ratification of union agreements, attending union meetings, or having a voice within the union's internal affairs. *Id.*

⁶⁸ See *infra* Part II.B-D (detailing the progression of case law regarding the freedom of association and agency fees associated with union membership).

B. *Building up to Abood v. Detroit Board of Education*

In *Railway Employees' Department v. Hanson*, the Supreme Court rejected the agency fee system.⁶⁹ In *Hanson*, employees of the railroad company brought the suit against the Union Pacific Railroad Company and separate labor organizations seeking to enjoin the implementation of a union shop agreement between the labor organizations and the railroad company.⁷⁰ Before *Abood* and *Harris*, the Court in *Hanson* made two important holdings: (1) the Court held that the Railway Labor Act's ("RLA") preemption of the right to work laws adequately supported the union shop agreements protected by the Constitution; and (2) the Court held that unions compelling financial support do not violate the First and Fifth Amendments due to the employees still receiving benefits.⁷¹ The Court made no holding regarding the issue of compulsory membership impairing employees' freedom of expression and left it for another court to address.⁷²

⁶⁹ See 351 U.S. 225, 238 (1956) (recognizing that the exaction of initiation fees, dues, or assessments could be used as a disguise to force an ideological viewpoint on the employee, and should not be allowed). In *Hanson*, the Union Pacific Railroad Company employees sought to prohibit the enforcement of the RLA between the labor organization and railroad company because of a violation of Nebraska's right to work provision. *Id.* at 227-28. The RLA's original purpose was to strike down and supersede inconsistent state laws. *Id.* at 231-32. The agency fee system is an alteration of private taxation where all employees, including non-members, of a public-sector union paid dues as a condition for government employment. See Himebaugh, *supra* note 45, at 536 (stating that this private taxation was for the purpose of safeguarding the unions, even if the public employees objected to being members of a union).

⁷⁰ See 351 U.S. at 227 (examining the terms of the union shop agreement as requiring membership of the unions within sixty days as a condition of their employment). The Court relied upon the RLA, which permitted a labor organization to require employee membership of the labor organization and could terminate the membership for failure to pay the dues. See 45 U.S.C. § 152 (2012) (requiring labor organizations to maintain agreements concerning rules, rates of pay, working conditions, and settling disputes). Without the RLA superseding the state right to work laws, a private agreement between the nonprofit union organization and the private employer might have been conjured with the union compelling membership dues combined with the subsequent union expenditures. See Fisk & Chemerinsky, *supra* note 41, at 1034 (explaining that the private agreement would make the First Amendment irrelevant to the issue).

⁷¹ See *Hanson*, 351 U.S. at 232 (describing that as long as the union agreements were pursuant to the RLA, then no provision could make the agreements illegal under the first holding). The second holding stated that the requirement of financial support is within the scope of Congress' power under the Commerce Clause, which does not violate the First or Fifth Amendments. *Id.* at 238; see also Fisk & Chemerinsky, *supra* note 41, at 1034 (identifying the two important holdings in *Hanson*).

⁷² See *Hanson*, 351 U.S. at 238 (acknowledging that the Court will not address the impairment of freedom of expression). Congress made explicit that the only conditions that can be imposed on union members are initiation fees, period dues, and assessments. *Id.* The Court ultimately held that financial support for collective bargaining purposes does not

Five years later, the Court addressed the issue of employees' freedom of expression in *International Association of Machinists v. Street*.⁷³ In *Street*, employees of the Southern Railway System brought a constitutional claim, alleging that compelled funds were wrongfully used for political propaganda and ideologies that most employees opposed.⁷⁴ The Superior Court enjoined the enforcement of the union shop agreement based on a violation of the Constitution because the constitutional right to be free from government compulsion has higher value over the expression of opinions.⁷⁵

The Supreme Court recognized constitutional questions as concerning the "utmost gravity," but then failed to address these questions.⁷⁶ Instead, the Court held the RLA limited the power of unions to spend exacted money.⁷⁷ In addition, the Court interpreted the statute as eliminating the union's power, over an employee's objection, to use his union dues for

violate the First Amendment and the Commerce Clause supports it. *Id.*

⁷³ See 367 U.S. 740, 749 (1961) (confirming the current case as being adequate to present the constitutional issues reserved in *Hanson*). *Hanson* did not address the issue of using agency shop fees for the advancement of political causes. See Cantor, *supra* note 61, at 67 (clarifying that the plurality refused to address the constitutional issue by interpreting the RLA in a narrow way).

⁷⁴ See 367 U.S. at 742 (explaining the allegation for the claim). The employees alleged that section 2 of the RLA was unconstitutional because it allowed unions to use compulsory dues for financing political campaigns that were opposed by objectors. See Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1, 19 (1989) (recognizing that employees opposed the propaganda of economic and political doctrines advocated by the unions).

⁷⁵ See *Street*, 367 U.S. at 744–45 (stating that the Superior Court enjoined the enforcement of the union shop agreement because demanding funds from employees violates the Federal Constitution). Men and women migrated to the United States to free themselves of government compulsion of ideas they were knowingly against. See *id.* at 796 (examining that migrants went to the extent of languishing in prison and losing their lives to oppose government oppression). Once the government steps into a voluntary membership organization and forces a particular cause on a group, then the government may have a monopoly on the ideas of its people. *Id.*

⁷⁶ See *id.* at 749 (identifying that the Court should refrain from making unnecessary constitutional decisions that are outside the scope of the statutory language concerning union shop agreements). Instead of reaching the constitutional decision, the Court recognized that *Hanson* identified the limits on compulsory dues that explained the RLA's statutory constraints over objectors of union activity. See Hartley, *supra* note 74, at 19 (reviewing the reason why the Court did not have to make a constitutional decision in the case to provide the necessary remedy to the parties).

⁷⁷ See *Street*, 367 U.S. at 768 (holding that Congress did not give complete approval to union shop agreements). The Court did not want to provide precise limits on the power to spend required dues on political causes. *Id.* In addition, the Court recognized that political uses of exacted funds do not defray the costs for administration or negotiation of collective agreements. *Id.* Therefore, the Court held that unions cannot support political activity against the dissenting employees' wishes. *Id.* at 770.

opposing political causes.⁷⁸ In other words, if an employee objects to a portion of the union dues used for political purposes, the union has no recourse or right to enforce the dues.⁷⁹ The principles from the majority in *Hanson* and *Street* remained the same until 1977 with *Abood v. Detroit Board of Education*, which dealt with the public-sector.⁸⁰

C. 1977 Paradigm of *Abood v. Detroit Board of Education*

In *Abood*, the Detroit Federation of Teachers was designated as the exclusive representative for teachers employed within the Detroit Board of Education.⁸¹ The agreement contained an agency shop clause that

⁷⁸ See *id.* at 768–69 (discussing the holding as achieving both congressional purposes when using the funds that are directly within the dissenting employee’s interest). The Court explained that the role of unions are delineated and defined to stabilize labor relations across any industry. See *id.* at 758–59 (recognizing every stage in the progression of the railroad labor code was progressively infused with a balance of the organizing railroads and railroad unions). In addition, non-union members sharing the same benefits as members for no cost (free riders) weighed against an argument for complete recognition of freedom of choice for individuals. See *Street*, 367 U.S. at 762–63 (acknowledging the challenges of unions that exclusively represent all of the employees in an industry, including those who do not share in payment of the dues). In this case, the RLA contemplated compulsory unionism to battle the costs of disputes against forcing employees to provide the costs for administering and negotiating collective agreements. *Id.* at 763–64. However, the Court held that Congress did not intend to compel employees to support opposing political causes that are different from their own beliefs. *Id.* at 764. In a dissenting opinion, Justice Frankfurter argued that members’ interests could be furthered by political means. *Id.* at 813–15. He explained that the AFL-CIO Executive Council Reports stressed the importance of labor’s participation in furthering legislation quickly because the political and economic concerns are inseparable. *Id.* at 813. The dissent further argued that the employees were free to speak on any issue concerning the union’s position, which equated to no coercion of speech within union activism. See *Fisk & Chemerinsky*, *supra* note 41, at 1036 (explaining that the dissent believed that the employees were not forced to give up any beliefs or views by the government). Furthermore, the dissent believed that any member may express his views freely in any private or public forum before the union collected his dues, which was contrary to the majority opinion of coerced speech. *Street*, 367 U.S. at 806.

⁷⁹ See *Street*, 367 U.S. at 768 (examining that funds cannot be used for purposes outside the expenses of negotiation). The NLRB requires unions to inform every employee of the opportunity to become non-members. See *How Do I Cut Off the Use of My Dues for Politics and Other Nonbargaining Activities?*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/a/a_4_p.htm [<http://perma.cc/YDF7-3ZCL>] (composing a list of requirements that unions must furnish to all employees). In addition, information must be provided that states non-members have the option to opt out of paying for dues not central to the union’s duties. *Id.* Furthermore, unions must provide sufficient information allowing the non-member to make an intelligible decision. *Id.* Moreover, unions must tell the employees about the procedures of filing objections with the union. *Id.* If a non-member does object to the political expenditures, then the union must provide a calculation of the deduction, which the non-member can challenge at a later date. *Id.*

⁸⁰ See *infra* Part II.C (analyzing the right to impose agency fees on public employees).

⁸¹ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211–12 (1977) (establishing the Detroit

required every teacher who was a non-member of the union to pay the same service charge and regular dues as a union member.⁸² A group of teachers sued, alleging that they opposed the union's use of collective bargaining in the public-sector due to their funds being used for the union's engagement in religious, professional, scientific, political, and economic programs.⁸³

The Court reasoned that agency shop provisions were linked with the principle of exclusive representation.⁸⁴ Exclusive representation promoted labor peace because it prevented inter-union rivalries among the work force.⁸⁵ The concept was that one representative entity was

Federation of Teachers as the exclusive representative for teachers in 1967). The collective bargaining agreement was effective between the dates July 1, 1969, to July 1, 1971. *Id.* at 212.

⁸² *See id.* (examining the agency shop clause requirement that required every teacher who was a non-member of the representative union to pay a service charge equal in amount to the full-fledged union members).

⁸³ *See id.* at 212-13 (reflecting that a substantial sum of the payments was used for activities other than for limiting bargaining agent costs).

⁸⁴ *See id.* at 220 (stating that a central element in industrial relations is exclusive union representation). In *Abood*, the Court reasoned that the holdings in *Hanson* and *Street* would go far toward resolving the First Amendment issue. *See id.* at 217 (beginning with *Hanson* and *Street* to determine whether an agency shop provision within a collective bargaining agreement can be considered constitutionally valid). The Court recognized that *Street* did not reach any of the constitutional issues. *See Abood*, 431 U.S. at 219-20 (interpreting that *Hanson* failed to answer important constitutional questions that need to be solved in the current case). The Court dismissed the teachers' argument because the interference was constitutionally justified due to the union shop being of substantial importance to the labor relations system. *See id.* (acknowledging that the judgment made in *Hanson* and *Street* made the interference constitutionally justified).

⁸⁵ *See id.* at 220 (recognizing the benefits of having only one union, rather than many). In addition, the Court recognized that requiring employees to financially support unions has a direct impact on First Amendment rights. *See id.* at 222 (clarifying that employee First Amendment interests are impacted when the employee is compelled to financially support a union). The Court gave the following as examples of potential impacts on the First Amendment interests of the employees:

An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination.

