No. 16-___

IN THE
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAN K. WEBB
JOSEPH J. TORRES
LAWRENCE R. DESIDERI
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

JACOB H. HUEBERT
JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1500
Chicago, IL 60603
(312) 263-7668

WILLIAM L. MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioner

QUESTION PRESENTED

Twice in the past five years this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, __ U.S. __ , __, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, __ U.S. __, 136 S. Ct. 1083 (2016).

This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was a Plaintiff-Appellant in the court below, is Mark Janus.

Respondents, who were Defendants-Appellees in the court below, are American Federation of State, County, and Municipal Employees, Council 31; Michael Hoffman, in his official capacity as the Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Lisa Madigan.

Parties to the original proceedings below, who are not Petitioners or Respondents, include plaintiffs Illinois Governor Bruce Rauner, Brian Trygg, and Marie Quigley, and defendant General Teamsters/Professional & Technical Employees Local Union No. 916.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The Seventh Circuit order affirming the district court is reproduced in the appendix (Pet.App.1) as is the district court's order dismissing Petitioner's complaint (Pet.App.6).

JURISDICTION

The Seventh Circuit entered judgment on March 21, 2017. Pet.App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the Appendix (Pet.App.43).

STATEMENT OF THE CASE

This case challenges the constitutionality of Illinois's agency fee law under the First Amendment.

A. Illinois Compels State Employees to Pay Agency Fees to an Exclusive Representative for Speaking and Contracting with the State over Governmental Policies.

1. The Illinois Public Labor Relations Act ("IPLRA"), 5 ILL. COMP. STAT. 315/1 et seq., grants public sector unions an extraordinary power: if a union meets certain qualifications, it can become "the exclusive representative for the employees of [a bargaining] unit for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment not excluded by Section 4 of this Act." *Id*. 315/6(c).

Exclusive representative status vests a union with agency authority to speak and contract for all employees in the unit, including those who want noth-

ing to do with the union and oppose its advocacy. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[1] The status also vests a union with authority to compel policymakers to bargain in good faith with the union, 5 ILL. COMP. STAT. 315/7, and to only change certain policies after first bargaining to impasse, *Vienna Sch. Dist. No. 55 v. IELRB*, 515 N.E.2d 476, 479 (Ill. App. Ct. 1987). These authorities are exclusive because the public employer is precluded from dealing with individual employees or other associations. 5 ILL. COMP. STAT. 315/4.

The IPLRA empowers an exclusive representative not only to speak and contract for unconsenting employees in their relations with the government, but also to force those employees to pay for its advocacy. The Act does so by authorizing "agency fee" arrangements in which employees are forced, as a condition of their employment, to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment" to an exclusive representative. 5 ILL. COMP. STAT. 315/6(e).

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[1] Case law concerning the National Labor Relations Act is apposite because Illinois's labor laws, like most public sector labor laws, are based on the NLRA. *See* Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary & Analysis*, 60 CHI.-KENT. L. REV. 883, 883 (1984) ("[T]he legislature, in discussing the *IPLRA*, expressly stated that it intended to follow the [NLRA] to the extent feasible.").

Illinois's agency fee requirement tracks this Court's holding in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), concerning the compulsory fees that public employees can be forced to pay under the First Amendment. *Abood* established a framework under which public employees can be forced to pay a union for bargaining with the government and administering the resulting contract, *id.* at 232, but cannot be forced to pay for union activities the *Abood* Court deemed to be political or ideological, *id.* at 236.

2. Petitioner Mark Janus is an Illinois state employee who is being forced to pay agency fees to a union, AFSCME, Council 31, against his will. Pet.App.10. AFSCME exclusively represents over 35,000 state employees who work in dozens of agencies, departments, boards, and commissions subject to the authority of Illinois's governor. *Id.*

In February 2015, AFSCME began bargaining with newly elected Governor Bruce Rauner, who acts through Illinois's Department of Central Management Services ("CMS"), over policies that affect these state employees. The course of these negotiations through January 2016 is detailed in an Illinois Labor Relations Board ("Board") decision. *Dep't of CMS v. AFSCME, Council 31*, 33 PERI ¶ 67, ALJD at 4-139,[2] 2016 WL 7645201 (Dec. 12, 2016). The decision dis-

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[2] "ALJD" refers to the Administrative Law Judge's Recommended Decision, and "Bd." to the Board's Decision, available at https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf.

cusses, among other things, Illinois's dire budgetary and pension-deficit situation, which formed the backdrop for the negotiations, *id*. at 12–13, and the Governor's "intent to seek contract changes that [would] provide[] additional efficiency and flexibility," link pay increases to merit, and "obtain significant savings (in the proximity of $700 million) from the healthcare program." *Id*. at 19. The Board's decision also details the parties' positions concerning twelve disputed "packages" of issues: wages, health insurance, subcontracting, layoff policies, outstanding economic issues (mainly holiday pay, overtime, and retiree health care), scheduling, bumping rights, health and safety, mandatory overtime, filling of vacancies, union dues deduction, and semi-automatic promotions. *Id*. at 37–97. The Board concluded that Governor Rauner and AFSCME reached a bargaining impasse in early 2016. *Dep't of CMS*, Bd. at 24.

