First Amendment — Freedom of Speech — Compelled Subsidization — Harris v. Quinn

For thirty-five years after *Abood v. Detroit Board of Education*,[1] the First Amendment unquestionably permitted a public-sector union to collect fair-share fees from those members of a collective bargaining unit who refused to join the union.[2] These so-called "agency shop" arrangements served the state's interests in promoting labor peace[3] and in preventing nonmembers from free riding on the union's bargaining efforts.[4] In 2012, though, the winds shifted against *Abood*, whose reasoning the Court now labeled "something of an anomaly."[5] Last Term, in *Harris v. Quinn*,[6] the Court retreated further, holding that the First Amendment prohibits the assessment of a fair-share fee against in-home caregivers — paid by the State of Illinois but hired and supervised by their patients — who refused to support their exclusive union representative.[7] Underlying the Court's refusal to extend *Abood* to "quasi-public employees"[8] were two doctrinal shifts. For the first time, the Court appears to have (1) protected employee speech[9] about the terms of public employment because of its potential budgetary impact and (2) subjected a public-sector fair-share clause to scrutiny bordering on strict. Together, these moves seemingly drive a wedge between the law of fair-share fees and that governing public-employee speech generally.

Through its Home Services Program — also known as the "Rehabilitation Program" — the Illinois Department of Human Services uses federal Medicaid subsidies to pay "personal assistants" who provide in-home care to patients who might otherwise be institutionalized.[10] Though Illinois sets the workforce-wide terms of the assistants' em-

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[1] 431 U.S. 209 (1977).

[2] *See id.* at 225–26, 232.

[3] *See id.* at 224. Agency fees and exclusive representation — in which a union represents an entire bargaining unit — are thought to help avoid "[t]he confusion and conflict that could arise if rival . . . unions," with divergent goals, "each sought to obtain the employer's agreement." *Id.*

[4] *See id.*; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that *Abood* is not justified solely by the fact that "union activity redounds to the benefit of 'free-riding' nonmembers," but also because a union is "mandated by government decree" to "seek to further the interests of its nonmembers").

[5] Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012).

[6] 134 S. Ct. 2618 (2014).

[7] *Id.* at 2624, 2644.

[8] *Id.* at 2638.

[9] Though *Harris* involved compelled funding of private third-party speech, the Court has traditionally treated such funding as largely indistinguishable for constitutional purposes from compelled speech. *See, e.g.*, *id.* at 2639 (citing *Knox*, 132 S. Ct. at 2288).

[10] *Id.* at 2623–24 (citing ILL. ADMIN. CODE tit. 89, § 676.10(a) (2007)). Illinois administers a similar service — known colloquially as the "Disabilities Program" — for mentally disabled adults. Harris v. Quinn, No. 10-cv-02477, 2010 WL 4736500, at *1 (N.D. Ill. Nov. 12, 2010).

ployment,[11] it is the patients who are otherwise "responsible for controlling all aspects" of the caregiver relationship.[12] In 2003, then-Governor Blagojevich directed the State to recognize a union chosen by a majority of the assistants.[13] The Illinois legislature soon codified that order, declaring the "assistants . . . 'public employees' of the State of Illinois — but '[s]olely for the purposes of'" collective bargaining.[14]

Later that year, the assistants elected Service Employees International Union, Healthcare Illinois & Indiana ("SEIU-HII") as their exclusive representative.[15] SEIU-HII and the State subsequently entered into two collective bargaining agreements containing fair-share provisions, as authorized by Illinois state law.[16] These provisions required nonmember assistants "to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment."[17]

Banding together, three assistants filed a putative class action against Governor Quinn and SEIU-HII, alleging that the fair-share clauses compel objecting assistants to support SEIU-HII's bargaining efforts, in violation of the First Amendment.[18] In 2010, a federal district court replied that such fees are constitutional pursuant to "longstanding Supreme Court precedent."[19] Because the plaintiffs were designated public employees for collective bargaining purposes, and had not "alleg[ed] that the fair share fees . . . support[ed] any political or ideological activities," the court dismissed the suit for failure to state a claim.[20]

The Seventh Circuit affirmed in part.[21] Writing for the panel, Judge Manion[22] noted that the Supreme Court "has not wavered from its position that, as a general matter, employees may be compelled to support

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[11] *Harris*, 134 S. Ct. at 2646 (Kagan, J., dissenting). Illinois's role in administering the program is largely limited to setting employment qualifications, helping create service plans, paying assistants, mandating annual reviews, and mediating disputes. *Id.* at 2624–25 (majority opinion).