Id. The primary reason for the union shop agreements was to solve the problems of free riding from non-members and to promote labor peace. *See id.* at 260 (explaining that the agency shop reduces the risk of free riders among non-union employees by fairly distributing the costs for exclusive representation and promoting labor peace among public

better than two because the employers would not have to worry about establishing different terms, thus making the system more efficient.⁸⁶ In addition, the union, acting as an exclusive representative of the employees, frees the employer from facing conflicting demands from multiple unions, and avoids attacks from rival labor unions.⁸⁷

When addressing the free rider issue, *Abood* noted that unions must represent all employees, including union and non-union members.⁸⁸ This amount of responsibility and difficulty of exclusive representation requires a lot of time and money, which makes free riding on benefits an issue for unions in continuing to successfully represent employees.⁸⁹ The union shop arrangement distributed the costs amongst the employees that benefit from services and reducing the incentive to then take advantage of the free benefits.⁹⁰

The appellants in *Abood* argued that *Hanson* and *Street* should not be followed because they dealt with unions in the private sector, rather than

employees).

⁸⁶ See *Abood*, 431 U.S. at 220 (imposing a single representative is more efficient and creates less confusion than enforcing multiple union agreements with varying conditions and terms). This philosophy was created over the disgust for independent unions before the passage of the NLRA. See Rabban, *supra* note 40, at 693 (demonstrating the purpose behind exclusive union representation).

⁸⁷ See *Abood*, 431 U.S. at 221 (examining the benefits of having only one union); see also Rabban, *supra* note 40, at 693 (mentioning that unions promote efficiency within the workforce by being the only representative for all employees).

⁸⁸ See *Abood*, 431 U.S. at 221 (finding that unions must fairly and equitably represent every employee in carrying out its duties). To overcome the free rider issue, the Court allowed union compulsion through the use of union security agreements. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 815 (2012) (discussing that unions can compel employees to financially support unions to combat the free rider issue).

⁸⁹ See *Abood*, 431 U.S. at 221 (stating that representing the interests of the employees is difficult and requires a lot of time and money). Unions claim that they spend a majority of the compelled dues for representation, contract negotiations, or non-political work. See Jarrett Skorup, *The Union "Free-Rider Problem" Myth in Right-to-Work Debate*, CAPCON (Dec. 10, 2012), <http://www.michigancapitolconfidential.com/18017> [<http://perma.cc/L79N-W5JS>] (exploring Michigan's evolution as a right to work state). According to union documents, activities classified as representational totaled eleven percent of the union's expenditures. *Id.* Another argument along with the free rider issue is that nobody is required to be in a union. *Id.* The distinction comes down to not whether someone is required to be in a union, but that they are compelled to pay association fees that can represent up to ninety percent of the full member dues. *Id.*

⁹⁰ See *Abood*, 431 U.S. at 222 (describing the union shop agreement as counteracting the incentive to obtain the benefits for free). Unions spent over \$4.4 billion on electing political candidates, and twelve of the top twenty political donors were unions. See Skorup, *supra* note 89 (inquiring into the substantial amount of funds used toward politics). There is a discrepancy with the placement of political funds with three percent of total political expenditures going towards the Republican Party, even though forty percent of union members vote for the Republican Party. *Id.*

the public sector, which would require an alternate result.⁹¹ The Court noted that even though private and public employers seek to keep costs down, the public employers lack the ability to oppose increases in labor costs that can be dealt with in the private-sector through adjustments in an established market.⁹² In addition, the Court noted that public employers are responsible to the electorate, comprising of government employees, taxpayers, and users of government services.⁹³ Given the opportunity for the government representatives to agree with the union's demands, the Court reasoned that public employees have more of an impact in the decision-making process compared to employees in the private-sector.⁹⁴ Even with these differences, the Court held that the collective bargaining differences between the private and public-sector do not equate with differences in First Amendment rights.⁹⁵

⁹¹ See *Abood*, 431 U.S. at 227–28 (noting that an alternative conclusion must be reached under the Constitution because collective bargaining by public sector unions is inherently political).

⁹² See *id.* (stating that concerns over decreases in employment and costly wage demands are less of a concern for public-sector unions). In Michigan, unions represented roughly 38,500 state employees in 2008 and received around \$450.00 per employee. See Paul Kersey, *News Release: State Government Paid \$17.6 Million to Unions in 2008, According to Documents Secured by FOIA Request*, MACKINAC CTR. FOR PUB. POL'Y, <http://www.mackinac.org/10326> [<http://perma.cc/57EA-MRQY>] (analyzing the millions of dollars in agency fees to unions). One of the problems with the unions is accounting for their spending. *Id.* Less than half of the union costs went to employee representation, and over ten percent accounted for political spending. *Id.*

⁹³ See *Abood*, 431 U.S. at 228 (explaining that the decision-making process by the public employer is inherently a political process); see also Tom Gantert, *Early Returns on Michigan as a Right-to-Work State: Incomes Rising*, CAPCON (July 25, 2014), <http://www.michiganapitolconfidential.com/20319> [<http://perma.cc/9PY7-BNNG>] (recognizing that educational attainment explains the variances in state incomes).

⁹⁴ See *Abood*, 431 U.S. at 229 (explaining the argument that public employees are in a better position to make an impact in the decision-making process). Even though public employees could make more of an impact within the decision-making process, the public-sector union memberships still decline similar to the private sector. See Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1639 (2014) (acknowledging the downward trend in union memberships, both in the private and public-sector). The recession and changes in public-sector employee rights contributed to the decline of union membership. *Id.*

⁹⁵ See *Abood*, 431 U.S. at 232 (reiterating that the First Amendment rights are the same in collective bargaining issues for both the public and private sector). The public-sector unions are political because the government pays the wages and benefits of its members, with lobbying being the sole advocacy system to raise compensation. See Steven Greenhouse, *Supreme Court Ruling on Union Fee Is a Limited Blow to Labor*, N.Y. TIMES, http://www.nytimes.com/2014/07/01/business/supreme-court-ruling-on-public-workers-and-union-fees.html?_r=0 [<http://perma.cc/J6V8-MU7X>] (examining the effect on the treasuries and memberships of the unions).

D. Harris v. Quinn

In Illinois, Section 676.10 of the Illinois Administrative Code establishes an employee-employer relationship between the personal assistant and the person receiving the care.⁹⁶ The personal assistant in this context encompasses individuals employed by a client to provide a variety of services approved by a physician.⁹⁷ In this situation, the customer controls the employment relationship between the personal assistant and the customer.⁹⁸ Even though the customer controls the employment

⁹⁶ See *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014) (discussing that the personal assistant's employer is the person receiving the home care). This relationship is important in the context of *Harris* because the unions have less of a need to step in to represent employees that do not interact with each other. See GERALD MAYER, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 17 (2004) (finding that focusing more on employees' concerns increased job satisfaction of non-members of the union, including the personal assistants). Illinois was one of the first states to establish the Medicaid funds program and created the Illinois Department of Human Services Home Services Program, known as the Rehabilitation Program. See *Harris*, 134 S. Ct. at 2623 (summarizing the factual background before the Court). The Rehabilitation Program provides homecare services for individual needs. *Id.* at 2624. Medicaid funds programs that offer in-home services to people that would normally need institutionalization, such as requiring transfer to a nursing home. *Id.* at 2623. The following code establishes the offered program:

The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan.

42 U.S.C. § 1396n(c)(1) (2012). Up until this was permitted, personal assistants were not considered state employees. See Jacob Huebert, *Harris v. Quinn: A Win for Freedom of Association*, CATO SUP. CT. REV. 195, 196 (2013-14) (stating that personal assistants were not considered public employees until the recognition of the Rehabilitation Program). The designation of personal assistants as state employees may not have been a big deal for unionization because the employers adapted to meet the employees' concerns. See Amanda McHenry, Comment, *The NLRB Wields Its Rulemaking Authority: The New Face of Representation Elections*, 62 CASE W. RES. L. REV. 589, 601 (2011) (acknowledging work satisfaction increased and unionization decreased).

⁹⁷ See ILL. ADMIN. CODE tit. 89, § 676.30(p) (2014) (authorizing the personal assistants to help elderly people with home care services); see also Keith Kelleher, *Harris v. Quinn: Another Nail in the Coffin or Shot in the Arm for Labor?*, <http://progressillinois.com/quick-hits/content/2014/09/01/harris-v-quinn-another-nail-coffin-or-shot-arm-labor> [<http://perma.cc/DLD4-DEHZ>] (admitting that the Service Employees International Union ("SEIU") effectively collectively bargained for increased wages immediately following the decision in *Harris*).

⁹⁸ See ILL. ADMIN CODE tit. 89, § 676.30(b) (authorizing the customers to have control over the business relationship); see also Ronald J. Kramer & Joshua L. Ditelberg, *Harris v. Quinn*:

relationship, the State, through Medicaid subsidizations, pays the personal assistant salaries.⁹⁹ Other than payment of the salaries, the State's involvement is limited.¹⁰⁰

In *Harris*, three personal assistants ("petitioners") filed a complaint on behalf of all Rehabilitation Program personal assistants seeking an injunction against implementing the fair-share provision, and to hold the Illinois Public Labor Relations Act ("PLRA") in violation of the First Amendment for requiring personal assistants to pay fees to a union with opposing views.¹⁰¹ The District Court dismissed the claim and the Seventh Circuit determined that they were employees of the State.¹⁰² The

Roadmap for the End of Fair Share?, LAW360 (June 30, 2014), <http://www.law360.com/articles/553168/harris-v-quinn-roadmap-for-the-end-of-fair-share> [<http://perma.cc/F8QF-7THQ>] (recognizing the regulation designated the employer as the customer for the personal assistants). The customer who received the care controlled nearly all aspects of the employment relationship. See Kramer & Ditelberg, *supra* note 98 (furthering the proposition that the personal assistants were not in charge of the employment relationship).

⁹⁹ See *Harris*, 134 S. Ct. at 2626 (acknowledging that the payment comes from the non-union member personal assistants).

¹⁰⁰ See *id.* (explaining that the State's involvement primarily deals with compensation, but the rest is minimal). In March 2003, Illinois Governor Rod Blagojevich, issued an executive order recognizing the SEIU as the personal assistants' exclusive representative for collective bargaining purposes with the State. See *id.* (describing the executive order as circumventing the Illinois Labor Relations Board decision). This order provided personal assistants with the opportunity to voice any concerns about their jobs to help "efficiently and effectively deliver home services." See *id.* (detailing the concern with the personal assistant's lack of structure to voice any concerns). Once the Act was codified, personal assistants were considered public employees of Illinois and covered under the PLRA. See 20 ILL. COMP. STAT. 2405/3(f) (2014) (stating that the personal assistants were public employees only for purposes of coverage). After the implementation of the statute, SEIU and Illinois agreed over collective bargaining agreements requiring all personal assistants that are non-union members to pay a reduced rate in dues, also referred to as a fair share rate. See *Harris*, 134 S. Ct. at 2626 (identifying that non-membership dues would be deducted from the Medicaid payments to the personal assistants).

