

Harris v. Quinn: A Win for Freedom of Association

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When can the government force someone to give money to a union to speak on his or her behalf? For several decades, under the precedent set in *Abood v. Detroit Board of Education*, the Supreme Court has maintained that the government can require its employees who don't want to join a union to pay the union an "agency fee" to cover its ostensible costs of representing them.¹

But what about someone who merely receives a state subsidy for something he or she does? Can the state make that person turn over a portion of that payment to a union? That's the question the Court considered in *Harris v. Quinn*, which challenged an Illinois scheme that unionized "personal assistants" who receive a Medicaid subsidy to provide home care to a disabled person (in many cases, a family member).²

The Court concluded that the First Amendment prohibits forcing those people, who are not "full-fledged" government employees, to support a union because it constitutes coerced speech and association that was not justified by any compelling governmental interest. But it also did more: it tore apart the Court's reasoning in *Abood*, suggesting that, in an appropriate case, the Court may put an end to compulsory union payments for all government employees. The decision was therefore a great blow to unions' efforts to coerce support for their political activities and a triumph for First Amendment rights—and it opens the door for a much greater triumph in the future.

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¹ 431 U.S. 209 (1977).

² 134 S. Ct. 2618 (2014).

Illinois and SEIU's Schemes to Unionize Subsidy Recipients

In March 2003, Illinois Governor Rod Blagojevich issued an executive order authorizing the state to recognize an exclusive representative for “personal assistants” in a state-administered Medicaid program, commonly called the “Rehabilitation Program,” who provide home care to individuals who are not able to care for themselves.³ Until then, the personal assistants had not been considered state employees. In fact, the Illinois State Labor Board rejected a 1985 attempt by the Service Employees International Union (SEIU) to unionize personal assistants in Chicago and parts of Cook County, Illinois, for that very reason: “There is no typical employment arrangement here, public or otherwise,” the board ruled; “rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients).”⁴ The person receiving care through the program, as the “customer,” has sole discretion over hiring, supervising, and terminating his or her personal assistant. The state’s only role is to establish basic requirements for personal assistants and to pay them.

Blagojevich’s order acknowledged all of this, including the 1985 Labor Board ruling, which it intended to overrule. The order stated that the “personal assistants are not State employees for purposes of eligibility to receive statutorily mandated benefits because the State does not hire, supervise or terminate” them and that the order would “not in any way alter the ‘unique’ employment arrangement of personal assistants and recipients, nor [would] it in any way diminish the recipients’ control over the hiring, in-home supervision, and termination of personal assistants.”⁵ In other words, the personal assistants would still not be state employees—except for purposes of collective bargaining. The order’s stated purpose was to allow personal assistants to “effectively voice their concerns about the organization of the . . . program, their role in the program, or

³ See *id.* at 2623–26; Ill. Exec. Order 2003-08 [hereinafter “EO 2003-08”], available at http://www.illinois.gov/Government/ExecOrders/Pages/2003_8.aspx.

⁴ SEIU/Illinois Dep’t of Cent. Mgmt. Servs. and Dep’t of Rehab. Servs., 2 PERI ¶2007 (IL LRB-SP 1985).

⁵ EO 2003-08.

the terms and conditions of their employment,” so the state could “receive feedback from [them] in order to effectively and efficiently deliver home services.”⁶

In July 2003, Blagojevich codified his order by signing legislation amending the state’s Disabled Persons Rehabilitation Act to declare that personal assistants would be considered public employees “[s]olely for purposes of coverage under the Illinois Public Labor Relations Act.”⁷ To be even clearer, the amendment declared that the state would not be considered the personal assistants’ employer for any other purposes, “including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or insurance benefits.”⁸

The state and the SEIU hadn’t waited for the General Assembly to pass legislation to begin unionizing personal assistants. In the same month that Blagojevich issued his executive order, the state recognized an SEIU local as the personal assistants’ exclusive representative. This happened even though the personal assistants never actually had an opportunity to vote on whether to join a union. Instead, the state recognized the union upon determining that a majority of providers wanted to be represented by SEIU based on the number of providers who, according to payroll records, were already SEIU members and the number of signed membership cards SEIU submitted.⁹

The state and SEIU soon entered a collective-bargaining agreement for personal assistants, which included an agency-fee provision requiring assistants who did not join the union to nonetheless pay fees to the union for the assistant’s pro rata share of collective-bargaining expenses, as state law allows for all public-sector union contracts.¹⁰

After Blagojevich was removed from office in 2009, his successor, Governor Pat Quinn, attempted to unionize personal assistants in the

⁶ *Id.*

⁷ 20 Ill. Comp. Stat. 2405/3(f) (2012).

⁸ *Id.*

⁹ Letter from Benno Weisberg, Illinois Dep’t of Cent. Mgmt. Servs., to Justin Hegy, Illinois Policy Institute (Nov. 21, 2013), available at <http://illinoispolicy.org/wp-content/uploads/2013/11/WeisbergLetter.pdf>. *Harris* incorrectly states that a vote was held. 134 S. Ct. at 2626, 2641.

¹⁰ *Harris*, 134 S. Ct. at 2626; 5 Ill. Comp. Stat. 315/6(e) (2003) (authorizing agency-fee provision in collective-bargaining agreements).

state's "Disabilities Program," another state-administered Medicaid program that provides subsidies to people who care for disabled individuals—again, often for a family member—in their homes.¹¹ The Disabilities Program is identical to the Rehabilitation Program in all relevant details. Disabilities Program personal assistants are hired, fired, and supervised by the individuals for whom they care, not by the state. As with the Rehabilitation Program providers, the state's only role is to set basic requirements and pay the assistants.

In June 2009, Quinn issued an executive order, substantially similar to Blagojevich's 2003 order, authorizing the state to recognize an exclusive representative for personal assistants in the Disabilities Program. Like Blagojevich, Quinn acknowledged that his order would not change the relationship between the assistants and the people they care for.¹² As discussed below, Quinn's attempt to unionize Disabilities Program assistants failed because of the efforts of Pamela Harris, the lead plaintiff in *Harris v. Quinn*.

Blagojevich's and Quinn's efforts were part of a nationwide strategy by public-sector unions, particularly SEIU, and their allies in government to boost diminishing union membership¹³ by unionizing people who receive a government subsidy for providing services to a private third party.¹⁴ SEIU's first victory in this campaign came in 1999, when it unionized some 74,000 home-care providers

¹¹ See 405 Ill. Comp. Stat. 80/2-1 et seq. (1989); Ill. Admin. Code tit. 59, §§ 117.100 et seq. (2008).