[12] *Id.* at 2624 (quoting ILL. ADMIN. CODE tit. 89, § 676.30(b)). Patients are largely free to hire, supervise, and terminate their assistants without state interference. *Id.* The State may, however, withhold pay from assistants who fail to meet its standards. *Id.* at 2647 (Kagan, J., dissenting).

[13] *Id.* at 2626 (majority opinion). Governor Blagojevich's order overturned the Illinois Labor Relations Board's prior finding that it lacked jurisdiction to grant a union's request to represent the assistants because the assistants were not employed by the State alone. *Id.* at 2625–26.

[14] *Id.* at 2626 (alteration in original) (quoting 20 ILL. COMP. STAT. 2405/3(f) (2012)).

[15] *Id.*

[16] Harris v. Quinn, No. 10-cv-02477, 2010 WL 4736500, at *2 (N.D. Ill. Nov. 12, 2010).

[17] Harris v. Quinn, 656 F.3d 692, 695 (7th Cir. 2011) (internal quotation mark omitted).

[18] *Harris*, 2010 WL 4736500, at *1, *3. The plaintiffs were joined by seven individual providers from the Disabilities Program, *id.* at *1 & n.1, who argued their First Amendment rights were imperiled by two unions' efforts — as yet unsuccessful — to unionize the providers, *id.* at *9.

[19] *Id.* at *9.

[20] *Id.* Since the Disabilities Program providers had not unionized, the court held both that their claim was not ripe and that they lacked Article III standing to bring the claim. *Id.* at *9–10.

[21] *Harris*, 656 F.3d at 701.

[22] Judge Manion was joined by then-Judge (now Chief Judge) Wood and Judge Hamilton.

legitimate, non-ideological, union activities germane to collective-bargaining representation."[23] Considered against the backdrop of *Abood*, the only question was "whether the personal assistants are . . . State employees."[24] Here, because Illinois held "significant control over virtually every aspect of a personal assistant's job" — including fixing qualifications, approving service plans, and setting pay — it could be deemed an assistant's employer even if she was also employed by her patient.[25] Judge Manion thus held "that the State may compel the personal assistants, as *employees* . . . to financially support a single representative's exclusive collective bargaining representation."[26]

The Supreme Court reversed in part.[27] Prefacing his opinion with a reminder that the Court recently "pointed out that *Abood* is 'something of an anomaly,'"[28] Justice Alito[29] stated that Illinois "asks us to sanction what amounts to a very significant expansion of *Abood*."[30] For the majority, the question was whether *Abood* should apply "not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization."[31]

In search of an answer, Justice Alito first retraced the Court's steps to *Abood*.[32] The trouble in *Abood* began, he argued, with the premise that the constitutionality of *public-sector* agency shops had been largely settled by two decisions that (1) said little about the First Amendment and (2) addressed *private-sector* union shops.[33] When workers in *Railway Employes' Department v. Hanson*[34] challenged a statute authorizing rail companies to enter into union-shop agreements, the

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[23] *Harris*, 656 F.3d at 697.

[24] *Id.* Judge Manion rejected arguments that the State's interest in labor peace was diminished here, finding that Illinois has a general interest in "'stabilized labor-management relations,' which are at issue in any [employment] relationship, regardless of whether employees share the same workplace." *Id.* at 699 (quoting Ry. Employes' Dep't v. Hanson, 351 U.S. 225, 234 (1956)).

[25] *Id.* at 698. The court held that, under the concept of joint employment, the "patient and the State may [both] be employers if they each exercise significant control over the . . . assistants." *Id.*

[26] *Id.* at 699. The Seventh Circuit also agreed that the Disabilities Program providers' claim was not ripe, citing a lack of "probabilistic future *harm*" sufficient to confer standing. *Id.* at 700.

[27] *Harris*, 134 S. Ct. at 2644.

[28] *Id.* at 2627 (quoting Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012)).

[29] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

[30] *Harris*, 134 S. Ct. at 2627.

[31] *Id.*

[32] *See id.* at 2627–30.