The Governor has been attempting to unilaterally implement, over AFSCME's objections, policies that include "$1,000 merit pay for employees who missed less than 5% of assigned work days during the fiscal year; overtime after 40 hours; bereavement leave; the use of volunteers; the beginning of a merit raise system; [and] drug testing of employees suspected of working impaired." *AFSCME, Council 31 v. Dep't of CMS,* 2016 IL App (5th) 160510-U, ¶ 7, 2016 WL 7399614 (Ill. App. Ct., 2016). AFSCME, however, has resorted to litigation to thwart the Governor's attempt to implement his desired reforms. *Id.*

Regardless of their personal views concerning these policies and AFSCME's conduct, Janus and all other employees subject to AFSCME's exclusive representation are required, by operation of 5 ILL. COMP. STAT. 315/6(f), to subsidize AFSCME's efforts to compel the State of Illinois to bend to the union's will. This statute mandates that agency fee exactions must continue notwithstanding the expiration of a collective bargaining agreement. *Id.*

The agency fees Janus and other Illinois public employees are compelled to pay AFSCME and other exclusive representatives are calculated by the unions themselves. 5 ILL. COMP. STAT. 315/6(e). Under *Chicago Teachers Union v. Hudson*, unions are supposed to calculate their agency fees based on an audit of their expenditures during the prior fiscal year and to provide nonmembers with a financial notice explaining the calculation of their fee. 475 U.S. 292, 304–10 (1986). AFSCME's *Hudson* notice, which can be found at Pet.App.28, indicates that AFSCME set its 2015 agency fee at 78.06% of full union dues based on an audit of union expenditures in calendar year 2009. Pet.App.34.

B. Proceedings Below

1. In recent years, this Court has increasingly questioned the validity of *Abood's* holding that public employees can constitutionally be forced to subsidize union speech to influence government policymakers.

In 2012, the Court, in *Knox v. SEIU, Local 1000*, deemed *Abood*'s "[a]cceptance of the free-rider argu-

ment as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly," given that "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 567 U.S. 298, __, 132 S. Ct. 2277, 2289–90 (2012). *Knox* also held that agency fee provisions are subject to at least "exacting First Amendment scrutiny," *id.* at 2289, which is a level of scrutiny *Abood* conspicuously failed to apply, *see Abood*, 431 U.S. at 245 (Powell, J., concurring in judgment).

In 2014, the Court in *Harris v. Quinn* gave no fewer than six reasons why "[t]he *Abood* Court's analysis is questionable."__ U.S. __, __, 134 S. Ct. 2618, 2632 (2014). To wit, *Abood*: (1) "fundamentally misunderstood" earlier cases concerning laws authorizing compulsory fees in the private sector; (2) failed to appreciate the difference between bargaining in the private and public sectors; (3) failed to appreciate the difficulty of distinguishing between collective bargaining and politics in the public sector; (4) did not foresee the difficulty in classifying union expenditures as "chargeable" or "nonchargeable"; (5) "did not foresee the practical problems that would face objecting nonmembers"; and (6) wrongly assumed forced fees are necessary to exclusive representation. *Id.* at 2632–34. The Court stopped short of overruling *Abood*, however, because it was not necessary to resolve the issue in *Harris*, which was whether Illinois could force individuals who were not public employees to pay agency fees. *See id.* at 2638 & n.19. The

Court opted to limit *Abood's* application to "full-fledged public employees." *Id*. at 2638.

In 2015, the Court granted certiorari in *Friedrichs v. California Teachers Association,* __ U.S. __, 136 S. Ct. 1083 (2016), to resolve the question of "whether *Abood* . . . should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment." Petition for Cert. at (i), *Friedrichs*, 2015 WL 393856. Following the death of Justice Scalia, the Court split 4 to 4 on this question. 136 S. Ct. at 1083.

2. On February 9, 2015, Governor Rauner filed a lawsuit seeking to overrule *Abood* and have Illinois's public-sector agency fee law declared unconstitutional. Pet.App.2. Shortly thereafter, Illinois Attorney General Lisa Madigan intervened as a defendant, and three Illinois state employees—Mark Janus, Brian Trygg, and Marie Quigley—moved to intervene as plaintiffs. *Id*. at 3. The district court granted the employees' motion to file their complaint in intervention and, in the same order, dismissed Governor Rauner from the case on jurisdictional and standing grounds. *Id*. This left the employees as the only plaintiffs in the case.