¹² Ill. Exec. Order 2009-15, available at http://www.illinois.gov/Government/ExecOrders/Pages/2009_15.aspx.

¹³ Union membership peaked in 1954, when 28.3 percent of Americans belonged to a union; by 2013, only 11.3 percent of American workers—and just 6.7 percent of private-sector workers—belonged to a union. Yoonsoo Lee & Beth Mowry, Union Membership, Federal Reserve Bank of Cleveland (Nov. 9, 2007), <http://www.clevelandfed.org/research/trends/2007/1107/04ecoact.cfm> (historical rates); Union Membership (Annual) News Release, Bureau of Labor Statistics (Jan. 24, 2014), available at <http://www.bls.gov/news.release/union2.htm> (current rates).

¹⁴ See Brief for Mackinac Center for Public Policy as Amicus Curiae in Support of Petitioners at 3-16, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681), available at <http://www.mackinac.org/archives/2013/NR11-681tsac.pdf>; Linda Delp & Katie Quan, Homecare Worker Organizing in California: An Analysis of a Successful Strategy, 27 Lab. Studs. J. 1 (2002); Patrice M. Mareschal, Innovation and Adaptation: Contrasting Efforts to Organize Home Care Workers in Four States, 31 Lab. Studs. J. 25 (2006); Peggie R. Smith, The Publicization of Home-Based Care Work in State Labor Law, 92 Minn. L. Rev. 1390 (2008).

in Los Angeles County, California.¹⁵ Unions then successfully campaigned for recognition of an exclusive representative on behalf of home-care providers in Oregon (2000), Washington (2001), Illinois (2003), Michigan (2004), Wisconsin (2005), Iowa (2005), Massachusetts (2006), Missouri (2008), Ohio (2009), Pennsylvania (2010), Connecticut (2011), Maryland (2011), Minnesota (2013), and Vermont (2013).¹⁶ (Four of those states, however—Ohio, Pennsylvania, Wisconsin, and Michigan—later effectively reversed the authorization to recognize a union for the providers.)¹⁷ In addition, before the Court decided *Harris*, 11 states authorized compulsory union fees for home child-care providers, such as people who operate a day care out of their homes and accept children who receive state child-care subsidies, and people who receive subsidies to take care of relatives' children in their own homes.¹⁸ And two states, Washington and Oregon, have authorized exclusive representatives for adult foster-care providers.¹⁹

¹⁵ Smith, *supra* note 14, at 1405–06; Cal. Welf. & Inst. Code § 12302.25(a) (1999).

¹⁶ See Conn. Gen. Stat. § 17b-706a(e)(1); Iowa Exec. Order No. 43 (July 4.); 20 Ill. Comp. Stat. 2405/3(f); Md. Code Ann., Health-Gen. §§ 15-901 et seq.; Mass. Gen. Laws ch. 118E, § 73(b); Interlocal Agreement Between Mich. Dep't of Cmty. Health & Tri-County Aging Consortium (Apr. 24), available at <http://goo.gl/lhZrho>; Mo. Rev. Stat. § 208.853; Ohio House Bill 1 §§ 741.01-06 (expired); Or. Const. art. XV, § 11; Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (Sept. 14) (rescinded); Vt. Stat. Ann. tit. 21, §§ 1631-44; Wash. Rev. Code § 74.39A.270); Wis. Stat §§ 111.81 (repealed).

¹⁷ The Ohio provision expired as scheduled when the term of the then-current governor, Ted Strickland, ended; the Pennsylvania executive order was rescinded; and the Wisconsin statute was repealed. Michigan's scheme dissolved after repeated attempts by the legislature to redefine "public employee" to exclude home-care providers, an SEIU lawsuit challenging the legislature's changes, and a failed attempt by SEIU to amend the state's constitution through a ballot initiative. The government entity that "employed" the providers finally announced its own dissolution after voters rejected the ballot measure. See Brief of Amicus Curiae Mackinac Center, *supra* note 14, at 28–32.

¹⁸ See Conn. Gen. Stat. §§ 17b-705 et seq. (2012); 5 Ill. Comp. Stat. 315/3, 315/7; Md. Code Ann. Fam. Law § 5-595 et seq.; Mass. Gen. Laws ch. 15D, § 17; Minn. Stat. § 179A.52; N.M. Stat. Ann. § 50-4-33; N.Y. Lab. Law § 695-a et seq.; Or. Rev. Stat. § 329A.430; R.I. Gen. Laws § 40-6.6-4; Wash. Rev. Code § 41.56.028. Compulsory union fees were also previously permitted in Michigan, Ohio, and Wisconsin.

¹⁹ Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

Pamela Harris Takes Action

Pamela Harris is a mother in northern Illinois whose son, Joshua, requires constant care because of a rare genetic syndrome that causes severe developmental and intellectual disabilities. Harris receives a subsidy through the Disabilities Program so she can take care of her son at home rather than see him institutionalized.²⁰

Harris learned of Quinn's executive order one Sunday morning in 2009 when some union representatives showed up unannounced at her door and urged her to join. She declined their offer because she wanted the money from her checks to go toward her son's care, not toward a union's agenda, and she was concerned that a union might intrude upon her home or attempt to interfere with her relationship with her son.

So she took action. With her own money and small contributions from other families that participate in the Disabilities Program, she sent notices to other personal assistants warning them of what she believed was a threat to their finances and their independence. And she succeeded: the Disabilities Program personal assistants voted against joining a union.

Harris then asked Quinn to respect the personal assistants' wishes and rescind his executive order, but he refused. She knew the unions' deep pockets would allow them to continue their unionization efforts and she couldn't afford to keep fighting them forever, so she looked for help. She got it from the National Right to Work Legal Defense Foundation, which brought a class-action lawsuit on behalf of personal assistants in the Rehabilitation and Disabilities Programs in the U.S. District Court for the Northern District of Illinois challenging the assistants' forced payment of agency fees as a violation of their First Amendment rights.

