

# BAD MATH: HOW NON-UNION EMPLOYEES ARE UNCONSTITUTIONALLY COMPELLED TO SUBSIDIZE POLITICAL SPEECH

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## I. INTRODUCTION

Unionization of American workers has undergone radical changes since federal and state governments first began implementing legislation to protect the rights of workers. While both federal<sup>1</sup> and, in many cases, state<sup>2</sup> legislation ensured the right of employees to organize, the rights of non-members have been more unsettled. Some states became “right to work” states, allowing such employees to opt out completely from any obligation to join a union.<sup>3</sup> Other states (and the federal government) permitted schemes that mandated union representation in the workplace<sup>4</sup> but allowed employees to decline to join unions.<sup>5</sup> Such non-member employees, however, could be compelled to become “agency fee payers”<sup>6</sup> (i.e., union non-members who would pay only for the cost of union representation related to the terms and conditions of employment).<sup>7</sup> Such agency fee payers are excused from any obligation to contribute to the cost of non-representational activities<sup>8</sup>—most notably political advocacy—on the

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1 The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935) (covering most private sector employment) permits employees to organize for purposes of collective bargaining. The Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7102 (2012), extends such rights to most federal government employees. The Postal Reorganization Act, Pub. L. No. 91-375 (1970), governs labor relationships of federal postal workers. See Rex H. Reed, *Revolution Ahead: Communications Workers v. Beck*, 13 HARV. J.L. & PUB. POL’Y 635, 635 n.5 (1990); see also Clyde W. Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647, 669 (1964).

2 See, e.g., WIS. STAT. § 111.04(1) (2015). For a complete list of “right to work” states, see *infra* note 20.

3 See *infra* note 20.

4 *Ry. Emps. v. Hanson*, 351 U.S. 225, 231-32 (1956) (“Union shop” agreements are authorized under the Railway Labor Act as applied to private employees).

5 5 U.S.C. § 7102 (2015) (federal employees generally); 39 U.S.C. § 1209 (2006) (postal employees). For a discussion, see David Silverstein & Erin Siuda, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Labor Law*, 73 GEO. WASH. L. REV. 896, 906-07 (2005). For an example of state legislation, see Illinois Educational Labor Relations Act, 115 ILCS 5/11 (2005) (non-member fair share payments under Illinois’ Educational Labor Relations Act). Labor relations of airline and railway employees are covered by the provisions of the Railway Labor Act. These employees may elect not to join unions but may be compelled to pay agency fees. *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 447-48 (1984). For an overview, see William E. Thoms & Frank J. Dooley, *Collective Bargaining Under the Railway Labor Act*, 20 TRANSP. L.J. 275, 275 (1992).

6 Sometimes referred to as “fair share” fees. See, e.g., *Abels v. Monroe Cnty. Educ. Ass’n*, 489 N.E.2d 533, 539 (Ind. Ct. App. 1986).

7 *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). For an overview, see Melanie Stallings Williams & Dennis A. Halcoussis, *Unions and Democracy: When Do Nonmembers Have Voting Rights?*, 9 J. BUS. & TECH. L. 213, 214-16 (2014).

8 The U.S. Supreme Court first ruled that compulsory union fees could not be assessed “over an employee’s objection” to support political speech in *Int’l Ass’n. of Machinists v. Street*, 367 U.S. 740, 768-69 (1961).

theory that compelling contributions for political advocacy violated such employees' rights of free speech and freedom of association.<sup>9</sup>

Implementing a rule requiring agency fee payers to contribute to the cost of representation but excusing them from contributing to a union's political enterprises, however, has created its own set of hurdles. Much litigation has focused on which activities should be included in the categories of "chargeable" or "non-chargeable" activities.<sup>10</sup> Other challenges relate to whether a union can charge non-members full membership fees, later refunding any amount spent on non-chargeable activities.<sup>11</sup> Other areas of dispute included a union's duty to "fairly represent" the rights of agency fee payers.<sup>12</sup> There has been increased attention at the U.S. Supreme Court level to compulsory exactions for union activities. In *Davenport v. Washington Education Ass'n*,<sup>13</sup> the court upheld a voter-initiative that required a non-union member's affirmative agreement before agency fees could be spent on election-related activities. More recently, in *Harris v. Quinn*, the U.S. Supreme Court declined to extend *Abood v. Detroit Board of Education*,<sup>14</sup> (under which public employees could be compelled to pay agency fees to unions) to compel home health care "personal assistants" who were not "full-fledged" state employees to pay agency fees, holding that to do so would violate First Amendment rights.<sup>15</sup>

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9 *Hudson v. Chi. Teachers Union Local No. 1*, 743 F.2d 1187, 1192-93 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (Freedom of association is an ancillary to freedom of speech). *See also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate" (citing *Abood*, 431 U.S. 209, 234-35)). While agency fees were designed to prevent "free riders" (i.e. those who benefited from a service without sharing the cost), this assertion rested on the assumption that workers share unified goals that were promoted by unions. The more a union engages in political activity, of course, the less this will be true. For a discussion, see Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 39 (2008).

