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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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THE FUTURE OF PUBLIC SECTOR BARGAINING: ONE DECISION TO UNDO THEM ALL

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THE FUTURE OF PUBLIC SECTOR BARGAINING: ONE DECISION TO UNDO THEM ALL

By, Margaret Angelucci, Amanda Clark, and Susan Matta

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On January 21, 2014, the United States Supreme Court heard oral argument in *Harris v. Quinn*.[1] The Court is not expected to issued its decision until May or June. Until the decision is issued, public sector labor organizations and right to work advocates wait with baited breath. Each side has a huge stake in this fight. The Court's decision in this case has the power to so fundamentally change public sector collective bargaining that collective bargaining's very survival may be at stake. As Harvard University Law School Professor Benjamin Sachs said, the Court's decision in *Harris* goes "to the heart of the legal regimes that are necessary to enable unionization."[2] The Court could simply reaffirm its long-standing

precedent regarding public sector fair share agreements which goes back to its 1977 decision in *Abood v. Detroit Board of Education*. [3] There is also a distinct possibility that the Court could rule all fair share agreements in the public sector unconstitutional. For the right-to-work advocates, such a decision in their favor would be the first step to implementing the new realities of Wisconsin and Michigan across the entire country. While it may be tempting for public sector labor to rest on the precedent of *Abood* and subsequent case law, a recent Supreme Court decision leaves this precedenton perceivably shaky ground. *Knox v. Service Employees International Union, Local 1000*, served a blow to public sector unions' ability to collect fair share fees.[4] In dicta, written by Justice Alito, the Court appeared to invite a case challenging the basic constitutionality of fair share agreements.[5] That invitation was accepted when the Court granted *certiorari* in *Harris v. Quinn*.

I. THE PRECEDENT

For almost forty years, Supreme Court precedent has held that fair share agreements in public sector collective bargaining are constitutional. While the contours and fine details of the precedent have been refined since 1977, the core finding that fair share agreements are constitutional has not been called into serious question. An understanding of this precedent is important to understanding what the Court could be poised to do in *Harris v. Quinn*.

A. Abood v. Detroit Board of Education

Abood v. Detroit Board of Education is the ground on which all cases dealing with public sector fair share agreements have been built. In *Abood*, public school teachers in Detroit challenged the requirement that they pay service fees comparable to union dues.[6] The teachers did not support public sector unions and objected to union ideological activity. The State of Michigan, at the time, had legislation that allowed a union and local government to agree that every employee represented by the union, as a condition of employment, pay a service fee equal to union dues. However, nothing in the contract "required any teacher to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs."[7] The issue before the Court, therefore, was whether the constitutional rights of government employees who object to public-sector unions and union activities are violated by compulsory service fees.[8]

For its decision, the Court looked to two private sector cases, *Railway Employees Deptartment v. Hanson*,[9] and *International Association of Machinists v. Street*.[10] Specifically, the Court noted the holding in *Hanson*, that "the requirement for financial support of the collective-bargaining agency by all who

receive the benefits of its work…does not violate…the First… Amendmen(t).”[11] The Court found Congress’ determination when passing the Railway Labor Act, that requiring employees who obtain the benefit of union representation share its costs promoted peaceful labor relations, was an allowable one.[12] In *Street*, the Court clarified its holding in *Hanson*. The *Street* record contained evidence that the nonmembers’ fees were being used to finance the political campaigns of state and federal candidates and promote political and economic policy issues, all of which the nonmembers did not support.[13] The Court recognized that the case presented “constitutional ‘questions of the utmost gravity’ not decided in *Hanson*.”[14] The Court found that the Railway Labor Act, which governed the case, could be construed in a way to avoid the constitutional issues presented.[15] Because the Act only allowed expenditures related to the union’s function in negotiating and administering the collective bargaining agreement and grievance procedures, charges for those services were not an issue.[16] However, the Court held that the use of compulsory union dues for political purposes violated the Act itself.[17] In so ruling, the Court avoided the constitutional question.

The Court in *Abood* noted the “great responsibilities” a union has as an exclusive bargaining representative.[18] Significant time and money are spent negotiating and administering contracts and settling disputes and grievances on behalf of employees. Requiring non-union members to pay a fair share “has been thought to distribute fairly the costs of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become ‘free riders’ to refuse to contribute to the union while obtaining the benefits of union representation.”[19] While such fair share payments may be thought to interfere with an employee’s freedom of association rights, “the judgment clearly made…is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”[20]

Moving from the private to the public sector, the Court in *Abood* found that the “very real differences” between public and private sector bargaining representatives “are not such as to work any greater infringement upon the First Amendment interests of public employees.”[21] Furthermore, nothing stops the public employee from expressing his viewpoint in opposition to the union.[22] The Court acknowledged that public employee unions and the employees who disagree with them are engaged in political activities because they are attempting to influence policy making.[23] However, the Court found that status as a public employee “does not raise the ideas and beliefs of public employees onto a higher

plane than the ideas and beliefs of private employees."[24] Put simply, the Court stated that "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment Rights."[25]