On July 21, 2016, Janus and Trygg filed a Second Amended Complaint alleging that forcing them to pay fees as a condition of public employment violated their First Amendment rights. Pet.App.9. Defendants moved to dismiss the complaint and argued, among other things, that *Abood* precluded Plaintiffs'

claim. *Id.* at 7. On September 13, 2016, the district court granted the motion to dismiss based solely on *Abood*. *Id.*

Janus and Trygg appealed the dismissal to the United States Court of Appeals for the Seventh Circuit. On March 21, 2017, the Seventh Circuit affirmed the dismissal of Janus' claim on the ground that *Abood* controlled but dismissed Trygg's claim on an alternative ground. Pet.App.4–5. Janus now petitions this Court for certiorari and requests that this Court overrule *Abood* and declare Illinois's agency fee law unconstitutional.

REASONS FOR GRANTING THE PETITION

This Court determined that the question presented here was worthy of its consideration when it granted certiorari on the same question in *Friedrichs*. 136 S. Ct. at 1083. That question is just as worthy of the Court's consideration today. Agency fees remain the largest regime of compelled speech in the nation. *Abood* remains wrongly decided for the reasons stated in *Harris*, 134 S. Ct. at 2632–34, and because it is inconsistent with this Court's precedents requiring that instances of compelled speech and association satisfy heightened constitutional scrutiny.

This case is a suitable vehicle for reconsidering *Abood* because it concerns the same statute as did *Harris*, but involves a full-fledged public employee. The Court should take this case to overrule *Abood* and declare agency fees unconstitutional.

I. The Court Should Reconsider *Abood* and Hold Agency Fees Unconstitutional.

A. *Abood*'s Validity Is a Matter of Exceptional Importance Because Agency Fee Requirements Are Widespread and Egregiously Infringe on First Amendment Rights.

1. It is a "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." *Harris*, 134 S. Ct. at 2644. Yet agency fee requirements are not rare. Janus and millions of public employees[3] are subject to agency fee requirements that compel them to subsidize the speech of a third party (an exclusive representative) that they may not wish to support.

This significantly impinges on the First Amendment rights of each and every employee who did not choose to subsidize the union's advocacy. *Knox*, 132 S. Ct. at 2289. Each such employee is being deprived of his or her fundamental right to choose which

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[3] There are 10,987,000 union-represented employees in the twenty-two states that do not have right to work laws prohibiting agency fees. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 5, http://www.bls.gov/news.release/union2.t05.htm (last visited Apr. 16, 2017). Roughly half of union-represented employees are in the public sector. *See id.*, tbl. 3, http://www.bls.gov/news.release/union2.t03.htm (last visited Apr. 16, 2017) (showing 8,437,000 and 7,834,000 union-represented employees nationwide in the private and public sectors, respectively).

speech is worthy of his or her support. With agency fees, the government is "substitut[ing] its judgment as to how best to speak for that of speakers" and violating "[t]he First Amendment['s] mandate that . . . speakers, not the government, know best both what they want to say and how to say it," *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988).

The infringement that agency fees inflict on public employees' rights is particularly egregious because those fees support speech designed to influence governmental policies. "In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ." *Harris*, 134 S. Ct. at 2632. Consequently, a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. While compelled subsidization of any speech offends First Amendment values, *see United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001), compelling support for political speech is particularly offensive because "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

In fact, agency fees inflict the same grievous First Amendment injury as the government forcing a citizen to support a mandatory advocacy group to lobby the government. This is because an exclusive representative's function under the IPLRA and other public-sector labor statutes is quintessential lobbying:

meeting and speaking with public officials, as an agent of interested parties, to influence public policies that affect those parties.[4] Janus and millions of other public employees are effectively being required to support a government-appointed lobbyist. If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government.

2. Agency fees interfere not only with individual liberties, but also with the political process the First Amendment protects. Mandatory advocacy groups that individuals are forced to support, and that enjoy special privileges in dealing with government enjoyed by no others, will naturally have political influence that far exceeds citizens' actual support for that group and its agenda. Agency fees transform employee associations into artificially powerful factions, which skews the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

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[4] *Cf. Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials"; and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); 2 U.S.C. § 1602(8)(A) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

In many ways, agency fee requirements have replaced unconstitutional political patronage requirements as the means by which government officials compel support for advocacy organizations that share their agendas. A plurality of this Court held in 1976 that states could not force most public employees to support a political party, *Elrod v. Burns*, 427 U.S. 347 (1976), but then inconsistently held one year later in *Abood* that states could force employees to support a representative for petitioning the government. These requirements are constitutionally indistinguishable, as several Justices recognized in *Abood*, 431 U.S. at 256–57 (Powell, J., concurring in judgment), except that agency fees are a more recent development.[5] There is, for example, little distinction between forcing Illinois public employees to directly support the Democratic Party, as in *Elrod*, 427 U.S. at 351, and requiring Illinois public employees to financially support advocacy groups with agendas closely aligned with that political party.