10 *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 537 (1991).

11 *See, e.g., Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 847-50 (7th Cir. 2000) (union violated the constitutional rights of non-members by collecting and escrowing 100% of union dues from non-members rather than the 84-86% attributable to representational activities).

12 *See, e.g., Williams v. Pub. Emp't Relations Bd.*, 204 Cal. App. 4th 1119, 1124, 1128-30 (2012) (agency fee members not entitled to vote on proposed contract modification). For an overview, see Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501 (2000); Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984); Note, *The Agency Shop, Federal Law, and the Right-to-Work States*, 71 YALE L.J. 330 (1961).

13 *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

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

15 *Harris v. Quinn*, 134 S. Ct. 2618 (2014). For a discussion, see Cynthia Estlund & William E. Forbath, *The War on Workers*, N.Y. TIMES: THE OPINION PAGES (July 2, 2014), [http://www.nytimes.com/2014/07/03/opinion/the-supreme-court-ruling-on-harris-v-quinn-is-a-blow-for-unions.html?\\_r=0](http://www.nytimes.com/2014/07/03/opinion/the-supreme-court-ruling-on-harris-v-quinn-is-a-blow-for-unions.html?_r=0). The U.S. Supreme Court's language in *Harris v. Quinn* "suggests that this may be the Court's first step toward nationalizing the 'right to work' gospel by embedding it in constitutional law."

However, there has been little examination of the way that “fair share” fees have been calculated. What should be a straightforward mathematical task is routinely mishandled (often with judicial approval), resulting in non-union member agency fee payers routinely subsidizing the political speech activities of unions in an unconstitutional violation of their rights. Ironically, the smaller the proportion that union membership bears to that of agency fee payers, the more non-members are compelled to subsidize a union’s political speech.

In this Article, we demonstrate that what is called the “pro rata” method of calculating the agency fee results in requiring agency fee payers to pay a portion of the non-chargeable expenditures. To the extent that agency fee payers pay any part of a union’s non-chargeable expenditures, they are forced to fund political or ideological activities that they may not support, in violation of their constitutional rights.<sup>16</sup> Because of increasing state legislative<sup>17</sup> and federal judicial restrictions<sup>18</sup> on union activities,<sup>19</sup> challenging agency fee calculations may prove to be the next hurdle for unions.

Section II.A. of this Article provides an overview of the law that permits unions to assess fees for representational activities. Section II.B. explains the error in the pro rata method used to calculate agency fees that overestimates the fees chargeable to non-member employees. We propose a mathematically sound method for simply and accurately computing agency fees so as not to violate employees’ constitutional rights. And, Section II.C. looks at court decisions that have considered methods of calculating the agency fees.

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16 *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 455 (1984). *See also* *Hudson v. Chi. Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (1984), *aff’d*, 475 U.S. 292 (1986) (Because of due process rights, “the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing services to him as his collective bargaining representative”).

17 Wisconsin became the twenty-fifth state (since Arkansas in 1944) to become a right-to-work state. ARK. CONST. amend. XXXIV, § 1 (1944); WIS. STAT. ANN. § 111.04(3) (West 2015).

18 *See, e.g., Harris v. Quinn*, 134 S. Ct. 2018, 2644 (2014), in which the U.S. Supreme Court declined to mandate agency fees from quasi-public employees, noting that “[f]or all these reasons, we refuse to extend *Abood* in the manner that Illinois seeks. If we accepted Illinois’ argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.”

19 For a discussion of the economic and political challenges unions face, see Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J., 407, 407 (2012) (“The institution of collective bargaining is under serious attack in the United States.”).

## II. RIGHTS OF AGENCY FEE PAYERS TO DECLINE TO SUBSIDIZE UNIONS' POLITICAL SPEECH

### A. OVERVIEW OF RELEVANT LAW

#### 1. *Imposition of Union Fees on Agency Fee Payers*

In “right to work” states, union membership for covered employees is purely voluntary. These states legislate (by constitutional amendments, statutes, or both) that workers cannot be compelled to join unions.<sup>20</sup> In other states and in some employment governed by federal labor law, however, employees were traditionally required to join a union if the workplace was created as a “closed shop.” Employees of closed shop workplaces could be compelled, as a condition of employment, to join a union.<sup>21</sup> Originally, employees paid union dues that covered all of a union’s activities: both its “representational” work (for example, contract negotiation) and also its “non-representational” activities (for example, political campaign donations).<sup>22</sup> Compelling union contributions, however, was particularly troublesome in the case of public employment. While there was a concern that non-members not be allowed to “free rid[e]” on any benefits resulting from union employment negotiation,<sup>23</sup> there were balancing concerns not only of the need to protect First Amendment rights of non-members, but also to avoid the potential for corruption if public