Abood raised an issue not previously addressed in *Street* or *Hanson,* the constitutionality of the use of nonmembers' contributions for purposes other than collective bargaining.[26] The Court found that requiring public sector employees to contribute to the ideological or political causes of the public sector union as a condition of holding a job was a violation of the employees' First Amendment freedom of association.[27] The Court was explicit that its holding did not stop a union from engaging in political activities, but only that the Constitution required that such activities be financially supported only by the dues of employees who do not object to such activities and who are not "coerced into doing so against their will by the threat of loss of government employment."[28] Left unresolved by the *Abood* decision was how unions were to classify collective bargaining activities and political activities unrelated to collective bargaining; the Court noted that these were difficult problems that were not in front of it at the time.[29]

B. Chicago Teachers Union, Local No. 1 v. Hudson

In *Chicago Teachers Union, Local No. 1 v. Hudson*, non-union employees challenged the union's method of calculating their proportionate "fair share" amount.[30] The union and school board had entered into a "proportionate share" agreement to solve the problem of free riders.[31] The union determined that 95% of dues was an appropriate deduction for a "proportionate share," and that the school board would deduct that amount from nonmembers' paychecks.[32] Objecting non-member employees alleged that the Union procedure violated their First and Fourteenth Amendment rights and permitted the use of their proportionate shares for impermissible purposes.[33]

The union had measures in place for dissenting non-members to object to their proportionate share. After the proportionate share deduction was made, an objection could be filed by writing to the union president.[34] The objection would then go through a three stage procedure: 1) consideration by the executive committee; 2) if the objector disagreed with the committee's determination, the executive board would consider it; and 3) if the objector did not agree with the board's determination, the union president would select an arbitrator. Should the objection be sustained, all nonmembers would receive a deduction in all future dues and the objector would receive a rebate.[35]

The Court found the union's system constitutionally inadequate. According to the Court, the system contained three fundamental flaws. First, by only offering a

rebate, the system did not adequately avoid the risk that dissenters' fees may be used, even temporarily, for impermissible purposes.[36] Second, the reduction of dues did not provide nonmembers adequate information about the calculation of the proportionate share.[37] The Court stated that while the employee has the burden of raising the objection, the union, as the holder of the information, has the burden of proving the fee's validity.[38] Objectors need to be given sufficient information regarding the propriety of union fees due to "basic…fairness, as well as concern for the First Amendment rights at stake."[39] Third, the union's system failed to provide a reasonably prompt decision by an impartial decision maker.[40] An objecting employee, the Court said is "entitled to have his objections addressed in an expeditious, fair, and objective manner."[41]

The Court also concluded that an escrow for the amounts reasonably being challenged is required, although it does not have to be a 100 percent escrow.[42] The take away from the *Hudson* case, and a key element of the *Knox* case, is what has come to be known as the *Hudson* notice. Unions must provide an annual accounting of expenditures to allow dissenters to challenge the union's determination of which expenses are chargeable and must inform nonmembers of the process for objecting.[43]

C. Lehnert v. Ferris Faculty Association

The Court addressed the issue of what is chargeable and non-chargeable to dissenting nonmembers in *Lehnert v. Ferris Faculty Association*.[44] Non-member teachers objected to the union charging them for lobbying and electoral politics; bargaining, litigation and other activities not undertaken on behalf of members of the bargaining unit; public relations efforts; miscellaneous professional activities; meetings and conventions of parent unions and preparation for a strike that would have been illegal under Michigan law.[45] In a highly divided opinion, the Court put forth a three part test for whether union services were chargeable to nonmembers. To be chargeable, the activity engaged in must: (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders;" and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.[46] While recognizing that, in the public sector, the line between bargaining-related activities and purely ideological activities is "somewhat hazier," the Court drew the line at general public relations activities in supporting a particular profession or public employees generally, which it held to be not chargeable to objectors.[47] However, the Court found to

be chargeable expenditures for lobbying and other political activities for securing ratification of collective bargaining agreements.[48]

II. THE CURRENT CLIMATE

On June 21, 2012, the Court issued its opinion in *Knox v. Service Employees International Union, Local 1000*.[49] At issue in *Knox* was the First Amendment's requirements for special dues assessments not disclosed in the yearly *Hudson* notice.[50] California law allows for a majority of public employees to vote to approve an agency shop agreement,[51] and one was involved in the *Knox* case. In June 2005, SEIU sent a *Hudson* notice, setting monthly dues and estimating chargeable expenses at 56.35 percent of its regular dues.[52] After the *Hudson* notice's 30-day objection period ended, SEIU sent a notice that the fee was temporarily increased to fund the union's engagement in opposing two ballot initiatives.[53] The 25 percent increase would be used for an "Emergency Temporary Assessment to Build a Political Fight-Back Fund."[54] One ballot measure the union opposed would have required unions to obtain employee consent before charging them fees to be used for political purposes.[55] The second, would have limited state spending and allowed the Governor, under certain circumstances, to reduce appropriations for public-employee compensation.[56] Nonmembers were not given the option of opting out of the temporary raise in fees.[57]