¹⁰¹ See *Harris*, 134 S. Ct. at 2626 (recognizing the case before the Court as dealing with three personal assistants under the Rehabilitation Program). The PLRA permits state employees to become members of labor unions and bargain collectively over the conditions and terms of employment. See 5 ILL. COMP. STAT. 315/6(a) (2014) (authorizing the state employees to join unions). The PLRA has an agency fee provision requiring non-members of the union to pay a union fee. See *Harris*, 134 S. Ct. at 2625 (examining the agency fee provision and its effect on non-members). The PLRA considers this a "fair share" provision, which states the following:

When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment

5 ILL. COMP. STAT. 315/6(e). Ultimately, the fair share provision is taken out of the non-member employee salaries and paid to the union. See *id.* (discussing the requirement that

Supreme Court granted certiorari when other states classified personal assistants as state employees, which raised important First Amendment questions.¹⁰³

The Court in *Harris* reaffirmed the belief that *Abood* is “somewhat of an anomaly” and directed the focus to *Abood* as the precedent to analyze.¹⁰⁴ Illinois sought to extend the ruling of *Abood* to include full-fledged public employees and quasi-public employees to collect an agency fee from personal assistants.¹⁰⁵ Unlike the characteristics of full-fledged

unions must certify with the employer that each non-member proportionate share amount that cannot exceed the regular membership dues).

¹⁰² See *Harris*, 134 S. Ct. at 2627 (holding that State employees are personal assistants within *Abood* because the customers and Illinois are considered joint employers of the personal assistants).

¹⁰³ See *id.* (noting an Illinois law that defines home healthcare workers as public employees, including licensed practical nurses, registered nurses, and private therapists). Not only has the Court stepped in to solve the issue, but Illinois Governor Bruce Rauner issued an executive order giving employees the option to opt out of fair share agreements. See Paul Meincke, *Rauner Eliminates “Fair Share” Union Dues for State Workers*, ABC 7 (Feb. 09, 2015), <http://abc7chicago.com/politics/rauner-eliminates-fair-share-union-dues-for-state-workers/510528/> [<http://perma.cc/YDR5-7KAV>] (reflecting on the new executive order issued to eliminate fair share union dues). The Governor declared the agency fee system as neither legal, nor fair, and moved to put an end to fair share agreements. *Id.*

¹⁰⁴ See *Harris*, 134 S. Ct. at 2627 (citing *Knox*, which explains that the free-rider arguments are not enough to overcome the First Amendment objections). The Court in *Harris* further discredited *Lehnert v. Ferris Faculty Association* for personal assistants. See *id.* at 2636 (rejecting *Lehnert’s* reasoning); *Lehnert*, 500 U.S. 507, 556 (1991) (concluding that a union cannot discriminate between non-members and members in administering and negotiating a collective bargaining agreement). The Court stressed that the union could not sacrifice higher pay because of statutory requirements specifying the hourly pay rate for personal assistants. See *Harris*, 134 U.S. at 2637 (detailing that unions should not have to give up higher membership pay for non-member protection). Furthermore, the Court noted that customers have complete control over the personal assistant’s work, which eliminated the union’s authority over grievances with personal assistants. See *id.* (explaining that the union’s authority over the personal assistant employment is virtually non-existent). The main difference the Court recognized was that the grievance procedure for personal assistants should deal directly with the customer, not with the State. See *id.* (acknowledging that in regard to personal assistants, the union’s purpose was for grievances with the state, rather than for the client).

¹⁰⁵ See *Harris*, 134 S. Ct. at 2627 (arguing that the expansion should include public employees for unionization). The Court noted that with respect to full-fledged public employees, the State establishes all of the duties for each employee and qualifications for each position. *Id.* at 2634. The following includes other functions that are characteristics of full-fledged public employees:

The State vets applicants and chooses the employees to be hired. The State provides or arranges for whatever training is needed, and it supervises and evaluates the employees’ job performance and imposes corrective measures if appropriate. If a state employee’s performance is deficient, the State may discharge the employee in accordance with whatever procedures are required by law.

Id.

public employees, personal assistants are employees of the customers.¹⁰⁶ For that reason, the Court recognized that *Abood* was not controlling, therefore, the analysis shifted to whether the compelled payments were constitutional under First Amendment standards.¹⁰⁷ After analyzing the constitutionality of the payments, the Court recognized that the agency fee provision in this case is not commercial speech, which would make the standard too permissive.¹⁰⁸

The Court recognized that there was no link between the right to receive an agency fee from non-members and the exclusive bargaining agent status of the union.¹⁰⁹ In addition, the agency fee system in *Harris* did not play a significant role in preserving labor peace because the employees did not interact with each other.¹¹⁰ The Court then addressed whether the agency fee provision promoted the welfare of personal assistants.¹¹¹ *Harris* held that the agency fee provision could not be

¹⁰⁶ See *id.* (describing the State as having no provision to check in on the personal assistants during the job performance). Illinois withholds most of the rights and benefits from personal assistants that are used by full-fledged state employees. *Id.* at 2634–35.

¹⁰⁷ See *id.* at 2639 (examining the constitutionality of the compelled payments of non-members of public-sector unions). In evaluating the agency shop agreement, the Court looked at *United States v. United Foods, Inc.* within the analysis of *Knox v. SEIU*, where a provision that required the subsidization of commercial speech was struck down. See *Harris*, 134 S. Ct. at 2639 (acknowledging the compelled speech in *Knox* as different than its precedent, but still capable of stirring the passions of many); see also *Knox v. SEIU*, Local 1000, 132 S. Ct. 2277, 2296 (2012) (stating that individuals should not be forced to subsidize private speech).

¹⁰⁸ See *Harris*, 134 S. Ct. at 2639 (expressing that the speech in the case extends beyond commercial speech that only proposes a commercial transaction). In addition, the provision did not complete the compelling state interest test under strict scrutiny. See *Knox*, 132 S. Ct. at 2289 (explaining the free rider arguments as insufficient to defeat First Amendment objections).

¹⁰⁹ See *Harris*, 134 S. Ct. at 2640 (“For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee.”). The link is in accordance with federal law that gives the employee the right to form, join, or refrain from a labor organization without penalty. See 5 U.S.C. § 7102 (2012) (establishing the employees’ right to organize).

¹¹⁰ See *Harris*, 134 S. Ct. at 2640 (recognizing the argument that agency fees play an important role as undermined by the Illinois scheme). The Court realized that personal assistants work in the customers’ home, not in a common state facility, which diminished any threat to labor peace. See *id.* (reiterating that a lack of a common state facility diminished the concern over a conflict of labor peace). Congress affirmed this theory by giving employees in domestic service the right to opt out of coverage. See 29 U.S.C. § 152(3) (2012) (excluding individuals employed with the domestic service of families or personal homes).

¹¹¹ See *Harris*, 134 S. Ct. at 2640 (determining the success between the Rehabilitation Program and the agency fee provision). Respondents claimed that the benefits and wages improved, along with procedures to resolve grievances. See *id.* at 2640–41 (arguing that the benefits of the union through training programs and grievance procedures makes collective bargaining necessary for the sector).

sustained because the benefits provided from the unions could have been achieved through voluntary contributions.¹¹²

Harris rejected Illinois' argument to extend *Abood* and allow unions to collect agency fees from non-members.¹¹³ The Court stressed that adhering to Illinois' argument would be an unprecedented violation of the principle providing no person can be compelled to support speech by a third party that he or she has no interest in supporting.¹¹⁴ The Court held that the First Amendment forbids collecting agency fees from personal

¹¹² See *id.* at 2641 (acknowledging that the agency fee provision should be allowed only if the benefits could not be obtained without the fees paid by the personal assistants to join the union); see also *Lathrop v. Donohue*, 367 U.S. 820, 877 (1961) (mandating that lawyers have the same protection provided in the RLA for railroad workers). The Respondents urged the Court to apply and balance the *Pickering* test with the agency fee. See *Harris*, 134 S. Ct. at 2641 (seeking to find a new justification for *Abood*'s decision). The Court began by dismissing the argument because the State and personal assistants were not in their traditional roles. *Id.* at 2642. The reasoning behind the decision stems from the *Pickering* case, stating that speech regarding public concern can be restricted if the interest of the state in promoting the public services executed through its employees outweighs the employees' interest in being able to comment on issues concerning the public. *Id.* The Court recognized that Medicaid funding would be a matter of great public concern, which required the Court to proceed to the next test. *Id.* at 2642-43. The next test measured the interference with the First Amendment compared to the degree the agency fee promoted efficiency for the Rehabilitation Program. *Id.* at 2643. The Court noted that agency fees impose a heavy burden on the objecting employees' First Amendment rights. See *id.* (asserting that the objecting employee First Amendment rights have a heavy burden when agency fee provisions are imposed); see also John Eastman, *Harris v. Quinn Symposium: Abood and the Walking Dead*, SCOTUSBLOG (June 30, 2014), <http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-abood-and-the-walking-dead/> [<http://perma.cc/SS2D-T379>] (recognizing that the heart of the arguments used to uphold compulsory union fees could no longer stand). The Court finalized the issue by holding that the provision could not be upheld as analyzed under *Pickering*. *Harris*, 134 S. Ct. at 2643.

¹¹³ See *Harris*, 134 S. Ct. at 2644 (refusing to extend *Abood* consistent with Illinois' arguments). The Freedom Foundation is suing SEIU 925 and Washington State for family home-care providers that are being forced to pay union dues. See Jim Brunner, *Labor Law Challenged: Freedom Foundation Sues SEIU 925*, SEATTLE TIMES (Mar. 6, 2015), <http://www.seattletimes.com/seattle-news/politics/freedom-foundation-files-suit-against-seiu-925/> [<http://perma.cc/83B4-6DPA>] (stating that ruling in Freedom Foundation's favor will give all public workers the right to associate with any organization).

¹¹⁴ See *Harris*, 134 S. Ct. at 2644 ("[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."); see also Bureau of Int'l Lab. Aff., *Freedom of Association & Collective Bargaining*, U.S. DEP'T OF LAB., <http://www.dol.gov/ilab/issues/foa-cb/> [<http://perma.cc/DQA8-2X36>] (discussing the importance of freedom of association and collective bargaining). California public school teachers are also arguing to opt out of agency fees. See Deborah J. LaFetra, *Rescuing Teachers from the Grasp of Forced Unionism*, PLF LIBERTY BLOG (Feb. 26, 2015), <http://blog.pacificlegal.org/2015/rescuing-teachers-grasp-forced-unionism/> [<http://perma.cc/47XX-N4BE>] (noting that the public school teachers believe the time is right to review the garnishment of paychecks by unions to protect their freedom of association).

assistants in the Rehabilitation program who do not wish to support the union.¹¹⁵ While partially abandoning the *Abood* standard, *Harris* reversed the judgment in part and affirmed in part.¹¹⁶

E. Fundamentals of the Freedom of Association

The First and Fourteenth Amendments protect the right to freedom of association for individuals.¹¹⁷ As early as 1958, the Court noted that the freedom to engage in associations to advance ideas and beliefs is inherent in the Due Process Clause of the Fourteenth Amendment.¹¹⁸ In addition, freedom of association is a fundamental part of a free society, similar to

¹¹⁵ See *Harris*, 134 S. Ct. at 2644 (prohibiting agency fees from personal assistants in the Rehabilitation program). However, other people believe the inclusion of a ban on the union's ability to charge agency fees will decrease the union membership and could make the right of workers to organize obsolete. See *Mirer*, *supra* note 59, at 38 (analyzing that unions seek to protect, rather than harm, the interests of union members). The current trend for public employees is voting against unionization to avoid having non-members essentially waive their freedom of association. See Bruce Parker, *Vermont's Child Care Providers to Remain Non-Unionized*, VERMONTWATCHDOG.ORG (Mar. 3, 2015), <http://watchdog.org/203206/unionized-childcare-vermont/> [<http://perma.cc/VN3B-A8MF>] (recognizing that Vermont child care providers should not have to be under the union representation if they choose to be non-members of a representative union).