[33] *See id.* at 2632. Though a union shop is distinct from the type of agency shop at issue in *Abood* and *Harris* — in that the former permits a union to "place an employee who only pays dues on its 'membership' rolls" — the Court has recognized that "there is no realistic difference from a legal standpoint between" the two arrangements. United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760, 765 (9th Cir. 2002) (citing NLRB v. Gen. Motors Corp., 373 U.S. 734, 743–44 (1963)). *But see The Supreme Court, 1976 Term — Leading Cases*, 91 HARV. L. REV. 188, 195 n.41 (1977) (arguing that union shops are more restrictive of associational freedom because they permit compulsory membership, not just the assessment of fair-share fees).

[34] 351 U.S. 225 (1956).

Court dismissed their First Amendment claim "with a single sentence" containing an inapt analogy.[35] And when the Court took up a similar challenge in *International Ass'n of Machinists v. Street*,[36] it skirted the constitutional question by construing the statute to prevent unions from using compelled fees "to support political causes which [an objecting employee] opposes."[37] Moreover, in treating these cases as dispositive, Justice Alito explained, *Abood* was blind to "difference[s] between the core union speech involuntarily subsidized" by private and public workers.[38] Because public-sector wage negotiations blur the line between bargaining and lobbying, it is hard to distinguish permissible union expenses from their politically oriented cousins.[39]

Given these concerns, Justice Alito refused to countenance the expansion of *Abood* to assistants who were not, in his view, full-fledged public employees.[40] Whereas the State typically governs all aspects of public employment, here supervisory authority over the assistants ultimately rested with the patients.[41] With most conditions of the assistants' employment thus insulated from state control, the majority argued, the principal justification for using agency fees to prop up an exclusive representative's bargaining efforts had become a "poor fit."[42]

Setting *Abood* aside, the majority considered anew whether a fair-share clause covering quasi-public employees "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'"[43] The provision here did not pass muster. It contributed little to labor peace because, inter alia, the assistants worked not in a common facility but in patient homes.[44]

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[35] *Harris*, 134 S. Ct. at 2629 (citing *Hanson*, 351 U.S. at 238).

[36] 367 U.S. 740 (1961).

[37] *Harris*, 134 S. Ct. at 2630 (quoting *Street*, 367 U.S. at 769) (internal quotation mark omitted). All *Hanson* held, Justice Alito explained, "was that [the Act] was constitutional *in its bare authorization* of union-shop contracts." *Id.* at 2632 (quoting *Street*, 367 U.S. at 749). *Abood*, however, raised a distinct issue since *Hanson*'s bare authorization had now yielded to actual imposition. *Id.*

[38] *Id.* at 2632. Though *Harris* and *Street* involved private employers, *Abood* treated the differences between private- and public-sector collective bargaining as immaterial. *See id.*

[39] *See id.* at 2632–33.

[40] *Id.* at 2638.

[41] *Id.* at 2634.

[42] *Id.* at 2636; *see also id.* at 2637 n.18 ("[T]he best argument . . . in support of *Abood* is based on the fact that a union, in serving as the exclusive representative . . . is required by law to engage in certain activities that benefit nonmembers . . . . But where the law withholds from the union the authority to engage in most of those activities, the argument for *Abood* is weakened."). Justice Alito specifically noted that the assistants are denied benefits normally afforded state employees, *id.* at 2634–35, that SEIU-HII lacks input into the service plans, *id.* at 2636, that state law sets the assistants' pay, *id.* at 2637, and that the union has no role in patient-assistant grievances, *id.*

[43] *Id.* at 2639 (omission and second alteration in original) (quoting Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2289 (2012)); *see also id.* (arguing that "agency-fee provision[s] impose[] 'a significant impingement on First Amendment rights,'" which "cannot be tolerated unless [they] pass[] 'exacting First Amendment scrutiny'" (quoting *Knox*, 132 S. Ct. at 2289)).

[44] *See id.* at 2640.