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[5] Some Justices have expressed the view that political patronage requirements are sanctioned by historical practice, as they were common before and after the First Amendment's adoption. *See, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 687–88 (1996) (Scalia, J., dissenting). Whatever the merit of this dissenting view, it has no application to public-sector agency fees. The vast majority of public sector labor laws were first enacted in the 1960s and 1970s. *See* Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 Cato J. 87, 96–99 (2010).

The constitutionality of agency fees thus presents an issue of exceptional importance worthy of this Court's review. *Abood* is a root cause of the widespread infringement agency fees wreak on First Amendment rights.

B. The Court Should Reconsider *Abood* Because It Is Inconsistent with Other Precedents, Wrongly Decided, Unworkable, and Not Supported by Reliance Interests.

This Court has "not hesitated to overrule decisions offensive to the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)), for stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Among other grounds, the Court will revisit a decision if it conflicts with its other precedents, is badly reasoned and wrongly decided, has proven unworkable, and/or is not supported by valid reliance interests. *See Citizens United*, 558 U.S. at 363; *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). *Abood* should be reconsidered, and ultimately overruled, for all four reasons.

1. *Abood* is inconsistent with this Court's precedents concerning the constitutional scrutiny applicable to compelled association and speech. The Court "explained in *Knox* that an agency-fee provision imposes 'a significant impingement on First Amend-

ment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289). This requires, at a minimum, that the agency fee provision "serve a 'compelling state interest[ ] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Knox*, 132 S. Ct. at 2289).

The Court has long applied that standard, or similar formulations, to instances of compelled expressive association. *See, e.g.*, *Roberts v U.S. Jaycees*, 468 U.S. 690, 623 (1984) (citing cases). It has done so in cases involving private organizations, *see id.*; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577–78 (1995), and political parties, *see Elrod*, 427 U.S. at 362–63; *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996). Even compelled support for the mundane commercial speech at issue in *United Foods,* 533 U.S. 405, received the "exacting First Amendment scrutiny" referenced in *Knox*, 132 S. Ct. at 2289.

Harris found it "arguable" that even this "standard is too permissive." 134 S. Ct. at 2639. Janus agrees because agency fees compel not only association, but also support for speech. The "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Id.* (quoting *Knox*, 132 S. Ct. at 2288). Given that agency fee laws compel support for speech concerning political affairs, *id.* at 2632–33, the laws constitute a regu-

lation of political speech that should be "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *Wis. Right to Life*, 551 U.S. at 464); *see also Riley*, 487 U.S. at 795–98 (subjecting compelled speech to scrutiny applied to content-based prohibition on speech).

Abood inexplicably failed to apply either form of heightened First Amendment scrutiny to compulsory fees to support public-sector unions' petitioning of the government. Most notably, *Abood* never considered whether agency fees are narrowly tailored—i.e., never evaluated whether exclusive representation can be "achieved through means significantly less restrictive of associational freedoms" than compulsory fees. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

Abood's failure to apply the proper level of scrutiny did not go unnoticed at the time. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, sharply criticized the majority opinion for not applying the exacting scrutiny applied in *Elrod*. *See* 431 U.S. at 262–64 (Powell, J., concurring in the judgment); *accord id.* at 242–44 (Rehnquist, J., concurring). This criticism was well founded, for the "public-sector union is indistinguishable from the traditional political party in this country," *id.* at 257 (Powell, J., concurring in the judgment), given that "[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public

decisionmaking in accordance with the views and perceived interests of its membership." *Id*. at 256.

Abood's analysis has only grown more aberrant over time. *Abood* now conflicts with a host of subsequent precedents concerning the constitutional scrutiny applicable to instances of compelled expressive association, *see Roberts*, 468 U.S. at 623; *O'Hare*, 518 U.S. at 714–15; *Dale*, 530 U.S. at 658–59; and *Hurley*, 515 U.S. at 577–78, to instances of compelled speech, *e.g., Riley*, 487 U.S. at 795–98, and to compulsory fee requirements, *see United Foods*, 533 U.S. at 411; *Knox*, 132 S. Ct. at 2289; and *Harris*, 134 S. Ct. at 2639. The conflict with *Harris* is particularly notable, as *Harris* held that compelling personal assistants to pay agency fees failed exacting scrutiny because the fees were not necessary either for exclusive representation or to improve public programs. 134 S. Ct. at 2640–41.