¹¹⁶ See *Harris*, 134 S. Ct. at 2644 (reversing the Court of Appeals judgment in part and affirming in part). Even though the Court acknowledged the First Amendment concerns that arise over government coercion through agency fees, the ruling was still considered a devastating blow to public-sector unions. See Tom McCarthy & Samuel B. Gedge, *Harris v. Quinn Symposium: A Quiet Blockbuster?*, SCOTUSBLOG, <http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-a-quiet-blockbuster/#more-214791> [<http://perma.cc/Z44J-F4BU>] (discussing the arguments for the support of the agency fee).

¹¹⁷ See *Huebert*, *supra* note 96, at 201 (identifying that previous Supreme Court holdings have protected the right to freedom of association under the First and Fourteenth Amendments); see also *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309–11 (1986) (holding that the teacher's union could not collect agency fees from non-members in accordance with the Constitution). The use of an auditor was considered overly broad to determine the accurateness of the expenditures. See *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987) (utilizing the auditor as an independent decision maker and in the traditional sense makes the scope of employment too vague). In determining the accurateness of the expenditures, absolute precision on behalf of the auditor is not necessary for public-sector unions. See *Am. Fed'n of Television & Recording Artists, Portland Local, 327 N.L.R.B. 474, 477* (1999) (recognizing that all that is needed for the determination of the expenditure accurateness is just a verification that the expenses were made).

¹¹⁸ See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (explaining that the Fourteenth Amendment embraces free speech, including the right to advance economic, cultural, religious, or political matters); *Donata Marcantonio, Knox v. Service Employees International Union: Balancing the First Amendment with Fairness Under Union-Shop Agreements*, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 211, 211 (2012) (examining the need for speech regulations to be minimally restrictive for analysis under the First Amendment); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (expressing that federal statutes require safeguards for non-members of unions).

that of free speech.¹¹⁹ Furthermore, freedom of association assumes a freedom *not* to associate with a public union.¹²⁰

As previously shown, the Court acknowledged that serious risks are imposed on the government when employees are required to pay subsidies for speech by recognizing the Court's ability to completely prevent the compelled speech.¹²¹ The Court held that if the contributions are used to support political or ideological causes that the employee opposes, then the employers' First Amendment rights are impinged, regardless of the time or money spent for such purposes.¹²² In addition, a mode of business that requires an employee to support a certain political party violates his or her First Amendment right.¹²³ Freedom of association

¹¹⁹ See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (acknowledging the State's burden of demonstrating a sufficiently important interest and closely drawn means to violating the freedom of association). A likely challenge the opposition would raise to the First Amendment challenge for implementing the proposed statute is *stare decisis*, but the argument is unlikely to work. Huebert, *supra* note 96, at 219. The majority in *Citizens United v. FEC* states that the Court will overrule decisions that offend the First Amendment while overruling a twenty-year old precedent. See 558 U.S. 310, 363 (2010) (highlighting that the Court will overrule a precedent if the decision was offensive to the First Amendment). Several factors were identified by the Court in *Citizens United* when considering whether to overturn a precedent: (1) "whether the decision was well reasoned;" (2) "the reliance interests at stake;" (3) "the antiquity of the precedent;" and (4) the shortcomings of the precedent. *Id.* The Court in *Harris* held that the experience over the course of history pointed to *Abood's* shortcomings. See *Harris*, 134 S. Ct. at 2633 (referring to the practical problems of non-members who object and the abundant administrative problems with union expenditures).

¹²⁰ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added) (acknowledging that freedom of association allows people to be a member of any organization); see also Gary Pecquet, *Private Property and Government Under the Constitution*, FOUND. FOR ECON. EDUC. (Jan. 1, 1995), <http://fee.org/freeman/detail/private-property-and-government-under-the-constitution> [<http://perma.cc/3DYZ-M7G4>] (weighing the economic concerns of the individual liberties that are protected by the Constitution).

¹²¹ See *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (recognizing the risks inherent with compelled subsidies of speech). Even if employees that are non-members continue working after being compelled to pay agency fees, the continuation of employment does not mean that non-members waived their constitutional right to freely associate with any organization. See *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (comparing the effective waiver of constitutional rights with being compelled to give up a fundamental right). In addition, unions can avoid subsidizing speech by becoming members-only organizations if they elect to not become the exclusive bargaining agent of an industry. See *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (justifying that unions are justly compensated by the *right* of being the exclusive bargaining agent).

¹²² See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986) (reasoning that the concern is not diminished based on each individual amount at stake); see also *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (evaluating that rights are infringed both when the government withholds or fines a grant of money based upon the political party of the individual).

¹²³ See *Elrod*, 427 U.S. 347, 355 (1976) (discussing the freedoms of association and belief). In addition, there is a right to be free from any unwanted government intrusions that impede

plays a significant role in the analysis of *Harris*, leading to the needed amendment of the Employees' Rights statute.¹²⁴

III. ANALYSIS

The majority's treatment of *Abood* suggests that the Justices will overrule the case in the future.¹²⁵ The good thing is the employers' rights will be protected once the court rules in their favor; the bad thing is there is no way of knowing when another case with the perfect fact scenario will reach the Court. First, Part III.A analyzes the freedom of association and its importance in society.¹²⁶ Then, Part III.B examines the error in analysis and reasoning behind *Abood*, and why Congress should step in and give all public employees the right to refuse agency fees.¹²⁷ Next, Part III.C reviews the uncertainty of *Abood's* ruling, which gives more credit to Congress amending the employees' rights statute to eliminate the *Abood* standard.¹²⁸ Next, Part III.D analyzes the impact *Harris v Quinn* will have in the short and long term.¹²⁹ Finally, Part III.E examines the future ramifications of the decision.¹³⁰

A. Importance of Freedom of Association

The analysis in *Abood* suggests that public-sector unions can compel an employee to pay an agency fee, but this was suspect over time with the development of case law.¹³¹ To uphold the unions' measures of charging

on a person's privacy. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (introducing the right of freedom of association as one that the framers of the Constitution sought to protect the pursuit of happiness).

¹²⁴ See *infra* Part IV (discussing the proposed statute to move the right to opt out of agency fees from quasi-public employees to all public employees due to the inconsistencies of the Supreme Court cases).

¹²⁵ See Huebert, *supra* note 96, at 219 (inferring the majority is ready to overturn *Abood* based on the evisceration of its reasoning in *Harris*).

¹²⁶ See *infra* Part III.A (examining the agency fee with the freedom of association).

¹²⁷ See *infra* Part III.B (discussing the errors in the analysis of *Abood* with regard to a misapplication of two cases).

¹²⁸ See *infra* Part III.C (describing why the Court was unable to make the decision to overturn *Abood* in *Harris*).

¹²⁹ See *infra* Part III.D (observing the short term and long term impacts the case will have on unions and the public sector).

¹³⁰ See *infra* Part III.E (exploring the impact this decision will have on public-sector jobs).

¹³¹ See *Knox v. Serv. Emps.*, 132 S. Ct. 2277, 2290 (2012) (acknowledging an anomaly exists with the free rider argument in justifying compelling non-members to pay a reduced amount of union dues). *Abood* treated *Hanson* and *Street* as if they had resolved the First Amendment infringement issue when the government coerces union support. See Huebert, *supra* note 96, at 205 (stating that *Abood* never solved the First Amendment issues).

members, the charge must serve a compelling interest.¹³² However, permitting public unions to collect fees from non-members crosses the limits of the First Amendment.¹³³ When balancing the state and individual interests together, the First Amendment weighs largely in favor of individual rights.¹³⁴ The framers of the U.S. Constitution intended our rights to be free from governmental force, which separates our nation from others.¹³⁵

The constitutional right to freedom of association inherently gives an individual the option to not associate with an organization.¹³⁶ For instance, if an employee wants to join an organization, he may do so, but if his personal beliefs contradict the organization's beliefs, then he may opt out of a membership and forgo any dues associated with the process.¹³⁷ Continuing to allow unions to force public employees to pay agency fees would violate the long recognized rule that public employees have the right to refuse payment of dues to unions that are contrary to their own political beliefs.¹³⁸ The Employees' Rights statute needs to be

¹³² See *Knox*, 132 S. Ct. at 2291 (recognizing that the procedure incorporated by the union is required to satisfy a high standard). The union in *Harris* had to prove the agency fee served a compelling interest. See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (holding that the agency fee did not fulfill the compelling state interest requirement).

¹³³ See *Knox*, 132 S. Ct. at 2291 (“By authorizing a union to collect fees from non[-]members and permitting the use of an opt-out system for the collection of fees levied to cover non[-]chargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.”).

¹³⁴ See Marcantonio, *supra* note 118, at 211 (establishing that the speech restrictions must be minimally restrictive to abide by the First Amendment). The Court weighed in favor of individual First Amendment interests under strict scrutiny review. *Id.* at 226.

¹³⁵ See Pecquet, *supra* note 120 (highlighting the freedom of religion, freedom of speech, and the right to assembly as rights exercised against the government). All the rights not specifically given to the government remain with the citizens. *Id.*

¹³⁶ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (interpreting the freedom of association as providing the opportunity to *not* associate). First Amendment concerns are raised when an individual is compelled to support an organization that is against his own beliefs. *Id.*; see *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (analyzing that a state cannot deprive a person of his freedom of association by compelling him to financially support a union).

¹³⁷ See *McCarthy & Gedge*, *supra* note 116 (describing that hundreds of thousands of personal assistants within the home caregiver market will be free to cease payments for union memberships). The personal assistants in *Harris* are now able to keep the agency fee amount in their own pockets. *Id.*

¹³⁸ See *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 n.9 (1986) (discussing the right of public employees to refuse compulsory dues); *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (asserting that orderly group activity must be considered with the freedom to associate in the advancement of political beliefs). As a fundamental right, public employees should be free to make their own decisions. *Elrod*, 427 U.S. at 357. The concept is that the state should not coerce the public employee into its own beliefs, but should allow the public employees the freedom to form their own beliefs. *Id.*; see also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (inferring that the power of the government to control men's minds

amended to put a halt to the continued deprivation of the non-member's freedom of association.¹³⁹

The Court does not "presume acquiescence in the loss of fundamental rights."¹⁴⁰ This statement suggests that public workers do not presumably acquiesce to losing their freedom of association through silence or action.¹⁴¹ The union supporters argue for the continued implementation of the agency fee because the agency fee produces labor equality in bargaining power for the employees and eliminates the free rider problem.¹⁴² The agency fee makes unions capable of supporting all public employees without producing an undue burden of representing a group of people for free.¹⁴³ The contention that the agency fee prevents free riders misses the key issue that all public employees have the right to freely choose who they want to be associated with and support.¹⁴⁴ *Harris* mentions that freedom of association is a fundamental right and should be treated as such.¹⁴⁵

would make our constitutional heritage rebel).

¹³⁹ See *infra* Part IV (proposing an amendment to the Employees' Rights statute to give all public employees the right to opt out of agency fees).