<sup>20</sup> There are twenty-five “right to work” states: ALA. CODE §§ 11-43-143 (1967), 25-7-1, -2, -3, -6 (1943), 25-7-9 (1886), 25-7-12, -13, -16 (1943), 25-7-30 to -35 (1953); ARIZ. CONST. art. XXV (1982); ARK. CONST. amend. 34, § 1 (1944); FLA. CONST. art. 1, § 6 (1968); GA. CODE ANN. §§ 34-6-6, -7 (West 1947), -20 to -21 (West 2013), -22 to -24 (West 1947), -25 to -26 West (2013), -27 to -28 (West 1947); IDAHO CODE ANN. §§ 44-2001 to -2010 (West 1985), -2011 (West 1995), -2012 to -2013 (West 2011); IND. CODE §§ 22-6-6-1 to -13 (2012); IOWA CODE ANN. §§ 20.8 (West 1974), 20.10 (West 2010), 731.1 to .5 (West 1977), .6 (West 1978), .7 (West 1977), .8 (West 2011); KAN. CONST. art. 15, § 12 (1957); LA. REV. STAT. ANN. §§ 23:881 to :889 (1956); MICH. COMP. LAWS ANN. §§ 423.1, .2, .8, .14, .17, .22 (2013); MISS. CONST. art. 7, § 198A (1960); NEB. CONST. art. XV, §§ 13-15 (1946); NEV. REV. STAT. §§ 613.130 (1967), .230, .250–300 (1953), 288.140 (1969); N.C. GEN. STAT. §§ 95-78 to -84 (1947), -98, -100 (1959); N.D. CENT. CODE § 15.1-16-07 (2001); §§ 34-01-14 (1949), -01-14.1 (1987), -08-02 (1935), -09-01 (1949), -11.1-01 (2009), -11.1-03 (1985), -11.1-05 (2007), -11.1-08 (1985), -12-02 (1961), -12-03 (1995); OKLA. CONST. art. XXII, §1A (2001); S.C. CODE ANN. §§ 41-7-10 (2012), -7-20 (1954), -7-30, -7-40 (2002), -7-50 to -7-70 (1954), -7-75 (2002), -7-7-80, -7-7-90 (2012); S.D. CONST. art. VI, § 2 (1946); TENN. CODE ANN. §§ 50-1-201 to -203 (1947), -204 (2011), §§ 49-5-602, -603, -609 (2011); TEX. LAB. CODE ANN. §§ 101.003, .004, .052, .053, .102, .111, .121 to .124 (West 1993); UTAH CODE ANN. §§ 34-34-1 (LexisNexis1953), -2 (LexisNexis 2011), -3 to -14 (LexisNexis 1953), -15 (LexisNexis 2011), -16 to -17 (LexisNexis 1953); VA. CODE ANN. §§ 40.1-58 (1970), -58.1 (1973), -59 to -60 (1970), -61 (2002), -62 to -68 (1970), -69 (1973); WIS. STAT. § 111.04(3) (2015); WYO. STAT. ANN. §§ 27-7-108 to -115 (1963).

<sup>21</sup> See generally Giles Gibson, Note, *Agency Fee Chargeability in California Schools*: *Cumero v. Public Employment Relations Board*, 25 U.S.F. L. REV. 359 (1991).

<sup>22</sup> See Stallings Williams & Halcoussis, *supra* note 7, at 214-15.

<sup>23</sup> Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 855, 855 n.1 (1989).

employees were required to contribute to political campaigns and initiatives as a condition of employment.

Whether public employees could be compelled to join unions was decided in *Abood v. Detroit Bd. of Educ.*<sup>24</sup> The U.S. Supreme Court held that while public sector employers had a legitimate interest in requiring that employees be represented by a union (for example, ease in negotiating employment contracts), nevertheless employees had a right not to join a union and not to pay for political expressions with which they may disagree.<sup>25</sup> The Court noted that “contributing to an organization for the purpose of spreading a political message is protected by the First Amendment” and that “a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment (citations omitted).”<sup>26</sup> When government workers were compelled to make indirect political contributions through a union, the court held those employees’ constitutional rights had been infringed upon, for “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State (citations omitted).”<sup>27</sup> In support of its decision, the Court quoted statements made by Thomas Jefferson and James Madison addressing the “sinful and tyrannical” nature of forcing an individual to pay even “three pence” for the “propagation of opinions which he disbelieves.”<sup>28</sup>

Thus, the *Abood* Court observed, nonunion employees have a constitutional right to “prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.”<sup>29</sup> Further, the Court noted that this conclusion was based on the U.S. Constitution’s guarantee of freedom of association as well as freedom of expression:<sup>30</sup>

These principles prohibit a State from compelling any individual to affirm his belief in God, or to associate with a political party, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to

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24 *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

25 *Id.*

26 *Id.*

27 *Id.* at 234-35.