Most importantly, the defendants had failed to prove that the State's interest in "exclusive representation in the public sector is dependent on a union or agency shop."[45] The majority thus held that the fair-share fee violated the objecting assistants' First Amendment rights.[46]

Before concluding, Justice Alito declined the defendants' invitation to affirm the Illinois scheme under *Pickering v. Board of Education*.[47] Under *Pickering*'s balancing test — the Court's traditional framework for evaluating free speech claims in the public workplace — the government may restrict a public employee's speech "as a citizen on a matter of public concern" *only if* it "ha[s] an adequate justification for treating the employee differently from any other member of the general public."[48] But Justice Alito declared this framework inapposite because the Court had never "seen *Abood* as based on *Pickering* balancing"[49] and Illinois was not acting as a "traditional employer."[50] For argument's sake, though, he opined that the objecting assistants' First Amendment interests would be protected under *Pickering* because (1) SEIU-HII's efforts to secure increased wages were a matter of public import in an age of rising Medicaid costs and (2) Illinois could not justify the First Amendment burden that attends compelled union dues.[51]

Justice Kagan dissented.[52] Because neither party had distinguished *Harris*'s fair-share clause from its cousin in *Abood* nor alleged that SEIU-HII misused agency fees for political ends, the Court faced a "straightforward question: does *Abood* apply equally to Illinois's care providers as to Detroit's teachers?"[53] Like Judge Manion, Justice Kagan found it irrelevant that the assistants "are employees not only of the State but also of the disabled persons for whom they care."[54] *Abood* controls, she argued, because "Illinois has sole authority over . . . the issues most likely to be the subject of collective bargaining."[55]

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[45] *Id.* at 2634; *see also id.* at 2640–41.

[46] *Id.* at 2644. The Court separately affirmed the Seventh Circuit's conclusion that the Disabilities Program providers' First Amendment claim was not ripe. *Id.* at 2644 n.30.

[47] 391 U.S. 563 (1968); *see Harris*, 134 S. Ct. at 2641–43. The defendants were joined by the United States, as amicus curiae, in urging the Court to apply *Pickering*. *Id.* at 2641.

[48] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). Under *Pickering*, an employee has no First Amendment claim if his state employer restricts speech on a matter of private concern. *See id.*

[49] *Harris*, 134 S. Ct. at 2641.

[50] *Id.* at 2642.

[51] *See id.* at 2642–43.

[52] Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor.

[53] *Harris*, 134 S. Ct. at 2646 (Kagan, J., dissenting).

[54] *Id.*; *see also id.* at 2649 ("The true issue is whether Illinois has a sufficient stake in, and control over, the petitioners' terms . . . of employment to implicate *Abood*'s rationales . . . .").

[55] *Id.* at 2647. Justice Kagan found that SEIU-HII's ability to bargain over wages, qualifications, and duties "more than suffices to implicate the state interests justifying *Abood*." *Id.* at 2650.

The dissent nevertheless applauded the majority for denying the plaintiffs' "radical request" to overrule *Abood*.[56] Notwithstanding the majority's "off-base" attacks, Justice Kagan insisted it lacked "the special justification necessary to overturn *Abood*."[57] Furthermore, by discarding *Abood*, the Court would have introduced a sui generis wedge between the "law surrounding fair-share provisions" and the more permissive "law relating to public employees' speech generally."[58] Though they "stemm[ed] from different historic antecedents,"[59] the dissent observed that *Abood* and *Pickering* both recognize that the state as employer has broad power to enforce employment conditions impacting expression.[60] *Abood*'s demise would thus have crafted "an anomaly," for "[p]ublic employers could then pursue all policies, except [fair-share provisions], reasonably designed to manage personnel."[61]

Buried amidst the many eulogies penned for *Abood* in the wake of *Harris*[62] is a puzzle. The Court has long afforded generous "constitutional latitude" to the government qua employer,[63] even with respect to speech restrictions in the public workplace.[64] But *Harris* cuts against this current; though the majority distinguished *Abood* by characterizing the assistants as quasi-public employees, its reasoning — in electing not to extend *Abood*, in striking down the Illinois scheme, and in applying *Pickering* in dicta — reaches further, splashing doubt upon a key tool in the state's regulation of its own workforce. This raises a question: can one reconcile the contra-*Abood* world augured by *Harris* with the "Court's overall framework for assessing public employees' First Amendment claims"?[65] The majority's reasoning suggests "no."[66]

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[56] *Id.* at 2658. The question presented on certiorari and occupying much of the merits-stage briefing and argument was whether the Court should overturn *Abood*. *Id.* at 2645.

[57] *Id.* at 2651. For the dissent, "the difficulties of distinguishing between collective bargaining and political activities" — which were foreseen by the Court in 1977 — did not justify upsetting thousands of contracts forged in *Abood*'s shadow. *Id.* at 2652.