¹⁴⁰ *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). The lack of acquiescence associated with the loss of the freedom of association is, to a lesser extent, comparable to racial discrimination. *Id.* If someone of a racial minority refused to speak up against discrimination in a public place, that does not mean he acquiesced to the discriminatory treatment. *Id.* Similarly with the public employee's right to freely associate with an organization, an employee does not acquiesce to losing his freedom of association through silence and should not lose his job for failing to pay dues. *Id.*

¹⁴¹ See *id.* (providing the insight that courts presume people do not waive their fundamental constitutional rights). In comparison, people that commit securities fraud would normally not waive their constitutional right of trial by jury. *Id.* In a similar matter, employees that are forced to pay fees to unions do not inherently waive their right of freedom of association. *College Savs. Bank*, 527 U.S. at 682.

¹⁴² See *McCarthy & Gedge*, *supra* note 116 (discussing the arguments for the support of the agency fee). In addition, one belief suggests that the laws aimed at unions should be illegal in its entirety. See *Mirer*, *supra* note 59, at 38 (articulating that the opposition believes the agency fee produces equality in bargaining power for employees).

¹⁴³ See *Mirer*, *supra* note 59, at 33 (discussing the negative impacts of free riders on the union membership system). Unions stress that they need resources to cover the costs of collective bargaining. *Id.* In addition, unions believe that their bargaining power decreases with a lack of funds. *Id.* However, *Harris* recently ruled that First Amendment objections are generally sufficient to overcome free rider arguments. See *Harris v. Quinn*, 134 S. Ct. 2618, 2627 (2014) (pointing out that the free rider arguments under *Abood* are insufficient to overcome the First Amendment arguments).

¹⁴⁴ See *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (explaining that the union's requirement to represent every employee is optional and does not justify the use of an agency fee). The requirement is optional because the union can opt to become a members-only union, thus eliminating the need to require just compensation of all employees. *Id.*

¹⁴⁵ See *Bureau of Int'l Lab. Aff.*, *supra* note 114 (articulating that the ability to organize is at the basis of freedom of association). The Bureau of International Labor Affairs promotes freedom of association by enforcing labor rights within free trade agreements. *Id.* Union

B. *Error in the Analysis of Abood*

The Court in *Harris* raised many errors within the analysis of *Abood*.¹⁴⁶ First, *Abood* never examined whether there was a compelling governmental interest with preserving labor peace and preventing free riding, which is why the Court relied upon *Hanson* and *Street*.¹⁴⁷ The Court in *Abood* based its decisions on questionable grounds and did not foresee the practical problems associated with its decision.¹⁴⁸ In particular, the Court incorrectly relied upon *Hanson* and *Street*, as these cases did not touch on the constitutional issue of compulsory payments to public-sector unions.¹⁴⁹ *Hanson* disposed of the question in one sentence and *Street* ultimately did not make, or attempt to make, a constitutional decision.¹⁵⁰ This failure amounts to a serious error in the analysis of *Abood* and produces further questions with regard to the constitutionality of agency

members cannot be prevented from speaking out at a public meeting in opposition of the regulation because this is at the heart of the expansion of worker influence on the employers. *Id.*

¹⁴⁶ See *Harris*, 134 S. Ct. at 2632 (describing that *Abood*'s analysis was questionable in many ways).

¹⁴⁷ See Huebert, *supra* note 96, at 203 (stating that the Court did not examine how the dissenting employees could have their First Amendment rights protected). The Court held that the government could compel public employees who were non-members to pay agency fees to cover the costs of collective bargaining. *Id.* At the time, the infringement was justified to prevent free riders from abusing the union's representation services, and this would avoid the conflict and competition of rival unions within the same sector. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 260–61 (1977) (highlighting the argument of requiring agency fees to combat confusion and conflict amongst the public employers).

¹⁴⁸ See *Harris*, 134 S. Ct. at 2633 (holding that a major problem with the system is that auditors do not correct the categories of union expenditures); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (“[C]hargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”). Auditing the correctness of the union’s categorization of expenditures is problematic. *Harris*, 134 S. Ct. at 2633. Auditors do not make legal determinations as to the correctness of chargeable expenditures. *Id.* Instead, the auditors only make sure that expenses were actually made. *Id.*; see *Andrews v. Educ. Ass’n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987) (ensuring that the payments the union claims it made for specific expenses were actually made for the listed expenses); *Am. Fed’n of Television & Recording Artists, Portland Local*, 327 N.L.R.B. 474, 477 (1999) (recognizing that auditors do not have the expertise to make legal findings determining the chargeability of certain expenditures).

¹⁴⁹ See *Harris*, 134 S. Ct. at 2632 (“The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.”).

¹⁵⁰ See *id.* at 2630 (noting that neither of the cases reached the constitutional issue); see also *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (stating that the constitutional questions were of the utmost gravity, but the Court did not want to touch those issues); *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956) (comparing the requirement of joining a state bar association with compulsory membership dues imposed by unions).

fees and compulsory payments because all public employees would have been given the right to opt out of agency fees had *Abood* correctly interpreted *Hanson* and *Street*.¹⁵¹

Second, *Abood* extended its authority beyond the interpretation that should have been implemented by imposing the agency fee, rather than authorizing the implementation of the agency fee.¹⁵² The closest *Hanson* came to supporting compulsory fees was a statement that, when compared to a state law requiring membership of an integrated bar, created no impairment or infringement of First Amendment rights.¹⁵³ The Court expanded its reasoning in *Abood* because compulsory integrated bar memberships were never held to be constitutional before *Hanson*.¹⁵⁴ Five years later, Justice Douglas, in *Hanson*, raised questions about his reasoning by changing his stance on furthering the protection of the First Amendment through prohibiting compulsory memberships for the integrated bar.¹⁵⁵

Third, *Abood* did not answer the constitutional questions concerning compulsory dues and freedom of association.¹⁵⁶ Instead, the RLA was

¹⁵¹ See *Harris*, 134 S. Ct. at 2632 (suggesting that *Abood* did not decide the constitutionality of compulsory payments). *Abood's* treatment of *Street* and *Hanson* produced further questions in analysis. *Id.*

¹⁵² See *id.* (describing the imposition of the fee, rather than the authorization of the fee, as presenting a different type of question to the Court). The fundamental misunderstanding was that *Hanson* declared the authorization of union shop agreements constitutional, rather than the imposition of union shop agreements. *Id.*

¹⁵³ See *id.* at 2629 (acknowledging that lawyers can be compelled to become a member of an integrated bar). In *Hanson*, the Court held that the RLA was constitutional in the authorization of union shop contracts. See *Street*, 367 U.S. at 749 (applying the reasoning in *Hanson* to *Street's* factual scenario); see also *Hanson*, 351 U.S. at 238 (holding that the requirement does not violate the First or Fifth Amendments).

¹⁵⁴ See *Harris*, 134 S. Ct. at 2629 (explaining the reasoning as remarkable because the Court never addressed the constitutionality of compulsory membership dues to an integrated bar); see also *Hanson*, 351 U.S. at 238 (proposing the analogy of a lawyer joining the state bar association with unions compelling membership fees); 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, 565 (2006) (describing that *Abood* raised issues that could affect two First Amendment rights: freedom of association and freedom of speech).

¹⁵⁵ See *Harris*, 134 S. Ct. at 2629 (examining the inconsistencies of Justice Douglas' reasoning). The states compel lawyers to join the bar, but do not require a similar membership for dentists, nurses, or doctors. See *Lathrop v. Donohue*, 367 U.S. 820, 878 (1961) (Douglas, J., dissenting) (stating that doctors, nurses, and dentists are excluded). These groups protect the public and, along with other groups, increase the vital services across the nation. *Id.* Subsequently, Justice Douglas thought the analogy he used in *Hanson* failed because being partially regimented behind causes the lawyers oppose are not compatible with the First Amendment. See *id.* at 878–84 (connecting the analogy between lawyers joining an integrated bar and an employee being compelled to join a union).

¹⁵⁶ See *Street*, 367 U.S. at 749 (determining that the Court should weigh against unnecessary

construed as not giving the unions unlimited power to spend compelled dues to support political causes that employees oppose.¹⁵⁷ This is not to say that all public employees oppose union memberships, but those who do, should not be compelled to pay the agency fee associated with the union.¹⁵⁸ However, the mere fact that *Street* did not make a constitutional decision raises questions about the foundation of *Abood's* analysis by only addressing the power of unions to spend compelled dues, rather than the constitutionality of compelling non-members to make payments to organizations in opposition of their own views.¹⁵⁹

The arguments for the implementation of agency fees failed because the free rider arguments were not enough to overcome the First Amendment objections.¹⁶⁰ Justice Alito reviewed the Court's rulings on mandatory union fees before *Harris*.¹⁶¹ He created the following analogy for further review:

constitutional decisions if Congress made this intention clear in the statute). The Court recognized the importance of the constitutional questions by phrasing them with the utmost gravity. *Id.*; see also Paul Kulwinski, *Trust in God Going Too Far: Indiana's "In God We Trust" License Plate Endorses Religion at Taxpayer Expense*, 43 VAL. U. L. REV. 1317, 1365 (2009) (applying the *Abood* analysis for private speech when the government is forcing taxpayers to fund a private message on a license plate that is in opposition with their own beliefs).

¹⁵⁷ See *Harris*, 134 S. Ct. at 2630 (establishing that the Court decided not to address the constitutional issue). The Court further explained the union could give a refund for the employees that object to the funds used for political causes. *Id.*; see Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 255 n.109 (1987) (expressing that ethical, literary, social, economic, and artistic matters are entitled to First Amendment protection in its entirety).

¹⁵⁸ See Huebert, *supra* note 96, at 210 (acknowledging that up until *Knox*, the non-members could be forced to pay union fees). The Court in *Knox* recognized the flaw and gave the suggestion that the Court may reconsider *Abood* in a subsequent case. *Id.* The issue in *Knox* was whether non-members of a union could be required to pay a temporary increase in fees for political purposes with no opportunity to opt out and no notice. See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2284–85 (2012) (recognizing the public-sector union issue within *Knox*). The Court held that the First Amendment did not permit the union to increase the fees with no notice when coupled with the opportunity to opt out. See Huebert, *supra* note 96, at 210 (reporting that seven Justices decided that First Amendment protection disallowed unions to increase their fees).

¹⁵⁹ See *Harris*, 134 S. Ct. at 2631 (ruling that *Street* did not reach any constitutional issues and was resolved as a matter of statutory construction.); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220 (1977) (holding that the RLA could be construed to avoid the constitutional issues).

¹⁶⁰ See *Knox*, 132 S. Ct. at 2289 (stating that First Amendment objections carry more weight than the free rider arguments). For example, a community organization that cleans a geographical area would have citizens that free ride on their services. See Huebert, *supra* note 96, at 210 (suggesting that doctors may be free riders under a medical lobbying group). Few people would argue that the citizens within the community should have to pay for the services. *Id.*

¹⁶¹ See Huebert, *supra* note 96, at 210 (examining whether Justice Alito's majority opinion took the necessary step to question the mandatory union fees, thus producing inconsistencies

If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.¹⁶²

The free rider argument is considered an anomaly because the argument works solely to further labor peace.¹⁶³

Fourth, there was also a great concern with non-member funds paying for political activities.¹⁶⁴ Justice Alito correctly noted that if union employees opt in the full-fledged union fees, as opposed to the opt out strategy, then the risk of using fees to further ideological ends would cease.¹⁶⁵ Justice Alito raised a good point when he asked rhetorically why the burden should be on the non-member when opting out of making the payments because there was an inherent unfairness imposed on the public employees.¹⁶⁶ In addition, employees would face a significant burden if they were required to raise issues concerning their subsidized speech when unions could impose a new assessment of chargeable expenditures at any time.¹⁶⁷

among the Court and furthering the need for statutory change).