28 *Id.* at 234, n.31 (citing Irving Brant, JAMES MADISON: THE NATIONALIST 354 (1948)).

29 *Id.* at 234.

30 *Id.* at 255.

contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher (citations omitted).<sup>31</sup>

Therefore, the *Abood* Court held that a union could charge represented non-member employees only for those costs attributable to employment representation.<sup>32</sup>

In a later ruling, the Supreme Court held that public employment unions must notify employees of their ability to “opt out” of union membership and to pay only agency fees reflecting the cost of employment representation.<sup>33</sup> These protections—i.e. that employees could not be compelled to join unions<sup>34</sup> and that unions must notify employees of their obligation to pay only agency fees<sup>35</sup>—were extended to most private sector employees pursuant to the National Labor Relations Act.<sup>36</sup> In right to work states (and depending on the provisions of the legislation), private sector employees are generally permitted to decline to join a union and to pay any fees.<sup>37</sup> Federal government employees cannot be compelled to join unions as a condition of employment and most cannot be compelled to pay agency fees.<sup>38</sup>

#### B. CALCULATION OF AGENCY FEES: THE MATHEMATICAL PROBLEM AND A PROPOSED SOLUTION

The most common method to determine the amount to charge non-members is as a percentage comparing the union’s chargeable activities to its overall expenditures.<sup>39</sup> This “pro rata” method is presumed to fairly determine the mathematical amount attributable to the costs of employee representation. To illustrate, suppose that the share of total expenditures

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31 *Id.* at 235.

32 *Id.* at 235-36.

33 *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

34 *Comm. Workers of Am. v. Beck*, 487 U.S. 735, 744-45 (1988).

35 *Abrams v. Comm. Workers of Am.*, 59 F.3d 1373, 1380 (D.C. Cir. 1995).

36 5 U.S.C. § 7102 (1978) (federal employees generally); 39 U.S.C. § 1209(c) (1970) (postal employees).

37 *See supra* note 20.

38 Most federal employees, including postal workers, but excluding airline and railroad employees, need not pay agency fees. *See* 5 U.S.C. § 7102 (federal employees generally); 39 U.S.C. § 1209(c) (postal employees). The Railway Labor Act (RLA) covers airline and railway employees and, in line with *Abood*, these employees cannot be compelled to join a union but may be required to pay agency fees. *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 447 (1984).

39 *See, e.g., Abels v. Monroe Cnty. Educ. Ass’n*, 489 N.E.2d 533, 539 (Ind. Ct. App. 1986). In *Abels*, the Indiana Court of Appeals noted with disapproval the petitioners’ proposal of determining agency fees by summing the actual cost of representational activities. Indeed, the court held “[i]f we were to adopt appellants’ formulation, we would in effect be requiring the mathematical and accounting exactitude which the Supreme Court has ruled is neither to be required nor expected (citations omitted).” *Id. See also Albro v. Indianapolis Educ. Ass’n*, 585 N.E.2d 666, 668 (Ind. Ct. App. 1992).

that are chargeable is 70%. The union would then charge agency fee payers an amount equal to 70% of what union members pay.

For an example of how the pro rata system of assessing agency fees works, we examine the California Faculty Association (“CFA”), the exclusive representative for California State University Faculty.<sup>40</sup> In the academic year 2008-09, the CFA had chargeable expenses of \$7,216,214. This was 64% of the CFA’s total expenses of \$11,177,939. Accordingly, the CFA set the agency fee at 64% of union dues. Union members paid 1.05% of their gross salary in union dues. Those who paid the agency fee paid 64% of 1.05% , or 0.672% of their gross salary.<sup>41</sup>

This calculation, however, is incorrect. It results in agency fee payers bearing a share of the non-chargeable expenditures in violation of such employees’ constitutional rights.

The following example is designed to show the error in the pro rata method:

Suppose that five friends are out to dinner and, for religious reasons, two won't drink or pay for wine. The total bill is \$300 of which \$200 is for the meal and \$100 is for the wine. In this case, the two individuals opposed to paying for wine would each pay one-fifth (20%) of the bill for the meal ( $\$200 * .20 = \$40$ ). Each of the remaining three would also pay for their share of the meal, \$40, plus one-third of the wine bill, \$33.33, for a total of \$73.33. Each religious objector pays \$40; each of the others pays \$73.33. Consider the food as the equivalent of “chargeable expenditures,” those paid by all. The wine is the equivalent of “non-chargeable expenditures” as not all diners pay for this portion of the meal (like union expenditures on political campaigns).

Alternatively, applying the pro rata method, because the meal is 67% of the total spent ( $\$200/\$300 = 0.67$ ), religious objectors would pay 67% of what the other diners pay. To raise enough money to cover the bill, the following equation would have to hold:  $\$300 = (3 * X) + (2 * 0.67X)$ . Here  $X = \$300/(3 + 2(0.67))$ , or \$69.12. Three individuals would pay the full amount ( $3 * \$69.12 = \$207.36$ ). The two individuals who do not drink would pay 67 percent of what the other diners pay ( $2 * (0.67 * \$69.12) = \$92.62$ ), \$46.31 each. The total amount collected would be exactly enough to pay the bill, as  $\$207.36 + \$92.62 = \$300$ .