²⁰ For these and other background details on Pamela Harris, see Sean Higgins, Forced Unionization Turned Illinois Homemaker into Supreme Court Plaintiff in *Harris v. Quinn* Case, Wash. Examiner (May 1, 2014), <http://washingtonexaminer.com/forced-unionization-turned-illinois-homemaker-into-supreme-court-plaintiff-in-harris-v-quinn-case/article/2547312>; Ben Yount, US Supreme Court to Hear Illinois Union Strong-Arm Case, Illinois Watchdog (Oct. 4, 2013), <http://watchdog.org/109220/us-supreme-court-to-hear-illinois-union-strong-arm-case/>; Video: *Harris v. Quinn: A Mother's Fight for Justice* (Illinois Policy Institute Dec. 5, 2013), available at <https://www.youtube.com/watch?v=kOM6gPbBzsg>.

The First Amendment and Forced Support for Unions

On its face, forcing personal assistants to pay an organization to speak on their behalf would strike many people as a clear violation of the rights to free speech and free association that the First Amendment is supposed to protect. But the federal district court dismissed the *Harris* plaintiffs' suit for failing to state a First Amendment claim, and the U.S. Court of Appeals for the Seventh Circuit affirmed. To understand why—and to understand the importance of the Supreme Court's decision—one must review not only First Amendment principles but also the history of Supreme Court case law on compulsory unionism.

First Amendment fundamentals

The Supreme Court has held that the First and Fourteenth Amendments do indeed protect a right to freedom of association. In the Court's words: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces free speech," regardless of "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."²¹ The Court has recognized that freedom of association, "like free speech, lies at the foundation of a free society."²² The Court has also made clear that the freedom of association "plainly presupposes a freedom *not* to associate."²³

Similarly, the Court has held that the First Amendment "may prevent the government from . . . compelling certain individuals to pay subsidies for speech to which they object," and it has recognized that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors."²⁴ The Court has approvingly cited Thomas Jefferson's statement that "[t]o compel a man to furnish contributions of money for the propagation of

²¹ NAACP v. Alabama, 357 U.S. 449, 460 (1958).

²² Buckley v. Valeo, 424 U.S. 1, 25 (1976) (internal marks and citations omitted).

²³ Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (emphasis added).

²⁴ United States v. United Foods, Inc., 533 U.S. 405, 410–11 (2010) (internal citations omitted).

opinions which he disbelieves, is sinful and tyrannical.”²⁵ The Court has held that First Amendment rights are impinged regardless of how little money is taken, or for how little time the individual is deprived of his or her money, if it is used to support political or ideological causes he or she opposes.²⁶ Applying these principles, the Court has held, for example, that “patronage” practices that require government employees to support a particular political party to keep their jobs violate the First Amendment.²⁷

First Amendment scrutiny and Abood

Given those principles, how could the lower federal courts in *Harris* uphold Illinois’s unionization scheme? Because the Constitution’s guarantees of individual rights aren’t as absolute as they appear to be: the Supreme Court allows the government to violate constitutional rights when it offers a good enough reason—with the government’s burden ranging from heavy to negligible, depending on which constitutional right is at stake. The Court has said that infringements on freedom of association “may be justified by regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”²⁸

That would appear to mean that, to infringe on personal assistants’ right not to associate with a union, the government must at least prove that (1) making personal assistants pay union fees serves a compelling governmental interest that is unrelated to controlling people’s speech, and (2) there is no other way the government could serve that interest while interfering substantially less with First Amendment rights.

²⁵ Abood, 431 U.S. at 235 n.31 (quoting Irving Brant, James Madison: The Nationalist 354 (1948)).

²⁶ See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986) (dissenters’ funds may not be used for union political purposes even temporarily and “[t]he amount at stake for each individual dissenter does not diminish this concern”); cf. *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) (“[T]he inducement afforded by [government] placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.”).

²⁷ See *Elrod*, 427 U.S. at 355–71.

²⁸ *Roberts*, 468 U.S. at 623.

But the lower courts in *Harris* didn't really require the government to make that showing. Indeed, the Supreme Court has never really required the government to make that showing to justify forcing actual government employees to pay union agency fees.

In *Abood*, the Court held for the first time that the government could require public employees who did not want to join a union to pay agency fees to cover their share of collective-bargaining costs. Any infringement this caused to employees' speech and association rights was justified because it prevented "free riders" from taking advantage of the union's representation services and because it served the interests of "labor peace"—that is, it would allow the government to avoid "the confusion and conflict that could arise if rival . . . unions, holding quite different views . . . each sought to obtain the employer's agreement."²⁹

Are the prevention of free riding and the preservation of labor peace compelling governmental interests? Is there no way to serve those interests that would better respect dissenting employees' First Amendment rights? *Abood* never really examined those questions. Instead, the Court simply pointed to two other decisions that it believed stood for the proposition that the government could force people to pay union fees in the interest of labor peace: *Railway Employees' Dep't v. Hanson* and *International Association of Machinists v. Street*.³⁰

But *Hanson* and *Street* didn't actually address those questions, either.

Hanson considered a provision of the federal Railway Labor Act (1926) that authorized private railway companies to enter into "union shop" agreements that would require all employees to pay union fees, regardless of any state "right-to-work" laws.³¹ The Court held that the act was within Congress's Commerce Clause power "to regulate labor relations in interstate industries" and noted that collective bargaining may serve the "legitimate objective" of "[i]ndustrial peace along the arteries of commerce."³² In response to the argument that

²⁹ *Abood*, 431 U.S. at 224.

³⁰ See *id.* at 217–32 (discussing *Hanson*, 351 U.S. 225 (1956) and *Street*, 367 U.S. 740 (1961)).

³¹ *Id.* at 227–28.

³² *Id.* at 233.

a union-shop agreement violates workers' freedom of association, the Court stated that "[o]n the present record," there was no evidence of any First Amendment violation.³³ In other words, in the absence of actual evidence of anyone being compelled to support speech with which he or she disagreed—of which there was none, because the Nebraska courts had enjoined the act—the law did not violate the First Amendment. As the Court later noted in *Street*, *Hanson* left open the question of whether evidence of compelled support for union political speech could establish a First Amendment violation.³⁴

The closest *Hanson* came to endorsing compulsory support for a union was a statement that the record presented "no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."³⁵ That was an odd thing to say because the Court had never considered whether the First Amendment allows a state to force lawyers to support an integrated bar—and when it did consider that issue five years later in *Lathrop v. Donahue*,³⁶ it hardly treated the question as uncontroversial or settled. The Court did uphold such fees with a plurality opinion, but Justice William O. Douglas, the author of *Hanson*, dissented, writing:

Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment.³⁷

As for *Street*, it considered a collective-bargaining agreement between a railroad company and a union that required nonmembers to support campaigns for political candidates they opposed and ideas

³³ *Id.* at 238 (emphasis added).