[58] *Id.* at 2654.

[59] *Id.*

[60] *See id.* at 2655. Justice Kagan dismissed concerns that public-sector bargaining blends into political advocacy; as she noted, the Court has never held "that any matter of public employment affecting public spending . . . becomes for that reason alone an issue of public concern." *Id.*

[61] *Id.* at 2654.

[62] *See, e.g.*, Lyle Denniston, *Opinion Analysis: A Ruling Inviting a Plea to Overrule*, SCOTUSBLOG (June 30, 2014, 5:27 PM), http://www.scotusblog.com/2014/06/opinion-analysis-a-ruling-inviting-a-plea-to-overrule [http://perma.cc/8JYT-6FM3].

[63] *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting); *see also, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 609 (2008) (holding that class-of-one equal protection claims are not cognizable in the context of public employment).

[64] *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011); Garcetti v. Ceballos, 547 U.S. 410 (2006).

[65] *See Harris*, 134 S. Ct. at 2651 (Kagan, J., dissenting).

[66] *See id.* ("To accept that framework, while holding *Abood* at arms-length, is to wish for a *sui generis* rule, lacking in justification, applying exclusively to union fees.").

Buoyed by two doctrinal innovations — the aggregation of employee speech and the evident application of strict scrutiny to a "public-sector" fair-share clause — the Court no longer appears willing to grant the state as much leeway when it comes to compelling union dues.

For decades, the Court's public-employee speech jurisprudence has reflected "the common-sense realization that government offices could not function if every employment decision became a constitutional matter."[67] As the Court explained in *Garcetti v. Ceballos*,[68] "there would be little chance for the efficient provision of public services" if state employers lacked "a significant degree of control over their employees' words and actions."[69] To resolve this concern — and "recognizing that both face comparable challenges in maintaining a productive workforce" — the Court "ha[s] tried to place the government-qua-employer in a similar . . . position to the private employer."[70]

It is this effort that unites *Pickering* and *Abood*.[71] In *Pickering* and its progeny, the Court "devised methods for distinguishing between speech restrictions reflecting the kind of concerns private employers often hold (which are constitutional) and those exploiting the employment relationship to restrict employees' speech as private citizens (which are not)."[72] Similarly, *Abood* declared the state "should have the same prerogative as a private business in deciding how best to negotiate with its employees."[73] In these cases, the Court took a stand: "except in narrow circumstances [it would] not allow an employee to make a 'federal constitutional issue' out of basic 'employment matters, including . . . pay, discipline, promotions, leave, [and] vacations.'"[74]

Consistent with the notion that the government "has broader discretion to restrict speech when it acts . . . as employer,"[75] the Roberts Court's pre-*Harris* cases evinced little desire to protect broad swaths of speech in the government workplace.[76] For example, in 2006, the Court ruled that public employees do "not speak[] as citizens for First

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67 Connick v. Myers, 461 U.S. 138, 143 (1983).

68 547 U.S. 410.

69 *Id.* at 418.

70 *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting).

71 *See id.* at 2654–55.

72 *Id.* at 2653.

73 *Id.* at 2654.

74 *Id.* at 2655 (quoting Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2496 (2011)); *see also id.* at 2654 (arguing that "the law surrounding fair-share provisions coheres with the law relating to public employees' speech generally" in that *Abood* recognized that "speech within the employment relationship about pay and working conditions pertains mostly to private concerns").

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

76 *See* Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725 (2011) ("The Roberts Court has consistently ruled against free speech claims when brought by government employees . . . ."); Ronald K.L. Collins, Foreword, *Exceptional Freedom — The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 & n.27 (2012).

Amendment purposes" when they "make statements pursuant to their official duties."[77] Thus, a deputy district attorney could be disciplined for recommending dismissal of a case.[78] Likewise, in *Borough of Duryea v. Guarnieri*,[79] the Court extended *Pickering* balancing to the Petition Clause, holding that if a public employee's union grievance regards private concerns, it cannot give rise to First Amendment protection.[80]

Cast against this backdrop, *Harris* is — to borrow a phrase from Justice Alito — "something of an anomaly."[81] Although *Harris* technically distinguished *Abood* by emphasizing that the assistants were not full-fledged public employees,[82] the majority took aim at the foundations of fair-share clauses generally. Neither its critique of *Abood* — which underlay the refusal to expand that decision — nor its reasoning in striking down the Illinois scheme turned on the quasi-public nature of the assistants' employment. Instead, *Harris* presages a Court prepared to eviscerate the state's ability to control one — but only one — form of public-employee speech.[83] Behind this apparent doctrinal divergence lies a pair of progressions in the law governing fair-share fees.