The District Court granted summary judgment to the nonmembers for the union's failure to provide notice of the new assessment.[58] The Ninth Circuit Court of Appeals reversed. The Court of Appeals reasoned that *Hudson* set forth a balancing test with the proper inquiry being whether the union's procedures accommodated the interests of the union, the employer, and the non-member employees.[59] Applying this test, the court concluded that it was not necessary to issue a new *Hudson* notice for midyear assessments. According to the Ninth Circuit, the letter sent by the union notifying all employees of the nature and purpose of the assessment and charging previous objectors according to the prior year's chargeability percentage properly protected the First Amendment interests of all employees.[60]

The Supreme Court disagreed. In a seven to two decision, the Court held that a new *Hudson* notice is required for "special union assessments intended solely for political and ideological expenditures."[61] The Court's opinion did not end there. Five members of the Court, in an opinion written by Justice Alito, held also that any special assessment from that notice can *only be levied on those employees who opt-in to pay it*.[62] "Therefore, when a public-sector union imposes a special

assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers *without their affirmative consent*."[63]

Justice Sotomayor in a concurring opinion, in which Justice Ginsburg joined, agreed only that a new *Hudson* notice was required. Justice Sotomayor opined that the majority, in the portion of the Court's opinion requiring opt-in procedures, "disregards our rules" and reaches "significant constitutional issues not contained in the questions presented, briefed, or argued," and questions "the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution."[64] A dissent, written by Justice Breyer, in which Justice Kagan joined, agreed with Justice Sotomayor.[65] Justice Breyer further argued that the approach the union took was "at least one reasonably practical way" to protect objecting nonmembers and there was insufficient distinction between regular and special assessments to modify the basic *Hudson* notice approach.[66]

A. The Implications of Knox

Knox changes the entire scheme of how public unions are able to collect fair share fees from nonmembers who they represent. Under some circumstances, Unions may no longer send *Hudson* notices giving nonmembers an opportunity to opt out of paying for non-chargeable matters but must assume that that bargaining unit members will not want to pay full dues. However, as Justice Sotomayor pointed out in her opinion, the scope of the majority's requirement for an opt-in rather than an opt-out approach is unclear.[67]

> [M]ust a union undertaking a special assessment or dues increase obtain affirmative consent to collect "*any funds*" or solely to collect funds for *nonchargeable* expenses? May a nonmember opt not to contribute to a special assessment, even if the assessment is levied to fund uncontestably chargeable activities? Does the majority's new rule allow for any distinction between nonmembers who had earlier objected to the payment of nonchargeable expenses and those who had not? What procedures govern this new world of fee collection?[68]

Justice Breyer's dissent also raised concerns over the majority's adoption of the opt-in requirement, as "each reason the Court offers in support of its 'opt-in' conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well."[69]

While this leaves practical uncertainties for public sector unions, true concern for unions and their advocates was raised by dicta contained in the majority's

opinion. The "most disturbing dicta" of the *Knox* opinion questions the constitutionality of "collective bargaining based on exclusive representation and majority rule."[70] Justice Alito, in his opinion for the Court, stated,: "Our cases to date have tolerated this impingement [of compulsory fees on First Amendment rights], and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."[71] Justice Alito called the Court's acceptance of the free-rider argument "something of an anomaly—one that we have found to be justified by the interest in further labor peace. But it is an anomaly nevertheless."[72] Later in the opinion, Justice Alito stated: "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees…out prior decisions approach, *if they do not cross*, the limit of what the First Amendment can tolerate."[73] Furthermore, by allowing "unions to collect *any* fees from nonmembers…our cases have substantially impinged upon the First Amendment rights of nonmembers."[74] This language seemed to invite litigation challenging the constitutionality of mandatory fair share agreements.

Exactly what the effect of the *Knox* ruling is on public sector bargaining is unclear. However, commentators have pointed to *Knox* and its dicta as a reason for unions to be fearful of what the Court's next term might bring.[75] If nothing else, with the granting of certiorari in *Harris, Knox* serves as a bad omen. Noting the current Court's anti-labor stance, University of Baltimore law professor Garret Epps said, "The Justices remind me a little bit of a crime family in the sense that before they whack you, they send you a bullet, they let you know that you're next. They've done that with the labor movement."[76]

III. WHAT IS NEXT?

It only took one year for the *Knox* Court's apparent invitation for a case challenging the constitutionality of exclusive bargaining representation and agency shop agreements in the public sector to be answered. The Supreme Court granted certiorari in *Harris v. Quinn* on October 1, 2013, almost two full years after the petition for review was filed. The possible implications of *Harris v. Quinn* are far reaching and very concerning for public sector unions. The Court could do anything from uphold the precedent established in *Abood* and its progeny, to completely strip public sector unions of the financial support they need to function. Even with the outcome unknown, *Harris v. Quinn* has already disrupted public sector bargaining in multiple states as unions, employers and courts await the Supreme Court's decision.