³⁴ See *Street*, 367 U.S. at 747–49.

³⁵ *Abood*, 431 U.S. at 238. An "integrated bar" is an association to which attorney must pay dues as a condition of practicing law in a state. *Keller v. State Bar of Cal.*, 496 U.S. 1, 4–5 (1990).

³⁶ 367 U.S. 820 (1961).

³⁷ *Id.* at 884 (Douglas, J., dissenting) (footnote omitted).

with which they disagreed.³⁸ The Court acknowledged that the case raised “constitutional questions . . . of the utmost gravity,” but then avoided those questions by determining that the Railway Labor Act did not authorize the forced payments.³⁹

As Justice Lewis Powell observed in his *Abood* opinion concurring in the judgment, *Street* left open several important questions: (1) whether withholding financial support for union political activities is protected “speech”; (2) whether Congress could “go further in approving private arrangements that would interfere with [First Amendment] interests than it could in commanding such arrangements”; and (3) whether any First Amendment violation that results from the mandatory payment of union fees “could be justified by the governmental interest asserted on its behalf.”⁴⁰

In sum, *Hanson* and *Street* never engaged in any analysis of whether government-coerced union support infringes First Amendment rights or, if so, whether that infringement could be justified by some compelling governmental interest. That is, the two decisions left open *precisely* the essential First Amendment questions the Court needed to answer in *Abood*. Yet the Court in *Abood* acted as though *Hanson* and *Street* had resolved them.

Compelled union support is compelled political speech

One of *Abood*'s fatal flaws is its failure to consider the difference between compelled support for private-sector unions and compelled support for public-sector unions. When unions represent government employees—or subsidy recipients—all of their speech is inherently “political,” and forced support for that speech would seem to be precisely what the Supreme Court’s First Amendment case law generally prohibits. The Court has noted that, even in traditional public employment, a union inevitably “takes many positions during collective bargaining that have powerful political and civic consequences.”⁴¹ The government is not like a private employer because its decisions regarding employee (or subsidy recipient) pay and benefits directly affect public policy and implicate issues on

³⁸ *Street*, 367 U.S. at 742–45.

³⁹ *Id.* at 749, 768–69.

⁴⁰ *Abood*, 431 U.S. at 248–49 (Powell, J., concurring).

⁴¹ *Knox*, 132 S. Ct. at 2289.

which members of the public—taxpayers, for example—may have opinions. A plurality opinion of the Court therefore acknowledged that “[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one.”⁴²

This is especially obvious in the case of personal assistants. If a union negotiates on their behalf, it can do little more than argue that the state should give them more money and benefits—making the union much like anyone else who lobbies for more or less spending on a Medicaid program, except that the union can legally force people to pay for its advocacy.

Abood held that the government could compel nonmembers to support a union’s activities related to collective bargaining, but it also held that nonmembers had a First Amendment right to opt out of paying for a union’s political and ideological activities that are not “germane” to collective bargaining on their behalf.⁴³

That distinction doesn’t make sense because both kinds of speech are actually political, particularly in the public-sector context—and both could be equally objectionable to a dissenter—but in any event, opting out hardly guarantees that a nonmember won’t still be forced to pay for union political speech on matters that aren’t related to collective bargaining. As the Supreme Court recently observed in *Knox v. SEIU*, a union’s auditors typically do not question the union’s determinations of which expenses are and aren’t “chargeable” to nonmembers—so if a union says political expenditures are chargeable, its auditors will take the union’s word for it and classify them as chargeable.⁴⁴ And although nonmembers may contest any chargeability determination, “the onus is on [them] to come up with the resources to mount a legal challenge in a timely fashion,” which, the Court has noted, is “a significant burden . . . to bear simply to avoid having their money taken for speech with which they disagree.”⁴⁵

Indeed, it’s difficult to imagine a personal assistant who provides constant care to a severely disabled family member spending whatever free time he or she can find making sure that the union isn’t

⁴² *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520 (1991) (plurality opinion).

⁴³ See *Abood*, 431 U.S. at 235–36.

⁴⁴ 132 S. Ct. at 2294.

⁴⁵ *Id.* (internal footnote and citations omitted).

spending nonmembers' fees on political activity. That would require the individual to review the union's report of its many expenditures, determine whether each was proper, and then, if he or she believed certain expenditures were improper, to take the steps required to challenge them. In Illinois, that could include filing an unfair-labor-practice charge, participating in a hearing on the charge, and if necessary, pursuing appeals before an administrative law judge and then a court—all to challenge a fraction of his or her fees.⁴⁶ Even for someone who highly values First Amendment rights, the effort would make little economic sense.

If a personal assistant in the Illinois Rehabilitation Program did take time to review the LM-2 form that the providers' SEIU local filed with the U.S. Department of Labor for 2012, he or she would find that the union's expenditures for purported representation expenses included numerous contributions to groups that appear to engage primarily or exclusively in political activities unrelated to collective bargaining.⁴⁷ They include contributions to Action Now, Home Care First, Inc., and Missourians Organizing for Reform and Empowerment—groups whose activities have respectively consisted of running "issue campaigns,"⁴⁸ funding a 2012 Michigan ballot initiative campaign,⁴⁹ and waging campaigns against "an economic system that prioritizes corporations above all else."⁵⁰ Perhaps the union could provide an innocuous explanation for those expenditures; the problem is that it is unlikely that anyone will ever find out because the costs of challenging them are prohibitively high.

Compelled union support distorts the marketplace of political ideas

The First Amendment harm from coerced union support doesn't just infringe the rights of people forced to pay; it also distorts the

⁴⁶ See Ill. Admin. Code tit. 80, §§ 1200.135, 1220.10 et seq.

⁴⁷ U.S. Dep't of Labor Form LM-2 for Service Employees Healthcare IL IN, schedule 15 (2012), available at <http://illinoispolicy.org/wp-content/uploads/2013/11/SEIUHII2012LM2.pdf>.

⁴⁸ Action Now Campaigns, <http://www.actionnow.org/campaigns>.

⁴⁹ Tim Martin, Proposal 4: SEIU Union Pumps Money into Michigan's Home Health Ballot Measure, MLive.com (Oct. 26, 2012), http://www.mlive.com/politics/index.ssf/2012/10/proposal_4_seiu_union_pumps_mo.html.