First, in line with its skeptical take on public-employee speech claims, the Court repeatedly suggested pre-*Harris* that speech about public-employee compensation, being of no public import, falls outside the First Amendment's protective umbrella.[84] *Harris* broke sharply from this practice, however, by protecting the assistants from "involuntarily subsidiz[ing]" union speech on "issues such as wages, pensions, and benefits."[85] In both criticizing *Abood* and applying *Pickering* in dicta, the Court reasoned by aggregation: as members of a union come

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[77] *Garcetti*, 547 U.S. at 421.

[78] *Id.* at 421–22; *see also* Lane v. Franks, 134 S. Ct. 2369, 2381 (2014) (holding First Amendment protects a public employee who provided subpoenaed testimony outside normal job duties).

[79] 131 S. Ct. 2488 (2011).

[80] *See id.* at 2500–01.

[81] Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012).

[82] As Justice Alito noted, this characterization of the assistants' status made it "unnecessary . . . to reach [the] argument that *Abood* should be overruled." *Harris*, 134 S. Ct. at 2638 n.19.

[83] *See, e.g.*, Jason Walta, Harris v. Quinn *Symposium:* Abood *and the Limits of Cognitive Dissonance*, SCOTUSBLOG (July 1, 2014, 12:49 PM), http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-abood-and-the-limits-of-cognitive-dissonance [http://perma.cc/VC5G-BBW3].

[84] *See, e.g.*, Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("[S]peech on merely private employment matters is unprotected." (citing Connick v. Myers, 461 U.S. 138, 146 (1983)); *see also* Garcetti v. Ceballos, 547 U.S. 410, 429 (2006) (Souter, J., dissenting) ("It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers."). Even Justice Powell — writing separately to criticize the majority's reasoning in *Abood* — opined "that on some . . . economic issues — teachers' salaries and pension benefits, for example — the case for requiring the teachers to speak through a single representative would be quite strong, while the concomitant limitation of First Amendment rights would be relatively insignificant." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 263 n.16 (1977) (Powell, J., concurring in the judgment).

[85] *Harris*, 134 S. Ct. at 2632; *see also id.* at 2655 (Kagan, J., dissenting) (arguing that the majority's "view of the First Amendment interests at stake blinks decades' worth of . . . precedent").

together to call for higher wages, their collective voices gain a salience they lacked individually.[86] The majority's reasoning was this: collective bargaining threatens public coffers to a far greater degree than does a single employee's remarks.[87] Thus, the majority criticized *Abood* for not grasping that union speech on public-sector wages reaches "important political issues," particularly in an age of ballooning state payrolls.[88] And in deciding the assistants would warrant protection under *Pickering*, Justice Alito insisted "it is impossible to argue that the level of Medicaid funding . . . is not a matter of great public concern."[89]

Harris evinces a second line of retreat: the requirement that public-sector fair-share clauses survive what appears to be strict scrutiny. The law of public-sector fair-share fees long exhibited one oddity: for years the Court hinted at[90] but never clarified the degree of scrutiny that would attach to such arrangements.[91] That hesitation began to give way in *Knox v. SEIU, Local 1000*,[92] however, in which Justice Alito explained — in a case involving full-fledged public employees — that "any procedure for exacting fees from unwilling contributors . . . must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest."[93] *Knox*, it seems, endorsed strict scrutiny in all but the most express terms.[94] And though the *Harris* majority professed that "no fine parsing of levels of First Amendment scrutiny is needed," it applied *Knox*'s standard not just to agency fee–assessment procedures, but — for the first time — to the underlying clause itself.[95] Avowed judicial minimalism aside, Justice Alito laid the standard bare: "The agency-fee provision cannot

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[86] *See id.* at 2642 n.28 (majority opinion) ("We do not doubt that a single public employee's pay is usually not a matter of public concern. But when the issue is pay for an entire collective-bargaining unit involving millions of dollars, that matter affects statewide budgeting decisions."); *see also* Transcript of Oral Argument at 6, *Harris*, 134 S. Ct. 2618 (No. 11-681), http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-681_8mj8.pdf [http://perma.cc/Q62C-3K5H] (counsel for plaintiffs arguing that while an individual officer's complaints about his wages are a private matter, when "you ha[ve] an organization petitioning a . . . police district for wages across the board for police officers . . . that is a matter of public concern").