The amount paid by those with religious objections to paying for the wine is not equal in the two cases. Using the pro rata method, those objecting to the wine would pay \$46.31, but their share of the meal is only \$40.00. In other

40 Williams v. Pub. Emp’t Relations Bd., 204 Cal. App. 4th 1119, 1122 (2012).

41 California Faculty Association and Agency Fee Objectors, AAA Case No. 72 673 416 10 (2010) at 23 (Arbitrator’s decision).



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words, the pro rata method requires the individual who does not want to purchase wine to pay \$6.31 toward the wine bill. Those who have a religious objection to paying for wine would be paying for some portion of the wine!

The calculation of union dues is somewhat more complicated as each person does not pay an equivalent amount. The union dues are assessed as a percent of an individual's gross salary. However the outcome is the same, with agency fee payers paying a portion of the non-chargeable expenditures in violation of their constitutional rights.

If union dues and agency fees are to be based on individual earnings, then the correct method of assuring that agency fee payers pay only their fair share of chargeable expenditures is to charge a share based on earnings. An agency fee payer who earns 0.00002% of the total of all salaries paid would pay 0.00002% of the chargeable expenditures and no share of the non-chargeable expenditures.

Ironically, the lower the number of union members among the overall number of employees, the more non-members subsidize political speech. See Table 1 for a numerical example.

This observation, when transferred to the topic of union fees, is that non-members subsidize a union's political speech in even greater amounts when the number of union members is low compared to the overall number of employees being represented.

TABLE 1.

<b>As the Number of Union Members Falls the Agency Fee Increases</b>						
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	
<b>Total Employees</b>	<b>Union Members</b>	<b>Chargeable Expenditures</b>	<b>Non-Chargeable Expenditures</b>	<b>Total Expenditures</b>	<b>Union Fee</b>	<b>Agency Fee</b>
20	18	\$700	\$300	\$1,000	\$51.55	\$36.08
20	16	\$700	\$300	\$1,000	\$53.19	\$37.23
20	14	\$700	\$300	\$1,000	\$54.95	\$38.46
20	12	\$700	\$300	\$1,000	\$56.82	\$39.77
20	10	\$700	\$300	\$1,000	\$58.82	\$41.18
20	8	\$700	\$300	\$1,000	\$60.98	\$42.68
20	6	\$700	\$300	\$1,000	\$63.29	\$44.30
20	4	\$700	\$300	\$1,000	\$65.79	\$46.05
20	2	\$700	\$300	\$1,000	\$68.49	\$47.95

## C. JUDICIAL REVIEW OF AGENCY FEE CALCULATIONS

If the pro rata distribution of fees results in inequity, why has this not been addressed judicially? It may be appropriate to repeat the observation that law students (and consequently attorneys and judges) “are typically smart people who do not like math.”<sup>42</sup> What seems intuitive (i.e., to charge non-union members in proportion to the amount chargeable activities bear to non-chargeable activities) is unfortunately wrong.

Still, the issue has been resolved in a mathematically correct way twice in reported cases. In *Belhumeur v. Labor Relations Commission*,<sup>43</sup> the Massachusetts Supreme Court held that a union correctly calculated the chargeable fee when it totaled the chargeable expenses and then divided that number by represented employees, hereafter referred to as the “Belhumeur Method.” Even if another calculation would have resulted in lower fees to agency fee payers, the Court held, there was no error in their method.<sup>44</sup> The *Belhumeur* Court cited as authority a Massachusetts labor law case, *Dailey v. Woburn Teachers Association*.<sup>45</sup> In *Dailey*, the Court held that to accurately calculate the agency fee share, the union would have to notify agency fee employees of the total amount of legitimate costs of representation and divide that number by the number of employees in the bargaining unit.<sup>46</sup> This calculation would ensure that employees are not paying imbedded fees for non-representational activities.<sup>47</sup> Indeed, the *Dailey* Court noted with approval the claimant’s observation that “applying a carefully calculated percentage to an arbitrary number does not provide any meaningful result.”<sup>48</sup> These two cases stand alone (among reported cases) in using a mathematically correct formula to calculate agency fees and are limited in effect since both are Massachusetts cases.

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42 Michael J. Saks, *Legal Policy Analysis and Evaluation*, 44 AM. PSYCHOL. 1110, 1115 (1989).

43 *Belhumeur v. Labor Rels. Comm’n*, 735 N.E.2d 860, 866 (Mass. 2000).

44 *Id.* at 866-67 (“Even if we assume that using another formula to calculate the agency fee would result in a lower fee, the formula used by the commission calculated the nonmember’s actual per capita share of the chargeable costs”).