¹⁶² *Knox*, 132 S. Ct. at 2289–90. The agency fee primarily promoted labor peace and reduced the employees from free riding on the services. *Id.* at 2290.

¹⁶³ *See id.* (acknowledging the anomaly with accepting the free rider arguments to further labor peace). The Court used the anomaly to further labor peace in the past. *Id.*

¹⁶⁴ *See Huebert, supra* note 96, at 211 (stressing concern over the burden on non-members to ensure that none of their funds were being used for political activity). The concern mainly deals with the burden being placed on the employees for protection against coerced speech. *Id.*

¹⁶⁵ *See Knox*, 132 S. Ct. at 2290 (stating that an opt out system, as opposed to an opt in system, establishes a risk that funds will be used for political purposes); Huebert, *supra* note 96, at 211 (recognizing the impingement on the employees' freedom of association with the opt out system imposed by unions).

¹⁶⁶ *See Knox*, 132 S. Ct. at 2290 (questioning the justification for placing the burden on the non-members of a union to show that they do not want to pay for the extra costs when they inherently have less bargaining power). The Court should have a system of accountability so that non-member funds are not used, even temporarily, to fund political activities. *Id.*

¹⁶⁷ *See id.* at 2294 (establishing that unions can create chargeable expenditures by utilizing a broad viewpoint in its description to the auditors). In addition, objecting employees would have to utilize more funds, on top of the amount compelled by the unions, to object to the

Fifth, *Abood* failed to distinguish compelled support between public-sector and private-sector unions due to the public-sector unions' capability of fulfilling many civic and political positions during its role in collective bargaining.¹⁶⁸ Unlike a private employer, the government makes decisions concerning employee pay that directly affect public policy through taxpayer dollars, thus requiring the need for change through amending the Employees' Rights statute.¹⁶⁹ As a government employer, the roles of collective bargaining and lobbying in the public sector are closely related and is a key reason why the analysis concerning private employees in *Hanson* and *Street* should not be used.¹⁷⁰

In *Abood*, the Court made a distinction between non-members opting out of paying fees for activities not relevant to collective bargaining, and the government authority compelling the non-member's support for activities in connection with collective bargaining.¹⁷¹ This distinction is unclear because both types of speech are political, but still does not clarify whether non-members will be forced to pay unions for political speech unrelated to collective bargaining.¹⁷² Furthermore, the effort to uphold First Amendment rights could make little sense for non-members because that would require the non-members to review the union's expenditure report and proper use of employee funds.¹⁷³

union's chargeability determinations. *Id.* In essence, there is a barrier to entry for challenging the union expenditures. *Id.*

¹⁶⁸ See *id.* at 2289 (describing the reason why compulsory fees are compelled speech and prohibited by the First Amendment). *Knox* did not revisit prior cases to determine if First Amendment rights provided adequate recognition. *Knox*, 132 S. Ct. at 2289. See Huebert, *supra* note 96, at 205 (distinguishing the flaw in *Abood*'s analysis between the public-sector and private-sector unions). Unions that deal with government employees are inherently political, and the First Amendment case law prohibits forced support of political speech. *Id.*

¹⁶⁹ See Huebert, *supra* note 96, at 205-06 (acknowledging that unions take positions that have powerful civic and political consequence). In this regard, the government is not similar to a private employer. *Id.*

¹⁷⁰ See *Lehnert v. Farris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (supporting the close analogy between collective bargaining and lobbying because of the dual roles of the government as the policymaker and employer). In the case of personal assistants, unions are essentially lobbyists that can legally force employees to pay for its advocacy. See Huebert, *supra* note 96, at 206 (identifying that unions can only argue for more money and benefits).

¹⁷¹ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (deciding that the Constitution only requires that expenditures be funded from dues, assessments, or charges paid by non-objecting employees that are not coerced into joining against their will).

¹⁷² See Huebert, *supra* note 96, at 206 (acknowledging that non-members may still be compelled to pay because the union's auditors do not question the credibility of chargeable union dues).

¹⁷³ See *id.* at 207 (examining the costly efforts needed to challenge a fraction of the fees associated with switching from being a member to being a non-member of a union, including participating in hearings, filing the unfair labor practice charge with the court, and pursuing appeals).

The coerced union support harms the employees' First Amendment rights and distorts the influence on public policy.¹⁷⁴ If the government coerces people with opposing views to support a contrary group, then the political forum is non-existent.¹⁷⁵ The public unions are given an unfair advantage because the cost to compete against them may be prohibitively high for employees.¹⁷⁶

Sixth, if Illinois' argument to expand the coverage of *Abood* to government subsidy recipients were upheld in *Harris*, the distortion would expand beyond the subsidy recipients.¹⁷⁷ Forcing a union fee on subsidy recipients essentially gives the union more state funds to achieve whatever political goals the union has in mind, including reelecting the same state officials who enabled the unionization and supported their policies.¹⁷⁸ In addition, if people opt out of the union dues, they will still pay for some of the representation.¹⁷⁹ As a consequence of appointing representatives for the subsidy recipients, the incumbent officials could shift the electoral process in their favor and weaken the competition in governmental policies and ideas that the First Amendment is designed to protect.¹⁸⁰

Creating a cycle to fund political officials with union dues moves away from what should be the primary purpose: collective bargaining.¹⁸¹

¹⁷⁴ See *id.* at 207–08 (exposing the bias coerced speech has on the marketplace for political ideas towards the union's favor that potentially decreases everyone's ability to influence public policy). In *Knox*, the Court stated that the First Amendment created an environment where all can achieve their political goals without hindrance from the state. See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2295 (2012) (requiring public-sector unions to obtain the non-members affirmative consent before they exact funds from those non-members).

¹⁷⁵ See Huebert, *supra* note 96, at 207–08 (asserting that coercing one group to support another cannot exist under the Constitution).

¹⁷⁶ See *id.* at 208 (discussing that the costs of opposing union views may be too high for employees to voice an opinion, thus effectively chilling employee speech).

¹⁷⁷ See *id.* (stressing the bad consequences resulting from the expansion). The problem with covering government subsidy recipients is that the *Abood* standard would expand to all subsidy recipients, rather than just personal assistants. *Id.*

¹⁷⁸ See *id.* (inferring that requiring subsidy recipients to pay dues to a union is good for politicians, but bad for employees because the money goes to the politician's pockets). Change must be made to the current labor law for unions to continue serving the collective bargaining purpose. See Becker, *supra* note 94, at 1647 (acknowledging that the law must change because the political parties evolve their behavior to the law).

¹⁷⁹ See Huebert, *supra* note 96, at 208 (recognizing little doubt that non-members will have to pay for some of representation expenses due to the burden placed on the employees to opt out of the union's political funding).

¹⁸⁰ See *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (noting that the right to support a political association goes to the heart of the First Amendment). The protection provides an opportunity for uninhibited debate on political issues. *Id.*

¹⁸¹ See Huebert, *supra* note 96, at 209 (exposing the system where the officials receive monetary funds from employees, and in turn, make contributions to public officials). The personal assistants did not satisfy the compelling governmental interest of labor peace. See

The government officials are aware of the many political opportunities from the unionization of personal assistants.¹⁸² In *Harris*, the executive orders raised more questions about compelled speech through agency fees because the orders benefited top political supporters for both governors.¹⁸³ For instance, the groups affiliated with SEIU were former Illinois Governor Pat Quinn's largest contributors, donating approximately eighteen percent of all contributions—much more than all the amounts combined from the Democratic Party committee.¹⁸⁴ The Court knew the impact unions have on political parties, which is part of the reason why the Court declined to overturn *Abood* at that time.¹⁸⁵

C. Uncertainty of the Ruling

The Court did not want to make the decision to overturn *Abood* for two reasons.¹⁸⁶ First, only five votes were needed to overturn *Abood*, and the critics believe the Court hesitated to overturn the precedent because of the uncertainty of the fifth vote.¹⁸⁷ People believe the Court decided to wait for another case to become relevant in the judicial system to address the issue more precisely, which gave the Justices more time to understand the importance of overturning *Abood*.¹⁸⁸ Adaptation was the second

id. at 216 (stating that labor peace was not a compelling government interest in *Harris*). The assistants did not intend to compete with the union, just the right to opt out of contributions to the union. See *Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014) (holding the agency fee does not satisfy the *Knox* test). The conflicting demands were lessened because the union's purpose was to increase pay and benefits, while providing little to no other benefits. *Id.*

¹⁸² See Huebert, *supra* note 96, at 208 (describing the government officials as being well aware of the opportunities from the unionization of personal assistants).

¹⁸³ See *id.* at 209 (asserting that SEIU gave roughly \$825,000 to Blagojevich's 2002 campaign). Two months after Blagojevich began his term as governor, he recognized SEIU as the exclusive representative for personal assistants. *Id.*

¹⁸⁴ See *id.* (expressing that SEIU gave over \$4.3 million to Governor Quinn's election). The power to force union support could create a cycle where unions make monetary donations to public officials; the public officials compel the subsidy recipients to make monetary contributions to the union; and the union makes more contributions to the public officials. *Id.* This system effectively compels employee speech. *Id.*

¹⁸⁵ See *supra* note 181 and accompanying text (discussing the system of using funds to promote public officials).

¹⁸⁶ See Eastman, *supra* note 112 (examining the reasons against completely overturning *Abood*).

¹⁸⁷ See *id.* (stating that one or more of the Justices in the majority thought *Abood* could not be properly distinguished, which delayed the overruling until another case comes to the court with more applicable facts).

¹⁸⁸ See *id.* (recognizing the need to wait to make a subsequent decision on the matter). Another case that may come to the Court's docket deals with public teachers from California. See LaFetra, *supra* note 114 (recognizing that *Abood* has been detrimental for individual rights for over forty years). Between the time of *Harris* and this Note being published, the U.S. Supreme Court issued an opinion in *Friedrichs v. California Teachers Association* that concerned

reason people believe the Court decided to wait for a new case.¹⁸⁹ The holding in *Harris v. Quinn* is a major step towards overturning *Abood* and expanding the right to refuse agency fee payments to all public employees.¹⁹⁰ If the Court, instead, decided to expand the initial holding from quasi-public employees having the right to opt out of agency fees, the decision would have been outside the scope of the facts in the case.¹⁹¹ The reason the decision would have been outside the scope is because *Harris* did not deal with full-fledged public employees, but rather a hybrid form of a public employee that was solely considered to be public for collective bargaining reasons.¹⁹² Furthermore, by waiting for a different fact scenario in another case to address all public employees, the unions have more time to adapt to the new rule and prepare for Congress to give all non-members the right to disassociate themselves from agency fees without repercussions.¹⁹³

The ruling in *Harris* further introduces more ambiguity into the law, rather than clarity.¹⁹⁴ Justice Kagan's dissenting opinion noted the majority created a perverse result by punishing the state for managing its program in a decentralized way that respects the independence and

overruling *Abood*, No. 14-915, 2016 WL 1191684, at *1 (Mar. 29, 2016). After oral arguments, but before the issuance of this opinion, Justice Scalia passed away, which led to the Court splitting four-to-four in a one sentence opinion on the issue of overruling *Abood*. *Id.* Thus, the Court set no legal precedent and left the constitutional issue still in the air, which further necessitates the need for this Note's proposed amendment to the Employees' Rights statute. *Id.*

¹⁸⁹ See Eastman, *supra* note 112 (discussing the potential future attacks on *Abood* that may be brought within the near future).