Abood's analysis (or lack thereof) must be revisited for this reason alone. The Court should take this case to do now what it failed to do in *Abood* and what the Court's other precedents require: apply First Amendment scrutiny to agency fee requirements.

2. *Harris* identified why *Abood* is poorly reasoned: a line cannot be drawn between bargaining with government and lobbying the government over its policies. 134 S. Ct. 2632–33. "[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and core sub-

jects of bargaining, "such as wages, pensions, and benefits are important political issues." *Id.*

The Court recognized this even prior to *Harris*, remarking that "[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion). Justice Marshall saw no distinction at all. *Id.* at 537 (Marshall J., dissenting). Even the majority opinion in *Abood* acknowledged "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political." 431 U.S. at 231; *see also id.* at 256 (Powell, J., concurring in judgment) (finding "no principled distinction" between public sector unions and political parties).

The Court has simply not followed this incontrovertible premise to its inevitable conclusion. Given that (1) bargaining with the government is indistinguishable from lobbying government; and that (2) "[a] State may not force every person who benefits from [a lobbying] group's efforts to make payments to the group," *Harris*, 134 S. Ct. at 2638, it follows that it is unconstitutional to force public employees to support bargaining with government.[6]

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[6] *Abood*'s finding that bargaining with the government is also analogous in some ways to private-sector bargaining, 431 U.S. at 220–23, is irrelevant even if accurate, for it does not change

3. *Abood*'s "practical administrative problems" stem from its conceptual flaw: it is difficult to distinguish chargeable from nonchargeable expenses under the *Abood* framework. *Harris,* 134 S. Ct. at 2633. The three-prong test a plurality of this Court adopted in *Lehnert,* 500 U.S. at 522, for this task is as subjective as it is vague. *See Harris,* 134 S. Ct. at 2633. Consequently, "[i]n the years since *Abood*, the Court has struggled repeatedly with this issue." *Id*. (citing several cases). For example, this Court has held that union lobbying expenses are nonchargeable, except for contract ratification or implementation, *Lehnert,* 500 U.S. at 522 (plurality opinion), and yet the chargeability of lobbying expenses remains a contested issue.[7] This Court also held that union lobbying expenses are nonchargeable, *see Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 451–53 (1984), and yet that too remains a litigated issue.[8]

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the relevant fact that bargaining with the government is political and indistinguishable from lobbying.

[7] *See, e.g., Knox,* 132 S. Ct. at 2294–96 (reversing Ninth Circuit decision that unions could charge nonmembers for "lobbying . . . the electorate"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422–23 (D.C. Cir. 1997) (holding nonchargeable pilot union's expenses in lobbying federal agencies); *United Nurses & Allied Prof'ls*, 359 N.L.R.B. 469, 474 (Dec. 14, 2012) (National Labor Relations Board deems lobbying expenses chargeable to nonmembers if the "specific legislative goal [is] sufficiently related to the union's core representational functions").

[8] *Scheffer v. Civil Serv. Emps. Ass'n*, 610 F.3d 782, 790–91 (2d Cir. 2010) (reversing district court decision finding union organ-

Separating the wheat from the chaff was made even more difficult, if not impossible, by *Locke v. Karass*, 555 U.S. 207 (2009), which held that extraunit activities of union affiliates are chargeable to nonmembers if they (1) "bear[ ] an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 218 (Alito, J., concurring) (quoting *Lehnert*, 500 U.S. at 524). The Court did not "address what is meant by a charge being 'reciprocal in nature,' or what showing is required to establish that services 'may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 221 (Alito, J., concurring). Nor did the Court resolve what accounting method, if any, can properly calculate the exact percentage of an affiliate's services that are available to each local union in a given year.

The ongoing problems with administering *Abood* are unresolvable because there is no true distinction between bargaining and lobbying in the public sec-

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izing expenses chargeable); *Bromley v. Mich. Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (holding defensive organizing nonchargeable to employees); *but see UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) (upholding NLRB decision that organizing expenses are partially chargeable to nonmembers).

tor, and because of the underlying incentives at work. Unions have strong financial incentives to extract the greatest fee possible from nonmembers by pushing the envelope on chargeability. In contrast, employees have little financial incentive to challenge excessive union fees because the amount of money at stake for each particular employee is comparatively low and the time and expense of litigation is high. *See Harris*, 134 S. Ct. at 2633. Given these incentives, any framework that permits unions to seize any compulsory fee from unconsenting employees will inevitably lead to abuse of employee rights and endless litigation.

No amount of tinkering with *Abood* can change these realities. As Justice Black prophetically noted in his dissent in *International Association of Machinists v. Street* when discussing the futility of trying to separate union bargaining expenses from political expenses: "while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated." 367 U.S. 740, 796 (1961) (Black, J., dissenting).