⁵⁰ Our Work—Missourians Organizing for Reform and Empowerment (MORE), http://www.organizemo.org/our_work.

marketplace of political ideas in the union's favor, which may affect everyone else's relative ability to influence public policy. The Supreme Court has stated that "[t]he First Amendment creates a forum in which all may seek, without hindrance *or aid* from the state, to move public opinion and achieve their political goals."⁵¹ That "forum" cannot exist if the government is coercing one group of people to support another group with opposing views. It gives the union an unfair advantage not only over dissenting personal assistants but also over all other groups in society, such as taxpayers, for whom the costs of organizing to oppose the union's views may be prohibitively high.

If *Aboud* were expanded to cover government subsidy recipients, there is no reason to believe that this distortion would be limited to relatively narrow issues affecting home care providers or other subsidy recipients the state chooses to unionize, though that's bad enough. By forcing subsidy recipients to pay fees to a union, the state also gives the union more funds to achieve its broader political goals, which may include reelecting the state officials who facilitated the unionization and supporting their policies. In light of the burden placed on unionized workers to opt out of political funding and unions' tendency to take a broad view of what constitutes representation expenses, there's little doubt that people who opt out of supporting the union's political advocacy will nonetheless be made to pay for some of it. And by appointing representatives for various groups of subsidy recipients, incumbent officials may place themselves in a position to "tip[] the electoral process in [their] favor" and undermine the "competition in ideas and governmental policies" that the First Amendment is supposed to protect.⁵²

Illinois's efforts to unionize personal assistants suggest that government officials are well aware of the political opportunities this tool offers them. The *Harris* plaintiffs alleged that Governors Blagojevich and Quinn issued their executive orders in exchange for SEIU's political support and campaign contributions.⁵³ Regardless of whether there was actually a quid pro quo agreement, it is certain

⁵¹ Knox, 132 S. Ct. at 2295 (emphasis added).

⁵² Elrod, 427 U.S. at 357 (internal marks omitted).

⁵³ Complaint at ¶¶ 19, 30, *Harris v. Quinn*, 2010 WL 4736500 (N.D. Ill. Nov. 12, 2010) (No. 10-cv-02477).

that the executive orders benefited a top political supporter of both governors. SEIU was the second-largest contributor to Blagojevich's 2002 campaign, giving \$821,294, or 3.3 percent of all contributions.⁵⁴ Less than two months after Blagojevich took office, he issued his executive order, and the state recognized SEIU as the Rehabilitation Program providers' exclusive representative. In the 2006 election for governor, SEIU was the top contributor to Blagojevich's reelection campaign by a wide margin, giving \$908,382, or nearly 5 percent of the total.⁵⁵ After Quinn issued his 2009 executive order, SEIU-affiliated groups together became the largest contributor to Quinn's narrowly successful 2010 election campaign, by far, giving a total of at least \$4.3 million, about 18 percent of all contributions—much more than he received from, for example, all Democratic Party committees combined.⁵⁶

If the governors issued their executive orders in exchange for SEIU's contributions as the *Harris* plaintiffs alleged, SEIU's investment paid off. From 2009 through 2013, Rehabilitation Program providers have given SEIU an average of about \$10.4 million per year in representation fees, plus about \$298,285 per year in fees for SEIU's political action committee.⁵⁷ Illinois's experience illustrates how the power to compel union support could facilitate a cycle in which a union gives money to political officials; the officials force subsidy recipients to give money to the union; and the union, with the benefit of the additional funds, makes more contributions to public officials with the expectation that they will deliver more new dues payers.

Knox v. SEIU

Despite its dubious foundations and disturbing implications, *Abood* has held on. Later decisions related to mandatory union fees have considered issues related to what activities are "chargeable"

⁵⁴ Contributions to Rod Blagojevich for 2002 Election, Nat'l Inst. on Money in State Politics, <http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=3756>.

⁵⁵ Contributions to Rod Blagojevich for 2006 Election, Nat'l Inst. on Money in State Politics, <http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=79667>.

⁵⁶ Contributions to Pat Quinn for 2010 Election, Nat'l Inst. on Money in State Politics, <http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=116445>.

⁵⁷ E-mail from Agostino Lorenzini, Illinois Dep't of Human Servs., to Justin Hegy, Illinois Policy Institute (Oct. 9, 2013), available at <http://illinoispolicy.org/wp-content/uploads/2013/11/LorenziniEmail2.pdf>.

to nonmembers⁵⁸ and what procedural protections are necessary to ensure that nonmembers aren't forced to pay for non-“germane” political activity⁵⁹—but *Abood's* conclusion that nonmember employees can be forced to pay union fees has remained untouched. In 2012, however, a five-justice “conservative” majority of the Court, led by Justice Samuel Alito, suggested in *Knox v. SEIU* that it recognizes *Abood's* flaws and might be willing to reconsider *Abood* in an appropriate case.

Knox concerned whether a union could require nonmembers to pay a temporary fee increase for political purposes without giving them notice and an opportunity to opt out.⁶⁰ Seven justices agreed that the First Amendment did not allow the union to do so.

Although the issue in *Knox* was relatively narrow, Justice Alito's majority opinion took the occasion to review—and question—the Court's decisions on mandatory union fees. Alito noted that “free-rider” arguments, such as the one the Court relied on in *Abood*, “are generally insufficient to overcome First Amendment objections.”⁶¹ For example, citizens might “free ride” off the clean-up efforts of a community organization, or doctors who are not members of a medical lobbying group might benefit from that group's efforts—but few would argue that those “free riders” could be compelled to give money to those groups.⁶² Therefore, Alito wrote, “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—

⁵⁸ See *Locke v. Karass*, 555 U.S. 207, 210 (2009) (nonmembers can be charged for national union organization's litigation expenses under some circumstances); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (nonmembers can be charged for pro rata share of state and local union affiliates' activities and for expenses of preparing for a strike that would have been illegal, cannot be charged for union lobbying); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455–57 (1984) (nonmembers can be charged for union social activities, publications, conventions).

⁵⁹ See *Knox*, 132 S. Ct. at 2284–86 (nonmembers must be given notice and an opportunity to opt out of temporary fee to be used for political purposes); *Hudson*, 475 U.S. at 310–11 (nonmembers must be given adequate explanation of basis for fee, opportunity to challenge amount before impartial decisionmaker, and escrow for amounts reasonably in dispute).

⁶⁰ See *Knox*, 132 S. Ct. at 2284–86.

⁶¹ *Id.* at 2289.