¹⁹⁰ See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (holding that the First Amendment prohibits unions from collecting agency fees from personal assistants). The Court noted that third parties are not allowed to subsidize speech from people that do not wish to support the material. *Id.*

¹⁹¹ See Eastman, *supra* note 112 (describing the process of completely overturning *Abood* would restructure employment across the country). Eastman believes that there was at least one Justice in the majority that will choose not to overrule *Abood* outright. *Id.* The courts also proved that public employees should be treated differently than private employees because they are different. *Id.*

¹⁹² See *Harris*, 134 S. Ct. at 2626 (establishing the requirement for vicarious liability in tort and advocating for health insurance benefits). The union was used solely to retrieve feedback from the personal assistants to make their home delivery services more efficient. *Id.* at 2641. The Court raised that the analysis was questionable on several grounds. See Eastman, *supra* note 112 (acknowledging that the Court did not distinguish between public union expenditures for political ends and collective bargaining purposes).

¹⁹³ See *infra* Part IV (recognizing the need for an amendment to the employees' rights statute to give all public employees the right to opt out of agency fee payments).

¹⁹⁴ See Huebert, *supra* note 96, at 219 (stating that the ambiguity of the analysis is a reason for the court to completely overrule *Abood*). The analysis in *Abood* is also poorly reasoned, but the Court's composition could change with newly elected Justices. *Id.*

dignity of program beneficiaries.¹⁹⁵ If the state were to classify quasi-public employees similar to full-fledged public employees, in regard to converting subsidy money to unwanted benefits, then would the payment of a mandatory union due be any more just?¹⁹⁶ The result in this scenario produces more government control over personal assistants, healthcare patients, and coerced union fees, which is the true conflict within the reasoning.¹⁹⁷ This line of questioning should result with the expansion of freedom of association to all public employees by amending the Employees' Rights statute.¹⁹⁸

D. *The Impact of Harris v. Quinn*

The impact of *Harris v. Quinn* will be significant for unions.¹⁹⁹ In the short-term, over 20,000 personal assistants in Illinois will no longer be subject to agency fees.²⁰⁰ The effect may similarly expand to other states as well.²⁰¹ This change could produce a negative impact on the unions because of the decrease in funding to support union expenditures.²⁰² However, after overruling *Abood* and expanding the holding in *Harris* to all public employees through amending the Employees' Rights statute, the likelihood of the continued existence of the unions is high because other organizations have shown success by surviving off of only membership fees.²⁰³ In addition, the home-care workers in SEIU Healthcare Illinois

¹⁹⁵ See *Harris*, 134 S. Ct. at 2650 (Kagan, J. dissenting) (explaining the majority decision reached a perverse result by not following the legal precedent).

¹⁹⁶ See Huebert, *supra* note 96, at 218 (acknowledging the disadvantages of treating quasi-public employees as full-fledged public employees). California teachers state that forcing public school teachers to make payments to labor unions violates their First Amendment rights. See LaFetra, *supra* note 114 (articulating that the *Abood* standard proved to be insufficient over time to protect the constitutional rights of public employees).

¹⁹⁷ See Huebert, *supra* note 96, at 218 (noting that it is not satisfactory to force employees to pay union fees that they do not want to pay). Other industries in the public-sector are moving away from unionization. See Parker, *supra* note 115 (stating that the home child care businesses throughout Vermont voted against unionization by a vote of 418 to 398). The union will have to wait another year before filing for another vote. *Id.*

¹⁹⁸ See *infra* Part IV (explaining the Employees' Rights statute needs to be amended to give all public employees the right to associate with any organization of their choice).

¹⁹⁹ See Kramer & Ditelberg, *supra* note 98 (discussing the potential short and long term impact resulting from *Harris*).

²⁰⁰ See *id.* (describing the proportion of full union members versus fair-share fee payers as unknown).

²⁰¹ See *id.* (acknowledging the decrease in funding may hinder unions in their ability to represent all employees in the bargaining unit).

²⁰² See *id.* (explaining the significance to the labor movement). 38.7% of the public-sector employees are represented by a union. *Id.* If public-sector employees do not have to pay the agency fees, it may be a critical blow to the public-sector unions. *Id.*

²⁰³ See *infra* Part IV (stating that unions can still function without the agency fee).

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project a wage increase after the decision of *Harris*.²⁰⁴ This increase suggests that the union goals of increasing the working standards will continue even without the agency payments from quasi-public employees.²⁰⁵

The long-term impact needs to be addressed to fully conceptualize the magnitude of *Harris*.²⁰⁶ The holding will likely bring an increase in litigation that will sway the tipping point from quasi-public employees to encompass all public employees because of the necessity to protect the freedom of association.²⁰⁷ In addition, the decrease in funding could decrease the political power of the public sector unions.²⁰⁸ However, unlike what many union supporters believe, employers have been adamant about improving the working conditions to better serve employee needs, thus taking away from the unions' purpose.²⁰⁹ Furthermore, this decision could expand to the private sector, but that is beyond the scope of this Note.²¹⁰

E. Future Ramifications of the Inconsistent Holdings

There will be future ramifications once Congress steps in to deal with the inconsistent holdings.²¹¹ In states that eliminated the requirement of agency payments by non-union members, the total number of jobs and the union memberships increased.²¹² In contrast to benefits, the amount of funding necessary for union expenditures may significantly decrease.²¹³

²⁰⁴ See Kelleher, *supra* note 97 (showing that in the year of 2014, SEIU membership amount increased to 10,000 personal assistants within the home care industry). *But see* Brunner, *supra* note 113 (recognizing that some state employees are still paying for the political functions of unions even after notifying the unions and objecting numerous times).

²⁰⁵ See Kelleher, *supra* note 97 (explaining that the ruling in *Harris* will be a shot of adrenaline for the unions and employees).

²⁰⁶ See *infra* Part IV (expanding on the holding in *Harris* by providing an amendment to the Employees' Rights statute).

²⁰⁷ See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (holding that the First Amendment prohibits unions from collecting agency fees from personal assistants); *see also* Kramer & Ditelberg, *supra* note 98 (stating the potential short-term and long-term impact about the future of unions).

²⁰⁸ See McHenry, *supra* note 96, at 601 (reasoning the decline in union membership is due to the failure of the union's adjustment to the economic realities).

²⁰⁹ See Mayer, *supra* note 96, at 17 (finding that there is greater job satisfaction among non-members of unions because some unions adapted to focus more of their intention on employee concerns).

²¹⁰ See *infra* Part IV (acknowledging that the contribution deals with public employees).

²¹¹ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (noting that unions can spend funds on political purposes as long as the employees do not object).

²¹² See Gantert, *supra* note 93 (stating that the jobs and wages increased in right to work states).

²¹³ See Mirer, *supra* note 59, at 33 (discussing the negative impacts of free riders on the union membership system). The depletion in money from the agency fees suggests that the

In addition, the analysis in *Harris v. Quinn* could lead practitioners to focus on other arguments necessary for overturning *Abood*.²¹⁴ For instance, *Abood* failed to distinguish the difference between opposition of union speech in the private-sector and in the public-sector.²¹⁵ In addition, *Abood* failed to distinguish the difficulty of classifying expenditures between achieving political ends and collective bargaining purposes.²¹⁶ Furthermore, the analysis in *Abood* relies upon an unsupported assumption stating that the exclusive representation in the public-sector is dependent on an agency shop system, which is not justified by any facts.²¹⁷

Overturning *Abood* follows the decreasing trend of union memberships suggesting that a majority of public employees will be satisfied with the opportunity to choose the option of supporting a union.²¹⁸ Compulsory membership dues provide a significant amount of funding for union expenditures.²¹⁹ The agency fees alone bring in millions of dollars for public unions.²²⁰ Furthermore, studies suggest that the aggregate drop in union membership may negatively impact public union

union coffers and resources will be depleted. *Id.* Without the resources, the unions cannot process grievances for arbitrations or be able to build a strike fund to protect employees. *Id.* This process may lead to union members questioning whether there is any incentive to join a union, but generally the benefits are enough to keep the current members around. *Id.*

²¹⁴ See *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014) (describing the concerns with *Abood*'s reasoning). One of the arguments is that unions can survive on voluntary, rather than mandatory, fees. *Id.* at 2631; *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014).

²¹⁵ See *Harris*, 134 S. Ct. at 2632 (stating that there is substantial importance in distinguishing between public and private-sector bargaining). The political issues involved with public-sectors are vastly different than the private-sector. *Id.* These issues are brought up through the negotiation of benefits, pensions, and wages that are not driven in the private sector. *Id.*

²¹⁶ See *id.* at 2632–33 (establishing that collective bargaining concerns lobbying, political advocacy, and the union's dealings with the employers). However, in the public sector, political advocacy, collective bargaining, and lobbying are geared towards the government. *Id.*

²¹⁷ See *Harris*, 134 S. Ct. at 2634 (acknowledging that exclusive representation is not dependent on an agency shop or union). The reliance on an unsupported empirical assumption is one of the main reasons why *Abood* should no longer be the standard. *Id.*

²¹⁸ See McHenry, *supra* note 96, at 601 (stating that the employee trend is to forgo union protection). Employees are already protected by federal laws and may not feel the desire to seek union protection. *Id.* In addition, many employers have become more sophisticated and aggressive in resisting unionization. *Id.*

²¹⁹ See Kersey, *supra* note 92 (recognizing that millions of dollars go to unions every year from agency fees). The problem with this system is that unions want the state government to be more expensive to have more money for political funding. *Id.*

²²⁰ See Gantert, *supra* note 93 (explaining the correlation between a right to work state's economy as growing and vibrant and the non-right to work state's economy as aging and stagnant).

treasuries.²²¹ However, history shows that union memberships decreased from the mid-1950s to current day and most likely will continue to decrease.²²²

The ruling in *Harris* will benefit many Americans by protecting the freedom of association of all non-members of unions.²²³ Personal assistants and subsidy recipients in Illinois will no longer have to support union representation through mandatory dues in opposition of their views.²²⁴ Other groups have already sought help since the decision was rendered.²²⁵ In addition, states suspended unions from collecting agency fees from personal assistants.²²⁶ The National Right to Work Legal Defense Foundation will be the organization that enforces the states to comply with the Supreme Court ruling.²²⁷

By failing to completely overturn *Abood*, the United States Supreme Court leaves the question open for future judicial intervention.²²⁸ While some people may argue the best remedy is for the case law to develop, full-fledged public employees will continue to have their freedom of association infringed if the courts do not address the issue immediately.²²⁹

²²¹ See Greenhouse, *supra* note 95 (discussing the effect on the unions' treasuries and memberships). The drop in union memberships will protect the nation's families from the union influence. *Id.*

²²² See Becker, *supra* note 94, at 1644 (describing that the public sector density rose over time). The union density decreased in Wisconsin from forty percent in 1959 to seven percent in 2011 when Governor Walker gutted the public-sector bargaining law. *Id.*

²²³ See Huebert, *supra* note 96, at 219 (reiterating that many Americans will benefit from *Harris* because the holding is a win for First Amendment rights). Other family-care providers in Washington challenged the union's capability of charging agency fees to full-fledged public employees. See Brunner, *supra* note 113 (acknowledging that the purpose of the lawsuit is to build upon the *Harris* decision).