The petitioners in *Harris*, home health care workers, originally filed their petition for writ of certiorari on November 29, 2011.[77] The case involves two groups of home health care workers in Illinois, personal assistants in the rehabilitation and disability programs. Personal assistants are individuals who provide household assistance, personal care and, with clearance from the client's physician, certain health care procedures for individuals with varying degrees of physical and mental disabilities.[78] The personal assistants' services are provided through two Medicaid waiver programs, the Home Service Program and the Home-Based Support Program, administered by the Illinois Department of Human Services (IDHS).[79] The Home Service Program is referred to as the Rehabilitation Program, and IDHS is responsible for funds being administered according to applicable laws. The Home Based Support Services program is referred to as the Disabilities Program, which assists individuals with mental disabilities and their families with in-home care.

Personal assistants in the Rehabilitation Program received the right to representational elections through an Executive Order in 2003.[80] The 2003 Executive Order not only gave personal care assistants the right to a representation election, but also required the state to recognize an exclusive representative of personal care assistants in the Rehabilitation Program for purposes of collective bargaining over terms and conditions of employment within the State's control. A majority of the personal assistants in the Rehabilitation Program voted to have SEIU, Healthcare Illinois and Indiana (SEIUHCII) represent them.[81] Shortly thereafter, the Illinois Public Labor Relations Act was amended to include personal assistants in the definition of public employees and to clarify that the duty to bargain regarding personal assistants was limited to terms and conditions of employment within the State's control.[82]

After the election, the State and SEIUHCII negotiated and entered into a collective bargaining agreement setting pay rates, creating a health benefit fund for personal assistants, a training program, and other provisions typical to collective bargaining agreements, such as a union security, or fair share, clause.[83] The fair share clause requires "all Personal Assistants who are not members of the Union . . . 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."[84]

In 2009, Governor Quinn signed Executive Order 2009-15, which gave personal care assistants in the Disabilities Program the right to a representation election and required the State to recognize an exclusive representative of personal

assistants in the Disabilities Program for purposes of collective bargaining over terms and conditions of employment within the State's control. SEIU, Local 73 petitioned for election and AFSCME, Council 31 intervened, but in a mail ballot election the majority of personal assistants rejected representation by either union.[85] This Executive Order remains in effect, but has not been codified.

Personal assistants from both groups filed a two count lawsuit against Governor Quinn and the three unions. The Rehabilitation Program personal assistants claimed the fair share requirements violated their First Amendment rights of free speech and association, and the Disability Program assistants claimed they were harmed by the threat of an agreement requiring fair share, even though they were not, and are not, paying any such fees.[86]

The Seventh Circuit Court of Appeals held that personal assistants were employees of the State.[87] The court reasoned that even though personal assistants were hired by their individual clients, the State still had significant control over aspects of their employment.[88] The Seventh Circuit found that "it is not an uncommon situation for a single individual to find himself with more than one employer for the same job."[89] Such control was evidenced by the State: (1) setting qualifications and evaluating the patient's choice of personal assistant; (2) having the ability to fire individuals who do not meet the state standards; (3) approving mandatory service plans that establish job responsibilities and work conditions; (4) conducting annual reviews of work performances; and (5) controlling all economic aspects of employment.[90]

Furthermore, the Seventh Circuit found that the state's interest in stabilized labor-management relations, a touchstone in previous public sector fair share cases, applies in any employer-employee relationship, even if all the employees are not in the same location.[91] Because the Seventh Circuit found personal assistants to be employees of the State, the fair share agreement was held constitutional.[92] However, the Seventh Circuit stressed that it's holding was narrow and limited to the finding that "personal assistants in Illinois home-care Medicaid waiver program are State employees solely for purposes of *Abood*."[93]

The Seventh Circuit did not reach the merits of the case for the personal care assistants in the Disabilities Program.[94] These personal assistants were not, and are not, represented by a union, and therefore their claimed violations were merely hypothetical.[95] The Seventh Circuit found that there was no certainty that these personal assistants would ever organize.[96] Because "the plaintiffs do not allege that the mere existence of the executive order violates their rights, only that it makes such a violation more likely…the courts cannot judge a hypothetical future

violation in this case any more than they can judge the validity of a not-yet-enacted law," to do so would be akin to giving an advisory opinion.[97] Therefore, the claim was dismissed without prejudice, allowing the plaintiffs to re-file should the dispute ripen.[98]

IV. THE POSSIBILITIES

The possible implications of the Supreme Court's decision in *Harris* range from the unlikely to the terrifying. The questions presented in *Harris* are:

> 1) May a State, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition to the State for greater reimbursements from its Medicaid programs? (2) Did the lower court err in holding that the claims of providers of Home Based Support Services Program are not ripe for judicial review?[99]

Public sector collective bargaining being shaken to its core after the Court's decision is a very possible reality that unions and employers should be prepared for.

A. The Great Hope

It is possible that the Supreme Court will affirm *Abood* and its progeny. This would result in the Court affirming the Seventh Circuit's ruling that personal assistants are employees of the State and may be constitutionally subject to a fair share agreement.

This would be the most positive outcome for public sector unions, especially those trying to organize home care workers who are funded by the state. Justice Scalia is the possible dark horse from the conservative cadre of the Court. Although he dissented in *Lehnert*, Justice Scalia did not disagree with the basic premise from the Court's precedent that fair share agreements are constitutional.[100] Instead, he disagreed with the three part test the Court came up with to determine what was a chargeable expense.