45 *Dailey and Woburn Teachers Ass’n*, 13 M.L.C. 1555, 1564 (1987), <http://www.mass.gov/lwd/docs/dlr/greenbook/13-mlc-1555.pdf>.

46 The *Dailey* court noted that the “amount of the proportional share (permitted by *Abood* and *Hudson*) can be determined by: (1) adding up all of the amounts that a union has spent permissibly and dividing by the total of the number of employees represented; or (2) evidence that the anticipated union expenses for a particular year represented the members’ pro rata share of the anticipated union expenses for that year and that a particular proportion of those expenses were permissible.” *Id.* at 1564. Because the union in the case at bar simply assessed the agency fee members a percentage of the union dues, they could not have met their burden of showing that the agency fee was correctly calculated.

47 *Id.* at 1563-64.

48 *Id.*

By contrast, many more jurisdictions have held that the erroneously labeled ‘pro rata’ method<sup>49</sup> is correct. The origin of the pro rata method appears to have been established in *Brotherhood of Railway and Steamship Clerks v. Allen*,<sup>50</sup> a Railway Labor Act<sup>51</sup> case, where the U.S. Supreme Court suggested a refund to agency fee payers for “a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and...a reduction of future such exactions from him by the same proportion.”<sup>52</sup> This was impliedly followed in a subsequent U.S. Supreme Court case where the court ruled that an appropriate remedy for funds wrongfully used by a union for non-representational purposes was for the non-union member employee to recover an amount “in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.”<sup>53</sup> This same approach was used in a subsequent U.S. Supreme Court case, *Ellis v. Brotherhood of Railway Employees*, which impliedly permitted the pro rata method of calculating agency fees; simply concluding that some of the included expenses were impermissible.<sup>54</sup>

The pro rata method became the norm. In *Price v. International Union*, the Second Circuit noted, with approval, the union’s reduction of fees charged to nonmembers because of the “percentage of dues attributable to collective bargaining activities.”<sup>55</sup> Similarly, in a case involving the burden of proof, the Indiana Court of Appeals noted that the union “has the burden of proving the ratio of chargeable expenses to total expenses (footnote omitted). Once this ratio is established,” the Court noted, “the ratio, expressed as a percentage, is multiplied by the amount of a member’s dues to determine a nonmember’s fair share...[and] a union can meet its burden of proving the proportion of chargeable expenses to total expenses by

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49 An accurate pro rata method would include only those chargeable expenses and then, pro rata, divide them among represented employees. However because the term “pro rata method” has been appropriated by the majority of cases that have used the inaccurate method of charging agency fee payers the ratio that chargeable expenses bear to total expenses, we use the term as it has most commonly been used, labeling the accurate method (i.e. the method that divides chargeable expenses by the number of represented employees so that agency fee payers are not bearing a portion of the costs of non-chargeable expenses) the “*Belhumeur* method.”

50 Bhd. of Ry. & S.S. Clerks v. Allen, 373 U.S. 113 (1963).

51 45 U.S.C. § 152 (2012).

52 Bhd. of Ry., 373 U.S. at 122. The *Allen* refund would have left the union short of funds. In the future, the union would have set a higher initial exaction. Applying the *Allen* refund to this higher exaction results in the “bad math” agency fee.

53 Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 775 (1961).

54 *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 457 (1984).

55 *Price v. Int’l Union*, 927 F.2d 88, 92 (2d Cir. 1991) (also holding that lesser procedural safeguards were required in cases where non-governmental employees’ rights were at stake because of the lack of state action).

proving the amount of nonchargeable expenses.”<sup>56</sup> Similarly, in *Thomas v. N.L.R.B.*, the D.C. Circuit upheld a “local presumption” case that used the pro rata expenditures of the union’s national organization to determine the agency fees of a local chapter member.<sup>57</sup>

At least three cases—all from Indiana—expressly declined to employ what, in this Article, we call the Belhumeur Method of dividing chargeable expenses among all unit employees.<sup>58</sup>

The Indiana Court of Appeals in *Abels v. Monroe County Education Association* expressly refused to rule that the pro rata method was incorrect.<sup>59</sup> While the non-union members urged the court to find that the proper measure of agency fees was the actual cost of representational activities, the court instead found that the “appropriate formulation” was “the one suggested by earlier Supreme Court decisions as [union] dues less a pro rata share of non-assessable expenses.”<sup>60</sup> Similarly, the Indiana Court of Appeals noted (in a case where non-union members paid a reduced fee) that the non-union member teachers “suggest that the proper calculation of fair share fees is obtained by taking the chargeable expenses of the exclusive bargaining representative and proportionately dividing those expenses among all the members of the bargaining unit. The nonmember teachers further assert that a calculation of fair share fees that includes a component of full membership dues has been held unconstitutional,” a point that the court expressly refuted.<sup>61</sup> A calculation of fair share fees that includes full membership dues as a component of the formula, the court held, does not violate the U.S. Constitution.<sup>62</sup>

In *New Prairie Classroom Teachers Association v. Stewart*, the Indiana Court of Appeals again refused to depart from the pro rata method.<sup>63</sup> Noting that the complainant teachers argued that their agency representation fee should be a proportional amount of the sums actually

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<sup>56</sup> *Albro v. Indianapolis Educ. Ass’n*, 585 N.E.2d 666, 668-69 n.3 (Ind. Ct. App. 1992) (noting that its decision concerning calculating ratios rested on *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991)).