⁶² See *id.* at 2289–90 (quoting Clyde Summers, Book Review: Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory*, 16 *Comparative Lab. L.J.* 262, 268 (1995)).

one that [the Court has] found to be justified by the interest in furthering ‘labor peace.’ But it is an anomaly nevertheless.”⁶³

Knox also expressed concern about the burden placed on nonmembers to ensure that their funds weren’t used for political activity. Alito observed that requiring employees who don’t want to pay for political activity to opt out—rather than requiring those who do want to pay for it to opt in—“represents a remarkable boon for unions” and asked rhetorically what justification could exist for forcing employees to take action simply to protect themselves against coerced speech.⁶⁴ “An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree,” which constitutes a “substantial impingement on First Amendment rights.”⁶⁵ And he noted the problem, discussed above, that even those who opt out bear a “significant burden” if they want to ensure that their funds really aren’t being used for impermissible political purposes.⁶⁶

Knox declined to “revisit . . . whether the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”⁶⁷ But it gave hope to those who would like to see *Abood* overturned, including the plaintiffs in *Harris v. Quinn*.

Harris v. Quinn

In *Harris*, the Seventh Circuit concluded that *Abood* controlled the outcome because, in the court’s view, the Rehabilitation Program personal assistants were state employees and therefore could be made to pay union fees. It had “no difficulty” concluding that an employer-employee relationship existed between the assistants and the state based on the state’s setting of qualifications, ability to refuse payments to personal assistants who do not meet its standards, approval of a mandatory “service plan” for each personal assistant, and control over “all of the economic aspects of employment,” including the setting of salaries and work hours, payment for worker

⁶³ *Id.* at 2290 (internal citation omitted).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Knox*, 132 S. Ct. at 2294.

⁶⁷ *Knox*, 132 S. Ct. at 2289.

training, and payment of wages.⁶⁸ The court summarily rejected the assistants' argument that they were actually employed by the people they cared for because of the care recipients' exclusive ability to hire, fire, and supervise them, ruling that it was enough that the state was their "joint employer."⁶⁹

The court also rejected the plaintiffs' argument that forcing them to support the union did not serve the interests of "labor peace" as the coerced contributions in *Abood* supposedly did. It interpreted "labor peace" broadly to include anything that would "'stabilize[] labor-management relations,' which are at issue in any employer-employee relationship, regardless of whether the employees share the same workplace."⁷⁰ Because the court considered the state and personal assistants to have an employer-employee relationship, stabilizing that relationship through coerced union support would serve the interests of labor peace.⁷¹

As for the personal assistants in the Disabilities Program, the court held that they lacked standing. The Disabilities Program plaintiffs argued that the existence of Quinn's executive order authorizing their unionization "ma[de] it significantly more likely that they [would] be forced to financially support [a] union's speech," creating a "reasonable probability of future harm to the plaintiffs' constitutional interests, which the plaintiffs [felt] they should not have to spend resources to defeat."⁷² But the court concluded that this was a mere "hypothetical future violation" of the Disabilities Program plaintiffs' rights and therefore was not ripe.⁷³

The plaintiffs then asked the Supreme Court to reverse the Seventh Circuit, not only on the basis that it had incorrectly applied *Abood*, but also on the basis that *Abood* was wrongly decided in the first place.

In a 5-4 decision, the Supreme Court reversed the Seventh Circuit's ruling on the Rehabilitation Program plaintiffs' First Amendment claims, ruling that *Abood* did not apply to the Rehabilitation

⁶⁸ *Harris v. Quinn*, 656 F.3d 692, 698 (7th Cir. 2011).

⁶⁹ *Id.*

⁷⁰ *Id.* at 699.

⁷¹ *Id.*

⁷² *Id.* at 700.

⁷³ *Id.* at 700–01.

Program plaintiffs because they were not “full-fledged” government employees. (The Court agreed with the Seventh Circuit that the Disabilities Program plaintiffs lacked standing.)⁷⁴ The Court did not overrule *Abood*, but it did take the opportunity to disparage *Abood* and cast more doubt on its long-term prospects for survival.

Writing for the same five-justice majority he had in *Knox*, Justice Alito reviewed the *Hanson* and *Street* decisions’ lack of support for the Court’s decision in *Abood*, as discussed above, concluding that “[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union” because “*Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later.”⁷⁵ The Court added that “[t]he *Abood* Court fundamentally misunderstood the holding in *Hanson*, which was really quite narrow. As the Court made clear in *Street*, ‘all that was held in *Hanson* was that [the Railway Labor Act] was constitutional in its bare authorization of union-shop contracts requiring workers to give ‘financial support’ to unions legally authorized to act as their collective bargaining agents.”⁷⁶ In *Abood*, in contrast, the government “actually imposed that fee,” which “presented a very different question.”⁷⁷

The Court further criticized *Abood* for failing to distinguish between the unionization of public-sector and private-sector workers, noting that “[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.”⁷⁸ *Abood* also did not foresee the problems that would arise in attempting to separate “chargeable” and “nonchargeable” union expenditures, a “substantial judgment call” the Court has been forced to make in a number of cases since *Abood*.⁷⁹ *Abood* also “did not foresee the practical problems that

⁷⁴ 134 S. Ct. at 2644 n.30.

⁷⁵ *Harris*, 134 S. Ct. at 2627–32.

⁷⁶ *Id.* at 2632 (quoting *Street*, 367 U.S. at 749)).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 2633 (citing *Ellis*, 466 U.S. 435; *Hudson*, 475 U.S. 292; *Lehnert*, 500 U.S. 507; *Locke*, 555 U.S. 207).

would face objecting nonmembers,” who “must bear a heavy burden if they wish to challenge the union’s actions.”⁸⁰

“Finally,” the Court added, “a critical pillar of the *Abood* Court’s analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.”⁸¹ It was not evident that the union would be unable to represent providers without compelling nonmembers’ support; after all, other successful advocacy groups rely on voluntary contributions.⁸²

Despite its thorough trashing of *Abood*, the Court nonetheless declined to overrule it, because it did not have to. “Because of *Abood*’s questionable foundations,” however, and also “because the personal assistants are quite different from full-fledged public employees,” it refused to extend *Abood* to allow compelling Rehabilitation Program providers to support a union.