Justice Scalia recognized that there is a connection in the Court's First Amendment jurisprudence "between the rights and duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other."[101] Justice Scalia recognized the distinctive position that "free-riding" nonmembers hold, "*they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests."[102]

Justice Scalia's argument in the *Lehnert* dissent seems to directly confront the substance of the dicta in *Knox*, which, relying on a quotation from Professor Clyde Summers, analogized free riding in the absence of fair share agreements to community associations, parent-teacher associations, associations of university professors, and medical associations where not all individuals who benefit from an activity of the organization are required to pay for that benefit.[103] However, that the current Court would have granted certiorari simply to affirm its precedent is made even more unlikely by the Summers' quote among other dicta in *Knox*. As discussed above, the Court in *Knox* seemed to invite a challenge to the constitutionality of fair share agreements and indicated that it would be open to departing from its precedent.

B. The Mixed Bag

The Supreme Court could find that Rehabilitation Program personal assistants, and individuals who provide services through similar state programs, are not employees of the State. In ruling in this manner, the Court would avoid the constitutional questions, which it has done previously in cases dealing with similar issues.[104] The fallout of such a ruling would make these employees incredibly difficult to organize. It would be a blow to not only the unions named in this case, but other labor organizations that have found success organizing and winning representation elections for home health care and child care workers in other states.

Such effects can already be seen. The Eighth Circuit Court of Appeals granted a temporary injunction in a representation election for Minnesota in-home child-care providers.[105] AFSCME is attempting to organize 12,500 in-home child-care workers into one of Minnesota's largest public unions. The Eighth Circuit granted the injunction while waiting for the Supreme Court's decision on granting certiorari in *Harris* and has maintained the injunction since certiorari was granted.[106] The cases in Minnesota have followed a similar path to the *Harris* case. Minnesota's governor, Mark Dayton, issued an executive order in November of 2011 allowing for a representation election among child-care providers.[107] The law was challenged by two home day-care providers who alleged it violated their First Amendment rights.[108] The district court in Minneapolis dismissed both cases.[109] A separate unit of personal care attendants who were organizing under SEIU, continued to move forward with their plans for a representation election despite the injunction in the day-care providers' case.[110]

While dealing a strong blow to unions who have found some success in organizing home care workers, a decision limited to these grounds would spare the larger public sector labor movement as a whole from the worst possible outcomes.

C. Reaching Unlikely Constitutional Grounds

The Court could overturn the Seventh Circuit's finding regarding the Disability Group's standing and the ripeness of their claim. The Court could then issue a ruling that Executive Orders, such as those granting rights to representation elections to the Rehabilitation and Disability Personal Assistants are unconstitutional. Most likely such a ruling would rely on the ground that the governor was acting in a legislative capacity by issuing the executive order, which, in the case of the Disability Program, has not been codified in Illinois.

Such a ruling would obviously have an impact on public sector unions. Illinois and Minnesota have both granted collective bargaining rights to public employees through executive orders Executive orders had also granted collective bargaining rights to workers in Missouri and Indiana.[111]

This ruling seems very unlikely. The Court is, generally, adamantly opposed to deciding cases in which the claims are completely hypothetical and any decision in this arena would essentially be an advisory opinion. Overturning the Seventh Circuit and finding the Disability Program claims ripe would set a dangerous precedent for the Court. This would create a slippery slope that the Court would not want to start down, as the door would be opened to all manner of hypothetical claims.

D. The Great Fear

The questions presented in *Harris* are relatively narrow and can be addressed by any of the three possible outcomes discussed above. However, the worst case scenario for public sector bargaining is that the Supreme Court goes beyond the questions presented in the case, and makes a sweeping ruling that would be devastating.

In *Knox*, over strong dissent, the Court went beyond the questions presented and addressed the constitutionality of the opt-in versus opt-out procedures under a *Hudson* notice. In *Harris*, the Court could again go beyond the questions presented. *Harris* may serve as the means by which the Court revisits and overturns almost forty years of precedent allowing agency shop agreements. As previously discussed, the dictum in *Knox* raises the possibility of this outcome. Such a holding would be catastrophic for unions.

Practically, such a ruling would make it financially infeasible for unions to continue to operate. While nonmembers would be allowed to no longer pay fair share fees, the unions would still be required, by law, to represent these employees. Free-ridership "would be not incidental, but calculated, not imposed by circumstances but mandated by government decree."[112] The union would be required "to *go out of its way* to benefit [the free-riders], . . . at the expense of its other interests."[113]

V. BE PREPARED

Unions must be ready for whatever the new reality is after *Harris*. After *Knox,* unions know that how they collect their fair share fees will change in some way. After *Harris,* the ruling in *Knox* may be moot if the Court goes to the most extreme measure. Should that happen, the landscape for public sector unions will be bleak, but it is not impossible for them to continue to exist. In order for the unions to continue to operate and represent the interests of public sector workers, new strategies will have to be developed.