[87] *See Harris*, 134 S. Ct. at 2642–43 & n.28 ("The $338 payment at issue in *Guarnieri* had a negligible impact on public coffers, but payments made to public-sector bargaining units may have massive implications for government spending." *Id.* at 2642 n.28.).

[88] *Id.* at 2632.

[89] *Id.* at 2642–43.

[90] *See, e.g.*, Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 & n.11 (1986) (stating that protecting "nonunion employees' constitutional rights . . . requires that the [agency shop] procedure be carefully tailored to minimize the infringement," *id.* at 303).

[91] *See* Aron Gregg, Note, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop*, 78 TEX. L. REV. 1159, 1172–74 (2000).

[92] 132 S. Ct. 2277 (2012).

[93] *Id.* at 2291.

[94] *See* W. James Young, *Casting an Overdue Skeptical Eye:* Knox v. SEIU, 2011–2012 CATO SUP. CT. REV. 333, 333.

[95] *Harris*, 134 S. Ct. at 2639.

be sustained *unless* the cited benefits for personal assistants *could not have been achieved* if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join."[96]

Together, *Harris*'s doctrinal novelties augur an *Abood*-less world to come.[97] Notwithstanding efforts to cabin its opinion by qualifying the nature of the assistants' employment, both the majority's aggregation principle and its apparent application of strict scrutiny undermine reasoning at the heart of *Abood*.[98] For instance, *Abood* is based on the premise that courts can distinguish between union expenses germane to collective bargaining and those pertaining to political causes.[99] But where the Court believes public-sector bargaining — by virtue of its aggregated impact on public budgets — encroaches upon crucial political sensitivities, *Abood*'s conceptual framework is likely untenable.[100] Furthermore, by insisting on proof that compelled dues are strictly necessary to the existence or effectiveness of "public-sector" exclusive representation, Justice Alito set out an empirical challenge that neither the defendants in *Harris*[101] nor the Court in *Abood* could have met.[102]

Harris depicts a Court at a crossroads. Through the invocations of "aggregation" and "strict scrutiny," *Harris* paints a landscape inhospitable to *Abood*. With these two brushstrokes, the Court appears poised to extend First Amendment protections to public employees at the bargaining table that they have long been denied in the office cubicle. But before *Abood* is dispatched to the land of doctrines forgotten, the Court will have to answer one question: why is only *this* public-employee speech worthy of such extensive protection?

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[96] *Id.* at 2641 (emphasis added).

[97] *See, e.g.*, John Eastman, Harris v. Quinn *Symposium:* Abood *and the Walking Dead*, SCOTUSBLOG (June 30, 2014, 6:09 PM), http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-abood-and-the-walking-dead [http://perma.cc/V3MZ-RZ6S].

[98] If the Court again considers the constitutionality of fair-share fees with respect to full public employees, it will likely have to decide whether to set *Abood* aside. But it is important to note that *Knox*'s exacting scrutiny has been grafted onto, not substituted for, *Abood*. *See Knox*, 132 S. Ct. at 2289–91. *Knox* and *Harris* thus suggest that, faced with a case indistinguishable from *Abood*, the Court will demand proof that the fee is the least restrictive means of achieving a compelling state interest. *See, e.g.*, *Harris*, 134 S. Ct. at 2639 (paradoxically refusing to parse levels of scrutiny since the clause "cannot satisfy even the test used in *Knox*," which is extraordinarily demanding).

[99] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236–37 (1977) (dismissing concerns about "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining," *id.* at 236).

[100] *Compare Harris*, 134 S. Ct. at 2632–33 ("[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government."), *with Abood*, 431 U.S. at 231 ("There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plan . . . .").

[101] *See Harris*, 134 S. Ct. at 2641 (striking down Illinois's scheme in part because no showing was made that compelled dues were necessary to improvements in the assistants' status).

[102] *See id.* at 2634 (rejecting the "unsupported empirical assumption" — critical to *Abood* — that "exclusive representation in the public sector is dependent on a union or agency shop").