²²⁴ See Huebert, *supra* note 96, at 219 (believing that Illinois' personal assistants will be free from government compulsion with regards to agency fees).

²²⁵ See *id.* at 220 (supporting the implementation of agency fees through evidence of employees using *Harris* to move around the forced unionization from Governor Blagojevich's order). The Freedom Foundation challenged the SEIU to force the union to stop deducting fees from the non-members paychecks. See Brunner, *supra* note 113 (seeking to build this lawsuit on the *Harris* decision to give all public employees the option to opt out of agency fees).

²²⁶ See Huebert, *supra* note 96, at 220 (demonstrating that Connecticut suspended the agency fee system for personal assistants).

²²⁷ See *id.* ("If any state doesn't comply, the National Right to Work Legal Defense Foundation and others will no doubt be ready to go to court to make sure they do—until no one is forced to give money to a union simply because he or she receives a government subsidy.").

²²⁸ See *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (holding that unions cannot compel agency fees from quasi-public employees, but leaving the option for all public employees open for future congressional or judicial intervention).

²²⁹ See *infra* Part IV.B (addressing the concern of needing congressional intervention to solve the agency fee issue).

In addition, there is no telling who the next Supreme Court Justice will be after the death of Justice Scalia, which makes an amendment to the Employees' Rights statute even more necessary after the recent split four-to-four decision in *Friedrichs v. California Teachers Association* that addressed overruling *Abood*.²³⁰ Due to the uncertainty of the time period, Congress is in the best position to settle the issue by amending a statute.²³¹

IV. CONTRIBUTION

Although the Employees' Rights statute gives employees many rights with regard to labor organizations, more rights still need to be introduced to protect the right of freedom of association and give the employees the opportunity to opt out of agency fees.²³² Amending the statute to give employees the right to refuse agency fees is an effective way of protecting their freedom of association because it eliminates the unions' use of subsidized speech.²³³ This contribution is based on the employee raising his statutory right before the Supreme Court renders a decision with nine Justices.

Congress is in the best position to protect all public employees from unions subsidizing their speech.²³⁴ The ability to hear the respective arguments from all sides of the issue—unions, public employees, employers, and lobbying groups—will provide the best input and establish a rule that best fits the public employees' interest.²³⁵ The inconsistent cases dealing with the issue of public employees' protection against subsidized speech makes action through the legislature important for the parties, attorneys, judges, and unions involved.²³⁶ Therefore, Congress is in the best position to provide statutory relief to public

²³⁰ See No. 14-915, 2016 WL 1191684, at *1 (Mar. 29, 2016) (affirming the judgment of the Court by a split decision); *infra* Part IV.B (recognizing that congressional intervention is the best way to move forward with a solution).

²³¹ See *infra* Part IV.A (amending the Employees' Rights statute to include all public employees and the ability to opt out of paying agency fees).

²³² See *supra* Part III.A (discussing the importance of protecting public employees' freedom of association); see also *infra* Part IV.B (arguing that employees' right to freedom of association is negatively impacted each day the Court or legislature delays action).

²³³ See *supra* Part I (posing a hypothetical scenario where the plaintiff is confronted with the issue of subsidized speech, but with no remedy against payment of the agency fee).

²³⁴ See *supra* Part II.B–D (recognizing the evolution of court decisions concerning agency fees, freedom of association, and the progression from *Abood*).

²³⁵ See *supra* Part III.D (acknowledging the necessity to provide statutory protections for public employees' freedom of association).

²³⁶ See *supra* Part II.B–D (describing the inconsistency and evolution between the cases that lead up to the *Harris* decision).

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employees by amending the Employees' Rights statute to enable public employees to refuse agency fees.²³⁷

The remainder of Part IV focuses on amending the Employees' Rights statute by adding a sub-section for Congress.²³⁸ The language in the proposed section will ensure that public employees, employers, unions, and judges have proper guidance when confronted with future issues involving public employees and agency fees.²³⁹

A. *Proposed Amendment to the Employees' Rights Statute Section 7102*

Congress should amend Section 7102 to include the following proposed language:

Each *public* employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right —

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, ~~and~~

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter, *and*

(3) *to refuse payment of any compelled membership due or agency fee imposed by a union while still receiving a reduced form of union benefits. Any and all claims against employees for refusal to pay agency fees must be brought before the National Labor Relations Board within thirty (30) days of the alleged breach.*²⁴⁰

²³⁷ See *infra* Part IV.A (providing a proposed section to the statute that will allow public employees to opt out of the mandatory agency fees imposed by unions).

²³⁸ See *infra* Part IV.A (explaining the new statutory language to add to the Employees' Rights statute to alleviate the inconsistencies among court cases addressing the issue of agency fees); see also *infra* Part IV.B (discussing the placement, reasoning, and arguments over the proposed section).

²³⁹ See *infra* Part IV.B (discussing the advantages of having the right of public employees to refuse agency fees as the new standard).

²⁴⁰ The regular portion of the text comes from 5 U.S.C. § 7102. The italicized portion of the

B. *Commentary*

Congress should insert the amended section between 5 U.S.C. § 7102, discussing the employees' rights to assist, join, or form any labor organization, and 5 U.S.C. § 7103, discussing the definitions for the terms used throughout the chapter.²⁴¹ This placement is the most appropriate because this section will distinguish the right of the public employers from private employers with the right to refuse agency fees.²⁴² In addition, this section will lead into Section 7103 that provides definitions.²⁴³

The proposed amendment applies to all public employees, rather than just employees that work in the private sector, to combat the usage of agency fees used for political purposes.²⁴⁴ *Public* employees refer to all people employed by the government, including, but not limited to, police officers, teachers, and public health care workers.²⁴⁵ Subsection 3 permits public employees to opt out of the mandatory dues imposed on non-union members for those people who do not want to join.²⁴⁶ The final section is crafted to prevent unreasonable delays from the parties involved and to help resolve congestion within the court system.²⁴⁷ The proposed section is the best solution because of the clear direction and guidance to the attorneys, judges, and parties involved.²⁴⁸ In addition, the proposed section eliminates the uncertainty in waiting for another case with the necessary facts to appear before the Court that could take years to establish. Furthermore, implementing this section will clear up the inconsistencies in the Court's decision concerning subsidized speech of public employees.²⁴⁹

Critics may argue that employees can always quit and go find work somewhere else.²⁵⁰ This theory ignores the fact that there may be no other

text represents the additions made by the author.

²⁴¹ The reasoning for the suggested placement of the proposed section is the contribution of the author.

²⁴² The suggested placement of the proposed section is the contribution of the author.

²⁴³ The proposed section's placement is the contribution of the author.

²⁴⁴ See *supra* Part IV.A (providing the proposed section to the Employees' Rights statute).

²⁴⁵ See *supra* Part IV.A ("Each *public* employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.").

²⁴⁶ See *supra* Part IV.A ("(3) to refuse payment of any compelled membership due or agency fee imposed by a union while still receiving a reduced form of union benefits.").

²⁴⁷ See *supra* Part IV.A ("Any and all claims against employees for refusal to pay agency fees must be brought before the National Labor Relations Board within 30 days of the alleged breach.").

²⁴⁸ See *supra* Part IV.A (establishing a basis for employees to rely upon, rather than hoping for future court decisions that may never come).

²⁴⁹ See *supra* Part II (describing the changes and inconsistencies among the Supreme Court decisions concerning the agency fees).

²⁵⁰ See *supra* Part II.D (discussing the argument throughout *Harris*).

reasonable alternatives for those employees with specialized skills. For instance, those who are firefighters, teachers, police officers, and tax professionals would have to undergo expensive and time consuming training to pursue other professions. The transition from each specialized job would be unduly burdensome on the public employees. Without reasonable alternatives, the employees must work as public employees to maintain their standard of living.

Critics may also argue that agency fees do not support speech and should still be required to represent all employees within the bargaining unit.²⁵¹ Although this may be low on the compelled speech scale, public employees are still being forced to fund and support an ideology that may be in opposition of their own views. In addition, unions are only required to represent all employees in the bargaining unit if it is selected as the exclusive bargaining agent. However, unions have the authority to be a members-only bargaining unit.²⁵² This clarification solves the issue of representing employees who do not want to pay the agency fee.

Opponents may contend that unions will fail without the agency fees due to a lack funding for resources. There are organizational groups outside of unions that operate in a similar fashion by advocating on behalf of the interests of the group members.²⁵³ In addition, these organizational groups have a history of being successful even by depending on voluntary contributions.²⁵⁴ The evidence suggests that unions, similar to the organizational groups, could survive off of voluntary contributions and still function at an adequate level.²⁵⁵ The survival and continued implementation of unions are important because the argument from the opposition loses credibility with the unions still successfully functioning without requiring the mandatory agency fees from all public employees who are non-members of a union.²⁵⁶

Finally, opponents may contend that this amendment will create an influx of free riders that may force unions to fail.²⁵⁷ This ignores the fact that non-members are required to pay a fee for being non-members; the non-members do not have full access to the union benefits; and the non-members are solely paying the union for the protection. If the union exists

²⁵¹ See *supra* Part II.D (articulating the effect of agency fees among public employees).

²⁵² See *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (recognizing that unions can determine to be a members-only organization).

²⁵³ See *supra* Part II.D (reasoning that other organizations exist that advocate for members).

²⁵⁴ See *supra* Part II.D (acknowledging that other organizations have survived through voluntary contributions).

²⁵⁵ See *supra* Part II.D (examining the analogy the court draws in reaching its decision).

²⁵⁶ See *supra* Part IV (explaining and reasoning through opposing arguments).

²⁵⁷ See *supra* Part II.D (stating that the free rider argument failed when used for quasi-public employees).

for the purpose of protecting employees' rights and the employees do not find it necessary, then why should the employees have to pay? Furthermore, unions have the right to be the exclusive bargaining agent for an employer. The just compensation for being the exclusive bargaining agent is paid with the *right*—not through forcing non-members to pay agency fees.²⁵⁸ The proposed amendment protects the employees' freedom of association by giving the employees the right to opt out of agency fees.²⁵⁹

V. CONCLUSION

The Supreme Court misapplied two cases in its analysis in *Abood*, which should be enough to reverse the decision and expand the holding in *Harris* to all public employees.²⁶⁰ Congress should recognize that freedom of association is an important right that needs to be protected from mandatory dues. Once all public employees have the opportunity to opt out of mandatory payments, then the money that would normally go toward union fees can be used in the economy to further the nation's economic growth. The public unions will have to find ways to better serve and promote their services if they wish to keep or improve their membership numbers. Public employees should no longer be required to support unions that have shown opposite beliefs through payment of the agency fee. Tim would not be required to pay the agency fee with this proposed statutory amendment. He would be free to opt out if the union supports views in opposition of his own. Congress should change the requirements of mandatory dues to voluntary dues, thus giving more power to the individuals that make up the public workforce by protecting their freedom to speak without reprimand, to advocate for any organization, and to associate with any organization of their choosing.

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²⁵⁸ See *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (stating that just compensation is through the right to represent public employees).

²⁵⁹ See *supra* note 240 and accompanying text (detailing the proposed changes to the Employees' Rights statute).

²⁶⁰ See *supra* Part III.B (analyzing *Abood's* error in its analysis in relying upon *Hanson and Street*).

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