Should the Court rule that mandatory fair share fees are unconstitutional, unions must be prepared to shift their mode of operations. The entire country's public sector labor will essentially become right to work. But some unions have found a way to thrive, even in the right to work conditions. Culinary Workers Local 226, out of Las Vegas can be a model that public sector unions can build off of. Nevada has been a right to work state since the 1950s, but Local 226 has found a way to thrive, with approximately 60,000 members, around 90 percent of whom pay union dues.[114] Most of this success is attributed to the fact that it is a limited competition market and the jobs cannot be outsourced.[115] However, the same can be said of most government services.

While Local 226 is a private sector union, and the impact of *Harris* will be felt in the public sector, unions must be flexible and take what lessons they can from where the labor movement is finding success. *Harris* has the potential to completely reform the public sector labor landscape. Unions and employers must be prepared to the new reality that will emerge, whatever it may be.

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[1] S. Ct. No. 11-681 (2013) (argued Jan. 21, 2014).

[2] Lawrence Hurley &Amanda Becker, *Workers and Employers Face off at U.S. Supreme Court*, Reuters, Oct. 4, 2013, http://www.reuters.com/article/2013/10/04/us-usa-court-business-idUSBRE99304K20131004.

[3] 431 U.S. 209 (1977).

[4] 132 S. Ct. 2277 (2012).

[5] *Id.* at 2290-91.

[6] *Abood*, 431 U.S. at 212.

[7] *Id*. at 212.

[8] *Id*. at 211.

[9] 351 U.S. 225 (1956).

[10] 367 U.S. 740 (1961).

[11] *Abood*, 431 U.S. at 219, *quoting*, *Hanson,* 351 U.S. at 238.

[12] *Id.* at 219, *citing*, *Hanson*, 351 U.S. at 235.

[13] *Street*, 367 U.S. at 744.

[14] *Abood*, 431 U.S. at 219-20, *quoting, Street*, 367 U.S. at 749.

[15] *Street*, 367 U.S. at 750.

[16] *Id.* at 763-64.

[17] *Id.* at 768.

[18] Abood, 431 U.S. at 221.

[19] *Id.* at 221-22.

[20] *Id.* at 222.

[21] *Id.* at 230.

[22] *Id.*

[23] *Id.* at 231.

[24] *Id.*

[25] *Id.* at 232.

[26] *Id.* at 232-33. The Court in *Street* had decided the issue under the Railway Labor Act, thus avoiding any constitutional issues. *Id.* at 232.

[27] *Id.* at 235.

[28] *Id.* at 235-36.

[29] *Id.* at 236.

[30] *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

[31] *Id.* at 294.

[32] *Id.*

[33] *Id.* at 296-98.

[34] *Id.* at 296.

[35] *Id.*

[36] *Id.* at 305. The Court previously found rebates to be inadequate remedies in similar circumstances under the Railway Labor Act in *Ellis v. Brotherhood of Railway, Airlines and Steamship Clerks,*, 446 U.S. 435 (1984).

[37] *Hudson*, 475 U.S. at 306.

[38] *Id.*, *citing, Abood*, 431 U.S. at 239-40 n.40.

[39] *Hudson*, 475 U.S. at 306.

[40] *Id.* at 307.

[41] *Id.*

[42] *Id.* at 310.

[43] *Id.*

[44] *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

[45] *Id.* at 514.

[46] *Id.* at 519.

[47] *Id.* at 520, *quoting*, *Abood*, 431 U.S. at 236.

[48] *Lehnert*, 500 U.S. at 520.

[49] 132 S. Ct. 2277 (2012).

[50] *Id.* at 2285.

[51] Cal. Govt. Code Ann. §3502.2(a).

[52] *Knox*, 132 S. ct. at 2285.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 290.

[58] *Id.* at 2286.

[59] *Id.* at 2287.

[60] *Knox v. Calif. State Employees Ass'n*, 628 F.3d 1115, 1122-23 (9th Cir. 2010), *vev'd*, 132 S. Ct. 2277 (2012).

[61] 132 S. Ct. at 2296.

[62] *Id.*

[63] *Id.* (emphasis added).

[64] *Id.* at 2297-98 (Sotomayor, J., concurring in part, dissenting in part).

[65] *Id.* at 2307 (Breyer, J., dissenting).

[66] *Id.* at 2305.

[67] *Id.* at 2298 (Sotomayor, J., concurring is part, dissenting in part).

[68] *Id.* at 2298-99.

[69] *Id.* at 2306 (Breyer, J., dissenting).

[70] Catherine L. Fisk & Erwin Cherminsky, *Political Speech and Association Rights after* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1047 (2013).

[71] Knox,132 S. Ct. at 2290 (internal quotations omitted).

[72] *Id.* (internal quotations omitted).

[73] *Id.* at 2291 (emphasis added).

[74] *Id.* at 2295.

[75] Pema Levy, *Supreme Court 2013: Court Could Cripple Unions In Major Labor Cases*, INT'L BUS. TIMES, Oct. 7, 2013, http://www.ibtimes.com/supreme-court-2013-court-could-cripple-unions-major-labor-cases-1415866.