<sup>57</sup> *Thomas v. NLRB*, 213 F.3d 651, 654, 660 (D.C. Cir. 2000).

<sup>58</sup> There is, additionally, a reported arbitration matter that expressly refused to apply what we term “the *Belhumeur* method.” In *Cal. Faculty Ass’n and Agency Fee Objectors*, AAA Case No. 72 673 416 10 at 19 (Nov. 19, 2010), the arbitrator noted that the method would be “contrary to the longstanding practice of [the union]” and, in n.2, discounted the statements of mathematicians who supported implementation of a mathematically correct calculation on evidentiary grounds but also because they added nothing, in the arbitrator’s opinion, to the fee objector’s argument.

<sup>59</sup> *Abels v. Monroe County Educ. Ass’n*, 489 N.E.2d 533, 539 (Ind. Ct. App. 1986).

<sup>60</sup> *Id.* Indeed, the court noted, “[o]ur own extensive review of the relevant authority reveals no support for appellants’ proposed formulation.” *Id.* at 539-40.

<sup>61</sup> *Whitley County Teachers Ass’n v. Bauer*, 718 N.E.2d 1181, 1193 (Ind. Ct. App. 1999).

<sup>62</sup> *Id.*

<sup>63</sup> *New Prairie Classroom Teachers Ass’n v. Stewart*, 487 N.E.2d 1324 (Ind. Ct. App. 1986).

spent on collective bargaining activities, the Court demurred, noting that the “United States Supreme Court has not gone so far.”<sup>64</sup>

This pro rata approach has been incorporated in various secondary sources that purport to advise unions on the correct way to calculate agency fees.<sup>65</sup> In addition, at least one state statute codifies the pro rata method of computing agency fees.<sup>66</sup>

In many cases, courts have not affirmatively approved the pro rata approach, but have impliedly done so. In *Lehnert v. Ferris Faculty Ass’n*, the U.S. Supreme Court (in a case involving the appropriate components of agency fees and not its method of calculation), simply concluded that agency fee payers could properly be charged “their pro rata share of the costs associated with otherwise chargeable activities,”<sup>67</sup> implying that the dues were correctly assessed when a union charged agency fee payers in that proportion. Similarly, *Knox v. Service Employees International Union, Local 1000* raised the question of whether agency fee payers in a public employee union were entitled to a fresh *Hudson* notice and opportunity to opt out of additional assessments.<sup>68</sup> While the U.S. Supreme Court did not directly comment on how the calculation should occur, it noted without comment the percentages applied to determine the agency fees, which apparently represented the percentage of the union’s chargeable activities bore to its annual expenses.<sup>69</sup>

Similarly, in *Air Line Pilots Association v. Miller*, the U.S. Supreme Court noted—again without comment—that the employees’ union had

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64 *Id.* at 1328.

65 *See, e.g.*, Cal. Faculty Ass’n and Agency Fee Objectors, Re: AAA Case No. 72 673 416 10 at 20 (Nov. 19, 2010) (Agency fees shall be set “in an amount equal to the proportion that nonchargeable employee organization expenditures bear to total expenditures” (quoting CALIFORNIA PUBLIC SECTOR LABOR RELATIONS § 31.31 (KIRSTEN L. ZERGER ET AL., EDS., 2010)); *see also* RACHEL LEVINSON, AM. ASS’N UNIV. PROFESSORS, STEPS FOR COMPLYING WITH AGENCY FEE REQUIREMENTS: A PRACTICAL GUIDE FOR AAUP 501(C)(5) CHAPTERS (2010), <http://www.aaup.org/NR/rdonlyres/B51D8161-4318-4CE0-B32A-CEB16FB75C01/0/AgencyFeememoupdatedOct2010.pdf> (“Nonmembers who object to paying union dues are required to pay only the percentage of the agency fee that supports activities related to collective bargaining, grievance handling and union administration . . .”).

66 “The fair share fee must be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative. In no event may the fair share fee exceed 85 percent of the regular membership dues.” MINN. STAT. § 179A.06, subd. 3 (1984).

67 *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991).

68 *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012).