4. No reliance interests justify retaining *Abood* notwithstanding its infirmities. Overruling *Abood* would merely deprive unions of "the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Knox*, 132 S. Ct.

at 2295. Unions have no valid interest in this unconstitutional privilege, for a "union has no constitutional right to receive any payment from . . . [nonconsenting nonmember] employees." *Id.*; *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007). The Court can and should reconsider *Abood*.

C. Compulsory Fee Requirements, and *Abood*'s Free Rider Rationale for Upholding Such Requirements, Cannot Satisfy Heightened Constitutional Scrutiny.

The Court should hold forced fee provisions unconstitutional because they cannot survive heightened constitutional scrutiny. This includes the exacting scrutiny required under this Court's compelled-association precedents, under which the provision must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289). *First*, exclusive representation can be achieved without agency fees because unions greatly benefit from the extraordinary powers, privileges, and membership-recruitment advantages that come with exclusive representative status. *Second*, far from being a least restrictive means, agency fees exacerbate the associational injury that exclusive representation already inflicts on employee rights. *Third*, *Abood*'s "free rider" justification inverts reality by presuming that exclusive representation burdens unions and benefits nonmember employees, when in most ways the opposite is true.

1. This Court recognized in *Harris* that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. Even a cursory review of this nation's labor laws makes clear that a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 2640. Exclusive representation functions without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and the nation's twenty-eight right to work states.[9]

Agency fees are not needed for exclusive representation because the extraordinary powers and privileges that come with exclusive representation are their own reward for a union. Exclusive representative status grants a union "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). The union gains legal authority to speak and contract for unconsenting employees, and authority to force government policymakers to listen to and only deal with that union, and not with individual employees themselves. *See supra* pp. 1–2. "The

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[9] *See Right to Work States*, Nat'l Right to Work Legal Def. Found., http://www.nrtw.org/rtws.htm (last visited Apr. 1, 2017).

loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

Compulsory fees are not necessary to induce unions to assume and exercise these special privileges. A union vested with exclusive representative authority is already "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table," *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014), and "justly compensated by the right to bargain exclusively with the employer," *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014).

This is particularly true given that "exclusive representation *assists* unions with recruiting and retaining members." Pet.App.12 (emphasis added). The status alone is advantageous, "as employees are more likely to join and support a union that has authority over their terms of employment, as opposed to a union that does not." *Id.* Unions also use their exclusive representative authority to obtain government assistance with recruitment and dues collection, "such as contract terms providing for union orientations for all employees and automatic deduction of union dues from employees' paychecks." *Id.*

AFSCME's expired collective bargaining agreement with the State illustrates the assistance unions

commonly obtain for themselves.[10] AFSCME had the State agree to grant union agents various privileges, including: special access to state facilities and email systems, Art. VI, § 2; time off to conduct union business, *id*. § 3; a right to use workplace bulletin boards, *id*. § 4; personal and work information about all employees, *id*. § 5; a right to distribute union literature in the workplace to non-working employees, *id*. § 6; a right to use state meeting rooms for union meetings, *id*. § 7; and a right to conduct a "union orientation" for new employees, *id*. § 10. All of these privileges facilitate soliciting employees to become and remain union members.

AFSCME also bargained for the State to collect union membership dues and political contributions directly from consenting employees' paychecks. Art. IV, § 1. This government commitment to act as a union collection agency is a great benefit to unions, which "face substantial difficulties in collecting funds for political speech without using payroll deductions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (quoting *Pocatello Educ. Ass'n v. Heideman,* 504 F.3d 1053, 1058 (9th Cir. 2007)). "At bottom, the use of the state payroll system to collect union dues is a state subsidy of speech." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). And it is a subsidy that only exclusive representatives en-

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[10] The collective bargaining agreement is an exhibit to the Second Amended Complaint (Pet.App.13) and can be found in the district court docket at ECF No. 145-1.

joy under the IPLRA. *See* 5 ILL. COMP. STAT. 315/6(f). These and other benefits of exclusive representation obviate any need to compel nonconsenting employees to subsidize an exclusive representative.

2. Agency fees are not a "means significantly less restrictive of associational freedoms," *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289), to achieve exclusive representation for another reason: the fees only exacerbate the associational injury that this mandatory association already inflicts on employees' First Amendment rights. Under a regime of exclusive representation, the government strips unconsenting employees of their individual right to speak and contract for themselves vis-à-vis their employer, and hands their rights over to an advocacy group they may oppose. The union gains agency authority both to speak and contract for those employees, which, in turn, "extinguishes the individual employee's power to order his own relations with his employer." *Allis-Chalmers*, 388 U.S. at 180.