[76] *The Power of Three: A Supreme Court Preview*, Brennan Ctr. for Justice (Sept. 24, 2013), http://www.nyu.edu/global/global-academic-centers/washington-dc/nyu-washington–dc-events/the-power-of-three–a-supreme-court-preview.html.

[77] *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *petition for cert. filed*, (U.S. Nov. 29, 2011) (No. 11-681).

[78] Illinois Department of Human Services, *Home Services*, (Dec. 23, 2013) http://www.dhs.state.il.us/page.aspx?item=29738.

[79] Illinois Department of Healthcare and Human Services, *Persons With Disabilities*, (Dec. 23, 2013) http://www2.illinois.gov/hfs/MedicalPrograms/HCBS/Pages/disablities.aspx.

[80] Ill. Exec. Order 2003-8.

[81] *Harris* 656 F.3d at 695.

[82] *See* 5 ILCS 315(3)(n) and (7).

[83] *See Harris*, 656 F.3d at 695.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 696.

[87] *Id.* at 698.

[88] *Id.* at 697-98

[89] *Id.* at 698.

[90] *Id.*

[91] *Id.* at 699.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 700.

[95] *Id.*

[96] *Id.*

[97] *Id.* 700-01.

[98] *Id.* 701.

[99] Petition for Writ of Certiorari at (i), *Harris et al. v. Quinn et al.*, (S. Ct. No. 11-681) (Nov. 29, 2011), 2011 WL 6019918.

[100] *Lehnert*, 500 U.S. at 556 (Scalia, J. dissenting).

[101] *Id.*

[102] *Id.* (emphasis in original).

[103] *Knox*, 132 S. Ct. at 2289- 90 n. 2 (""*If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs."* Quoting Clyde

W. Summers, *Book Review, Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory*, 16 COMP. LAB.L. J. 262, 268 (1995).

[104] *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 761-62 (1988) (ruling that Section 8(a)(3) of the National Labor Relations Act is the operational equivalent of Section 2, subd. 11 of the Railway Labor Act, and therefore the *Street* decision is controlling.); *Street*, 367 U.S. at 750.

[105] Jim Ragsdale, *Federal Court Halts Vote to Unionize Home Child-Care Providers*, STARTRIBUNE, Sept. 19, 2013, http://www.startribune.com/politics/statelocal/224508101.html.

[106] *Id.*; *see, Parrish,. v. Dayton,* No. 13-2739 (8th Cir. 2013).

[107] Doug Belden, *Day Care Unionization Drive Put on Hold by Court Ruling*, Pioneer Press TwinCities.com, Sept. 19, 2013, http://www.twincities.com/politics/ci_ 24134467/day-care-unionization-drive-put-hold-by-court.

[108] *Id.*; *Parrishl. v. Dayton* ., No. 13-cv-01348-MJD-AJB, 2013 WL 4536260 (D. Minn. Aug. 27, 2013).

[109] 2013 WL 4536260 at *1.

[110] Jim Ragsdale, *Unionization of Personal Care Attendants Moves Ahead*, STARTRIBUNE, Sept. 20, 2013, http://www.startribune.com/politics/statelocal/224 661401.html.

[111] The orders in both these states were repealed by successor governors. *See*, *Governor Daniels Signs Executive Orders to Create Department of Child Services, Rescind Collective Bargaining Agreements*, Former Gov. Mitch Daniels' Newsroom, (Jan. 11, 2005) http://www.in.gov/governorhistory/mitchdaniels/files/pressreleases/2005/1-11-05.html; Maria Hickey, *Blunt Restricts State Workers' Bargaining Rights*, ST. Louis Public Radio (Jan. 11, 2005) http://news.stlpublicradio.org/post/blunt-restricts-state-workers-bargaining-rights.

[112] *Lehnert*, 500 U.S. at 556 (Scalia, J. dissenting).

[113] *Id.* (emphasis original).

[114] Nicholas Riccardi, *Right-to-Work Nevada a Rare Bright Spot for Labor*, Associated Press, Dec. 17, 2012 http://bigstory.ap.org/article/right-work-nevada-rare-bright-spot-labor.

[115] *Id.*

RECENT DEVELOPMENTS

By, Student Editorial Board:
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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes.

I. IELRA DEVELOPMENTS

A. Discrimination

In *SIUC Faculty Ass'n, IEA-NEA and Southern Illinois University Carbondale*, 30 PERI ¶ 172 (IELRB 2014), the IELRB affirmed an ALJ decision which found that Southern Illinois University Carbondale discriminated to discourage membership in an employee organization in violation of sections 14(a)(3) and 14(a)(1) of the IELRA when it failed to appoint Marvin Zeman as interim chair of the Math Department. Zeman had served as association president and as chair of its grievance committee. He also served on the association's bargaining team and had assisted other faculty members in opposing decisions of the dean of the university's College of Science. The IELRB found that his union activity was known to the university and the dean of the college.