69 *Id.* at 2293 (“The SEIU required these employees to pay 56.35% of the special assessment, just as they had been required to pay 56.35% of the regular annual dues.”). Further, the court noted, “[a]ccording to the union’s statistics, the actual percentage of regular dues and fees spent for chargeable purposes in 2005 turned out to be quite a bit higher (66.26%), and therefore, even if all of the money obtained through the special assessment is classified as nonchargeable, the union’s total expenditures for 2005 were at least 66.26% chargeable” *Id.* at 2294 (citation omitted).

charged agency fee payers based on the percentage that chargeable activities bore to the union's overall expenses.<sup>70</sup> Continuing this line of cases that apparently, but not explicitly, applied the pro rata approach to calculate agency fees was *Tierney v. City of Toledo*, a Sixth Circuit case involving the adequacy of the agency fee plan.<sup>71</sup> In *Tierney*, the court noted that an agency fee payer owed an obligation to "contribute only his proportionate share of the costs" of employment representation and that this, combined with those expenditures that do not involve employment negotiations, would "normally total 100 percent" of the union's expenses<sup>72</sup>, thus implying implementation of the pro rata calculation. Expressly following *Lehnert*, the D.C. Circuit held (in a case in which use of union-wide figures could be used to determine agency fees) that use of the pro rata method was authorized.<sup>73</sup>

In some instances, it is unclear how the calculation is to be performed, with the characterization simply that the agency fee must be "pro rata."<sup>74</sup> Other cases do not address the issue directly, but, for example, allow agency fee payers recovery of a "nonchargeable portion of the unconstitutionally collected fees,"<sup>75</sup> with the portion presumably, but not expressly, a percentage of union expenditures spent on non-representational activities.

Whether actively examined or not, however, the issue of how to calculate agency fees has been routinely mishandled to the detriment of non-union members.

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70 *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 870 (1998) (The court noted "for 1992, that 19 percent of ALPA's expenses for that year were not germane to collective bargaining. Accordingly, the Union adjusted fees charged nonmembers to equal 81 percent of the amount members paid"). In another case involving agency fees, the Sixth Circuit held that while charging agency fee payers union dues and then rebating any amounts not attributable to representation activities did not meet constitutional standards, the court made no comment on the union's pro rata calculation method. *Damiano v. Matish*, 830 F.2d 1363, 1368, 1370-71 (6th Cir. 1987).

71 *Tierney v. Toledo*, 824 F.2d 1497 (6th Cir. 1985).

72 *Id.* at 1504.

73 *Finerty v. NLRB*, 113 F.3d 1288, 1291-92 (D.C. Cir. 1997).

74 *See, e.g., Seidemann v. Bowen*, 499 F.3d 119, 122 (2d Cir. 2007) ("Although fee payers must pay union fees even if they are not union members, they are entitled to notice of the union's expenditures not related to the collective bargaining process—i.e., expenditures for items political and ideological in nature—and may obtain a refund of their pro rata share of those expenditures by filing timely objections with the union."); *see also Otto v. Pa. State Educ. Ass'n-NEA*, 330 F.3d 125, 140 (3d Cir. 2003), where the issue was which items could be included as chargeable expenses, the court noted that *Lehnert* authorized the pro rata calculation of chargeable expenses.

75 *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433 (6th Cir. 1990).

### III. CONCLUSION

The question of how to calculate agency fees to ensure that non-union employees do not pay for non-representational activities has been largely ignored. When examined, courts have usually miscalculated the fees, sometimes with the rationalization that the standards do not require exactitude in determining the precise amounts due.<sup>76</sup> However, since the risk of miscalculation is so dire (in that it constitutes an unconstitutional exaction)<sup>77</sup> and because an accurate method is so simple, it behooves employment of the proposed *Belhumeur* method (i.e., to tally chargeable expenses and divide them among all represented employees). Particularly in an environment with increasing scrutiny of union activities, mathematical evidence supporting union overreaching may inspire further judicial and legislative limits on the amounts collected from non-union members.

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<sup>76</sup> *Bhd. of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963) (“Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise”).

<sup>77</sup> *See, e.g., Knox v. Serv. Employees Int’l Union, Local 1000*, 132 S. Ct. 2277, 2283 (2012), where the court noted that:

[T]he SEIU’s claim that the assessment was a windfall because chargeable expenses turned out to be 66.26 percent is unpersuasive. First, the SEIU’s understanding of the breadth of chargeable expenses is so expansive that it is hard to place much reliance on its statistics. “Lobbying the electorate,” which the SEIU claims is chargeable, is nothing more than another term for supporting political causes and candidates. Second, even if the SEIU’s statistics are accurate, it does not follow that it was proper to charge objecting nonmembers any particular percentage of the special assessment. If, as the SEIU argues, it is not possible to accurately determine in advance the percentage of union funds that will be used for an upcoming year’s chargeable purposes, there is a risk that unconsenting nonmembers will have paid too much or too little. That risk should be borne by the side whose constitutional rights are not at stake. If the nonmembers pay too much, their First Amendment rights are infringed. But, if they pay too little, no constitutional right of the union is violated because it has no constitutional right to receive any payment from those employees.