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can (and do) engage in advocacy that individual employees oppose. *See Knox*, 132 S. Ct. at 2289; *Abood,* 431 U.S. at 222. Exclusive representatives can also enter into binding contracts as the employees' proxy that harm employees' individual interests. *E.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (exclusive representative waived employees' right to bring discrimination claims against their employer

in court by agreeing that employees must submit such claims to arbitration). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers,* 388 U.S. at 180.

Unsurprisingly, given an exclusive representative's power to speak and contract for individuals against their will, this Court has long recognized "the sacrifice of individual liberty that this system necessarily demands," *Pyett*, 556 U.S. at 271, that "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, *Douds*, 339 U.S. at 401, and that exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).[11]

For the government to additionally force nonconsenting employees to subsidize their government-imposed agent and its unwanted advocacy only compounds the First Amendment injury inflicted on these individuals. The employees are forced to pay a union for suppressing their own rights to speak and contract for themselves. The employees are also forced to subsidize advocacy that they oppose and

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[11] *See also Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (holding that a union's "status as [an employee's] exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship" with a union with whose demands he may disagree).

that may harm their interests. This is perverse, akin to requiring kidnapping victims to pay their captors for room and board. Agency fees thus cannot be considered a "means significantly less restrictive of associational freedoms." *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

3. *Abood's* "free rider" justification for agency fees, *see* 431 U.S. at 221–22, falls short of what is required to satisfy First Amendment scrutiny. *Abood* begins by treating exclusive representation as if it were an onerous burden, or "great responsibilit[y]," the government imposes on unions, and for which unions deserve compensation for bearing. *Id.* at 221. This turns reality on its head. Exclusive representative authority is not imposed on unions: unions voluntarily seek that mantle. And it is not a burden, but an incredible government-conferred power. Consequently, "it is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation." Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. SOC. POL'Y & ECON. STUD. 163, 179 (1995). Union complaints about the heaviness of the crown they coveted, and now jealously guard, cannot be taken seriously.

Abood then posits that agency fees "distribute fairly the cost of these activities among those who *benefit*, and . . . counteract[] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining *bene-*

fits of union representation that necessarily accrue to all employees." 431 U.S. at 222 (emphasis added). Among other flaws,[12] this incorrectly presumes that employees believe they benefit from an exclusive representative's advocacy, which many do not. *Abood* itself inconsistently recognized this only two sentences later when acknowledging that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative," and listed several examples. 431 U.S. at 222.

Abood was thus wrong to label as "free riders" employees who do not want to subsidize unwanted advocacy by an unwanted representative. It is far more accurate to label employees subject to agency fee mandates "forced riders," as these employees are being forced by the government to travel with an exclusive representative to policy destinations that they may not wish to reach.

Finally, *Abood*'s statement that an agency fee arrangement "counteracts the incentive that employees might otherwise have to become 'free riders,'" 431 U.S. at 222, ignores the previously discussed advantages exclusive representation provides unions with respect to recruitment and dues collection, *see*

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[12] This rationale is also faulty because "[t]he mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." *Harris*, 134 S. Ct. at 2636; *see also Knox*, 132 S. Ct. at 2289–90 (finding "free-rider arguments . . . generally insufficient to overcome First Amendment objections").

supra pp. 23–25. These advantages far outweigh any minor disadvantages that may come with exclusive representative power. Union membership among public employees skyrocketed after several states passed laws authorizing their exclusive representation. *See* Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 CATO J. 87, 96–99 (2010).[13] Union membership rates are far higher in those states that authorized exclusive representation than in those states that did not. *Id.* at 106–07. The difference is considerable even absent compulsory fees.[14] Exclusive representative status does not, contrary to *Abood's* implausible speculation, impede a union's ability to recruit and retain members. It facilitates that endeavor.

Overall, *Abood* got it backwards by presuming that exclusive representation burdens unions and benefits nonmember employees. *Abood's* free rider rationale for agency fees thus "falls far short of what the First Amendment demands." *Harris*, 134 S. Ct. at 2641.[15]

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[13] *Available at* https://goo.gl/z08rpZ (last visited May 1, 2017).

[14] In 2008, public-sector union membership rates were 37.9% in Nevada, 31.6% in Iowa, 27.9% in Florida, and 27.2% in Nebraska, s*ee* Edwards, *supra*, at 106, each of which allow exclusive representation, but ban compulsory fees. By contrast, public-sector union membership rates were far lower in states that ban exclusive representation: 4.2% in Georgia, 5.2% in Virginia, 6.0% in Mississippi, and 8.2% in South and North Carolina. *Id.*

[15] *Abood's* finding that a state's interest in "labor peace" justifies exclusive representation of employees, 431 U.S. at 220–21,

II. This Case Is a Suitable Vehicle for Reconsidering *Abood*.

This Court laid bare *Abood's* infirmities in *Harris*, a case concerning Illinois's agency fee statute, but stopped short of overruling *Abood* because the case did not involve full-fledged employees. 134 S. Ct. at 2638 & n.19. This case involves the same agency fee statute as *Harris*, 5 ILL. COMP. STAT. 315/6(e), but concerns its application to a full-fledged state employee. This action is thus a suitable vehicle to overrule *Abood* for the reasons stated in *Harris*.