To distinguish *Harris* from *Abood*, the Court emphasized the differences between personal assistants and ordinary government employees. For true employees, the state establishes all of each person’s duties, vets applicants and chooses which ones to hire, provides or arranges training, supervises and evaluates each employee’s job performance, “imposes corrective measures,” and may discharge the employee “in accordance with whatever procedures are required by law.”⁸³ In contrast, personal assistants’ job duties are specified in service plans approved by the customer and the customer’s physician; the customer has complete discretion to hire (and fire) anyone who meets the state’s basic requirements; customers supervise the personal assistants; the state has no right to enter the home to check on the assistant’s job performance; the state-mandated annual review of each assistant and the assistant’s work are both controlled by the customer.⁸⁴ The Court also listed the many state laws that provide benefits to state employees but not to personal assistants, including the State Employee Vacation Time Act, the State Employee Health Savings Account Law, the State Employee Job Sharing Act, the State

⁸⁰ *Harris*, 134 S. Ct. at 2633.

⁸¹ *Id.*

⁸² *Id.* at 1240–41.

⁸³ *Id.* at 2634.

⁸⁴ *Id.*

Employee Indemnification Act, the Sick Leave Bank Act, and the Illinois Whistleblower Act.⁸⁵ The Court also noted many other state employee benefits apparently unavailable to personal assistants, including “a deferred compensation program, full worker’s compensation privileges, behavioral health programs, a program that allows state employees to retain health insurance for a time after leaving state employment, a commuter savings program, dental and vision programs, and a flexible spending program.”⁸⁶ And the Court noted the state’s explicit disclaimer of vicarious liability in tort, “[s]o if a personal assistant steals from a customer, neglects a customer, or abuses a customer, the state washes its hands.”⁸⁷ The Court also contrasted the many things subject to collective bargaining for ordinary employees under federal law—such as “the days of the week and the hours of the day during which an employee must work, lunch breaks, holidays, vacations, termination of employment, and changes in job duties”—with the limited scope of bargaining that unions could do on personal assistants’ behalf.⁸⁸

The Court concluded that the free-rider justification, whatever its merits for ordinary government employees, “has little force” for personal assistants. “What justifies the agency fee [for ordinary government employees], the argument goes, is the fact that the state compels the union to promote and protect the interests of nonmembers.”⁸⁹ That means the union cannot simply seek to benefit its members—for example, it can’t seek higher wages for members only—but must seek equal benefits for all employees, and must also provide equal and effective representation to all in grievance proceedings.⁹⁰ That concern does not exist for personal assistants because Illinois law requires them all to be paid the same; “therefore the union cannot be in the position of having to sacrifice higher pay for its members in order to represent nonmembers whom it is obligated to represent.”⁹¹ As for grievances, “the union has no authority with respect to any

⁸⁵ *Id.* at 2635.

⁸⁶ *Id.* (footnotes omitted).

⁸⁷ *Id.*

⁸⁸ *Id.* (footnotes omitted).

⁸⁹ *Id.* at 2636 (citing *Lehnert*, 500 U.S. at 556 (opinion of Scalia, J.)).

⁹⁰ *Harris*, 134 S. Ct. at 2637 (citing 5 Ill. Comp. Stat. 315/6, 315/8).

⁹¹ *Id.*

grievances that a personal assistant may have with a customer, and the customer has virtually complete control over a personal assistant's work."⁹²

Because of those differences and "*Abood's* questionable foundations," the Court "refuse[d] to extend *Abood*" to cover "partial-public employees, quasi-public employees, or simply private employees."⁹³ At least *Abood* has a relatively clear boundary: it applies to government employees. If it applied to others who receive government money, "it would be hard to see just where to draw the line," and "a host of workers who receive payments from a governmental entity would be candidates for inclusion within *Abood's* reach."⁹⁴

Having determined that *Abood* was not controlling, the Court performed the sort of First Amendment analysis that it should have done in *Abood* in the first place but did not. Citing *Knox*, the Court noted that forcing anyone to pay agency fees to a union "imposes 'a significant impingement on First Amendment rights'" and therefore "cannot be tolerated unless it passes 'exact[ing] First Amendment scrutiny.'"⁹⁵ The Court then easily concluded that the agency-fee provision at issue could not survive exacting scrutiny because it "does not serve a compelling governmental interest that cannot be achieved through means significantly less restrictive of associational freedoms."⁹⁶

"Labor peace," whatever its merits as a justification in *Abood*, was not a compelling governmental interest in this context. If personal assistants were not forced to pay agency fees, the government would not have to contend with conflicting claims by rival unions because the assistants did not seek to create a rival union; "all they [sought was] the right not to be forced to contribute to the union, with which they broadly disagree."⁹⁷ And in any event, there was no need to actually maintain "peace" in a workplace "because the personal assistants do not work together in a common state facility but instead spend all their time in private homes, either the customers' or their

⁹² *Id.*

⁹³ *Id.* at 2638.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

⁹⁶ *Harris*, 134 S. Ct. at 2639 (internal marks omitted).

⁹⁷ *Id.* at 2640.

own.”⁹⁸ The “specter of conflicting demands by personal assistants” was also lessened by the union’s ability to bargain for little more than greater pay and benefits—“[a]nd, of course, state officials must deal on a daily basis with conflicting pleas for funding in many contexts.”⁹⁹

The Court also rejected the purported benefits provided to personal assistants as a justification for making them pay fees. A fatal problem with that argument was the lack of evidence that the union could not achieve the same results by relying on voluntary funding. After all, the state in this context “is not like the closed-fisted employer that is bent on minimizing employee wages and benefits and that yields only grudgingly under intense union pressure”¹⁰⁰—its stated purpose for unionizing personal assistants was to get “feedback” about their needs. There is no reason to think that the dues paid by personal assistants who are willing to pay them would not be enough for the union to provide “feedback” to its apparently eager audience in government.¹⁰¹

The Court rejected an argument that it should apply a “balancing test” derived from *Pickering v. Board of Education*, under which government employees’ speech is not protected if it does not pertain to matters of public concern, and their speech on matters of public concern may be restricted “only if ‘the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees’ outweighs ‘the interests of the [employee], as a citizen, in commenting upon matters of public concern.’”¹⁰² In the view of the U.S. government (as amicus) and the dissent, the union speech at issue did not pertain to matters of public concern.¹⁰³ The Court cited evidence to the contrary regarding the impact of Medicaid expenditures on state budgets.¹⁰⁴

The Court also rejected an argument that its ruling would undermine the Court’s decisions approving integrated bar fees and

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2641.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2642 (quoting *Pickering*, 391 U.S. 563, 568 (1968)).

¹⁰³ *Harris*, 134 S. Ct. at 2642; *id.* at 2655 (Kagan, J., dissenting).