When a vacancy in the Math Department's chairmanship arose, Zeman and another faculty member applied to be interim chair. The department faculty voted overwhelmingly to recommend Zeman but the dean selected the other faculty member. The IELRB observed that the other faculty member had openly expressed his lack of union sympathies and that the department chair had previously expressed hostility to the union in a response to a grievance.

The university maintained that Zeman was not selected because he lacked recent research activity. The IELRB found this rationale to be a pretext for antiunion discrimination. The ILERB noted that no requirement of recent research activity was included in the requirements for permanent department chair. The Board concluded that the dean "seized on the alleged qualification to legitimize his opposition to Zeman . . . concealing his true motivation – retaliating against Zeman due to his union activity."

II. IPLRA DEVELOPMENTS

A. Arbitration

In *SEIU and City of Chicago*, No. L-CA-10-070 (IELB Local Panel, 2014), the ILRB Local Panel held that Section 8 of the IPLRA, requiring costs of arbitration to be split equally between the employer and employee organization, also included the costs of cancellation fees paid to arbitrators.

At issue in the case was whether the city violated sections 10(a)(4) and (1) of the IPLRA when it failed to timely schedule arbitrations, and when it refused on two occasions to pay half of the cancellation fees to arbitrators. With regard to fee splitting, the city argued that the Illinois Uniform Arbitration Act (UAA) applied, and that cancellation fees should be paid as provided for in the agreement or as allocated in the award. The latter option cannot apply to cancellation fees because there is no award. The ALJ found, and the Local Panel agreed, that where the IPLRA and the UAA conflict, the IPLRA prevails pursuant to section 15 of the IPLRA.

The ILRB emphasized that the importance of preserving the appearance of neutrality of the arbitrator. It stated a "clear public policy favoring arbitration which would presumably favor that arbitrators get paid for their services." Allowing one party to pay the fees, or one party insisting upon the other party paying those fees and thereby standing in defense of the arbitrator's right to get paid, necessarily taints the appearance of neutrality. This practice could also bias the arbitrator in future dealings with those parties, and jeopardize future negotiations.

While the Local Panel acknowledged that the requirement to split cancellation fees could lead to abuse in the form of last minute cancellations, it did not find this persuasive for three reasons. First, each party would still bear half the cost and have an incentive against delay. Second, where an arbitration award ultimately is arrived at, these fees can be taken into account when calculating the award. And third, provisions for paying cancellation fees can be negotiated into collective bargaining agreements.

The ILRB determined, however, that the city's failure to pay its half of the cancellation fees did not amount to a violation of section 10(a)(4) of the IPLRA because it did not amount to a repudiation of the collective bargaining agreement. Rather, the Local Panel opined, payment and collection of cancellation fees should be left to the normal processes for breach of contract.

B. Managerial Employees

In *AFSCME, Council 31 v. State of Illinois, Department of Central Management Services*, Case No. S-RC-11-074 (ILRB State Panel 2014), the State Panel affirmed an ALJ's finding that an employee of the Department of Central Management Services ("CMS") working at the Illinois Commerce Commission ("ICC") with the title of Assistant Director Administrative Law Judge was a manager under the IPLRA.

The mission of the ICC is to ensure that utility companies provide those utilities in a safe and cost effective way. The ICC balances the needs of the utilities with the needs of the consumers. The ICC's ALJs conduct hearings upon matters that come before the ICC. In contested cases, the ALJs make findings, rulings and issue proposed orders. Parties file exceptions with the ALJs, who may then issue revised orders. The Commission reviews the revised order. The Commission may accept the revised order unchanged or make changes, which would constitute the Commission's final order.

In 2011, as the date of this matter, the ALJs had issued 88 proposed orders, of which the Commission entered orders in 81 cases. Seventy-seven of the 81 orders were accepted with no changes. The Chief ALJ testified that in his years at the ICC he could only recall a few instances that the Commission substantially reversed a proposed order.

In 2011 and the two years prior, the employee spent 70 percent of his time performing the work of an ALJ and 30 percent on other duties. In 2011, while acting as an ALJ, the employee spent all his time working on a single matter along with two subordinate ALJs, both of whom were previously excluded from collective bargaining by the ILRB. In that case, the Commission altered the revenue requirement approved by the employee, which the chief judge testified was a significant change.

The ILRB, in holding that the employee was managerial, determined that the employee engaged in predominantly managerial functions since his function was the same as those performed by ALJ IIIs and IVs who were held to be managerial in a previous case by applying the standard that an employee is managerial "if the responsibilities of [their] job titles encompass the agency's entire mission, or a major component of its mission." Like the ALJ IIIs and IVs, the employee hears cases and renders decisions on a wide verity of issues, which is the main avenue by which the ICC performs its statutory objectives.

Next, the ILRB found that the employee was charged with directing and effectuating management directives because his recommendations were effective, as evidenced by the acceptance rate of the recommendations by the Commission. Additionally, the complexity of the recommendations in rate cases, such as those the employee worked on, encompassed dozens of recommendation, most of which were accepted by the Commission. Thus, the State Panel found that the employee was managerial even though the Commission did not rubber stamp all of the employee's decisions because the Commission accepted the vast majority of the employee's recommendations.