¹⁰⁴ *Id.* at 2642.

student-activity fees.¹⁰⁵ Bar fees used in connection with “proposing ethical codes and disciplining bar members” served the government’s interests in regulating the legal profession and having members of the bar, rather than the public, bear the costs of keeping lawyers ethical.¹⁰⁶ Student fees were “viewpoint neutral” and helped promote expression by a “broad array of student groups.”¹⁰⁷ Neither of those cases, the Court implied, required individuals to pay funds specifically to support lobbying activity from a particular perspective as mandatory union fees do.

Is *Abood* Doomed?

Justice Elena Kagan’s dissenting opinion in *Harris*, joined by the other three “liberal” justices, argues primarily that it doesn’t make sense to treat personal assistants any differently from ordinary government employees for First Amendment purposes simply because the government has chosen to give the “customer” authority over some aspects of their relationship.¹⁰⁸ In the dissent’s view, the majority creates a “perverse result” by essentially punishing the state for administering its program in a decentralized manner that “respect[s] the dignity and independence of program beneficiaries.”¹⁰⁹

Kagan has a point. Should a person’s First Amendment right to not support a union turn on whether his or her relationship with the state crosses some arbitrary line into “employment”? And if Illinois and other states restructure their benefit programs to make caregivers more like employees—if they start making people like Pam Harris contribute to state pension funds and convert some of their subsidy money into state-employee “benefits” they never asked for—would that make forcing them to pay union fees any more just? The results—greater government control over personal assistants and the people they care for *and* coerced union fees—could indeed be “perverse.”

¹⁰⁵ *Id.* at 2643–44 (citing *Keller v. State Bar of Ca.*, 496 U.S. 1 (1990); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000)).

¹⁰⁶ *Harris*, 134 S. Ct. at 2543–44 (citing *Keller*, 496 U.S. at 14).

¹⁰⁷ *Harris*, 134 S. Ct. at 2544.

¹⁰⁸ *Id.* at 2645–51 (Kagan, J., dissenting).

¹⁰⁹ *Id.* at 2651 (Kagan, J., dissenting).

So arguably *Harris* does introduce some (more) arbitrariness into the law. But that's not a reason why the Court should have upheld Illinois's infringements on personal assistants' First Amendment rights; it's a reason why the Court should have gone all the way and overruled *Abood*.

The majority's evisceration of *Abood* strongly suggests that the five justices in the majority are ready to overrule it in a case that forces the issue. *Stare decisis* seems unlikely to restrain them. In *Citizens United*, the majority opinion joined by these same justices stated that the Court "has not hesitated to overrule decisions offensive to the First Amendment" and overruled a 20-year-old precedent.¹¹⁰ *Citizens United* identified several factors that the Court considers in deciding whether to overturn precedent: "the antiquity of the precedent, the reliance interests at stake, . . . whether the decision was well reasoned, . . . [and] whether experience has pointed up the precedent's shortcomings."¹¹¹ The *Harris* majority certainly considers *Abood* to be poorly reasoned, and its decision discusses "practical administrative problems" regarding classification of union expenditures and "practical problems [facing] objecting nonmembers" that *Abood* "did not foresee," which suggests that the justices believe that experience has exposed *Abood's* shortcomings. As for the other two factors, *Knox's* concern for the injustice that mandatory fees inevitably cause to dissenting union members suggests that the justices would not give much weight to the unions' "reliance" interest in preserving the flow of funds from dissenters (and taxpayers) to their coffers, even if they have been getting away with it for a long time. Of course, the Court's composition could change by the time the next challenge to *Abood* arrives—and the liberal wing has made clear that it is committed to *Abood* both on its merits and as a matter of *stare decisis*.¹¹²

In any event, *Harris* is a victory for First Amendment rights that will benefit thousands of Americans. Illinois personal assistants will no longer be forced to pay for union speech they disagree with. Neither will other subsidy recipients in similar programs. Illinois

¹¹⁰ *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)).

¹¹¹ *Citizens United*, 558 U.S. at 363 (internal marks omitted). See also Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Should Courts Overturn Precedent*, 16 *Nexus: Chapman's J. L. & Pol'y* 121 (2011).

¹¹² *Harris*, 134 S. Ct. at 2651–53 (Kagan, J., dissenting).

day care providers, for example, have already taken advantage of *Harris* to escape the forced unionization that Governor Blagojevich imposed on them in 2005. After the Supreme Court issued *Harris*, my colleagues and I at the Liberty Justice Center and the Illinois Policy Institute helped one of those day care providers, Laura Baston, petition Governor Quinn to stop taking union fees from day care providers in light of the Supreme Court's decision. We didn't think the state and SEIU would give that money up without a fight—we were ready to file a lawsuit—but they backed down. In a letter responding to Baston, the state said that, in light of *Harris*, it and SEIU had decided to immediately stop taking union fees from any day care provider who had not signed a union card.¹¹³ At this writing, Connecticut has suspended the collection of agency fees from personal assistants,¹¹⁴ and other states are likely to follow. 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 do¹¹⁵—until no one is forced to give money to a union simply because he or she receives a government subsidy.

Meanwhile, *Harris* has forced public-sector unions to try a new “experiment”: persuading people to give them money voluntarily to advance their ideas, just like the rest of us have to.¹¹⁶

¹¹³ Press Release, Illinois Policy Institute, *Unionized Illinois Daycare Providers No Longer Forced to Pay \$10 Million to SEIU* (July 31, 2014), available at http://www.illinoispolicy.org/press_releases/unionized-illinois-daycare-providers-no-longer-forced-to-pay-10-million-to-seiu/.

¹¹⁴ Hugh McQuaid, *State Delays Collection of Union Fees*, CTNewsJunkie (July 21, 2014), http://www.ctnewsjunkie.com/archives/entry/state_delays_collection_of_union_dues/.

¹¹⁵ Less than one month after the Court's decision in *Harris*, the National Right to Work Legal Defense Foundation sued to enjoin the forced unionization of home-care providers in Minnesota. See Press Release, National Right to Work Legal Defense Foundation, *Minnesota Homecare Providers File Federal Lawsuit Challenging Forced Unionization Scheme* (July 28, 2014), available at <http://www.nrtw.org/en/press/2014/07/minnesota-homecare-providers-file-federal-suit-07282014>.

¹¹⁶ David Moberg, *Has AFSCME Found the Cure to Harris v. Quinn?*, In These Times (July 16, 2014), http://inthesetimes.com/working/entry/16963/has_afscme_found_the_cure_to_harris.