There are three facets to this case that render it a particularly good vehicle for reconsidering *Abood*. *First*, Illinois's agency fee statute authorizes what *Abood* permits. The statute calls for forcing public employees 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," but not other expenses. 5 ILL. COMP. STAT. 315/6(e). This case, therefore, squarely presents the question of

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does not justify agency fees, but only "[t]he principle of exclusive union representation," *id*. at 220. The two "are not inextricably linked," as exclusive representation can and does exist without agency fees. *Harris*, 134 S. Ct. at 2640; *see* p.22, *supra*. To the extent there is a linkage, agency fees are not a least restrictive means to achieve labor peace, as the government can maintain order and discipline in its workplaces through means far less offensive to First Amendment freedoms. Pet.App.15.

whether *Abood* was correct that such exactions are facially valid under the First Amendment.

Second, AFSCME generally uses the three-prong test adopted by a plurality of this Court in *Lehnert*, 500 U.S. at 519, to determine the expenses the union charges to nonmember employees. AFSCME's Fair Share Notice states:

> In addition your Fair Share fee includes your pro rata share of the expenses associated with the following activities which are chargeable to the extent that they are germane to collective bargaining, are justified by the government's vital policy interest in labor peace and avoiding free riders, and do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Pet.App.30. AFSCME's use of this agency fee test illustrate why *Abood*'s dividing line is unworkable. It leaves Janus and other employees with little idea of what activities they are being forced to subsidize because each prong of the chargeability test "involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?)." *Harris*, 134 S. Ct. at 2633 (quoting *Lehnert*, 500 U.S. at 551 (Scalia, J., concurring in judgment in part & dissenting in part)). At the very least, AFSCME's use of this Court's agency fee test provides an excellent basis for reviewing whether that test makes sense.

Finally, the political nature of bargaining with the government is vividly illustrated by AFSCME's negotiations with Governor Rauner, which are chronicled at *Department of CMS*, 33 PERI ¶ 67. "There can be no reasonable disagreement that the outstanding issues—including wages, health insurance, subcontracting, layoff—were of the utmost importance to the parties." *Id.,* ALJD at 153. During the negotiations, given Illinois's precarious fiscal situation, *id*. at 12, "[t]he State consistently indicated its need to save hundreds of millions of dollars in health insurance costs" and "that it could not afford to pay step increases or across the board wage increases and was opposed to increases that were unrelated to performance," *id*. at 154. AFSCME took opposite positions. *Id*. For example, while "[i]t is uncontested that the State was looking to save hundreds of millions of dollars per year on health insurance, . . . the Union had, over two proposals, offered savings that essentially had a net savings of zero dollars due to the increased benefits it still sought." *Id*. at 224. This dispute, and other policies subject to the negotiations,[16] make clear that "the terms upon which the State settles with its employees is necessarily a political, public policy issue." *Id*. at 159.

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[16] To offer other examples, the State claimed that its preferred holiday and overtime policies would save taxpayers an estimated $180 and $80 million, respectively, *Dep't of CMS,* ALJD at 63-64, and that AFSCME's semi-automatic promotion demand would cost taxpayers $20-30 million, *id*. at 97.

AFSCME's conduct during bargaining illustrates the same point, as its advocacy extended to the legislature, the public, and the courts. AFSCME proposed, during bargaining, that the state executive branch commit to "jointly advocate for amending the pension code" and increasing State taxes. *Id.* at 26–27. AFSCME also sought legislation "to change the existing structure for contract negotiations only for negotiations between the Rauner administration . . . and not any later-elected governor." *Id.* at 167. "AFSCME sponsored rallies in various regions of the state" that "were organized to educate the public and to put pressure on the Governor to change his position at the bargaining table." *Id.* at 135.[17] AFSCME is petitioning state courts to stop the Governor from implementing the reforms he sought during bargaining. *AFSCME, Council 31,* 2016 WL 7399614. These and other aspects of AFSCME's bargaining and related disputes with Governor Rauner have been the subject to widespread public attention.[18] AFSCME's

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[17] AFSCME used similar tactics "[d]uring the course of the 2012-2013 negotiations," wherein "the Union communicated its displeasure in the State's proposals and bargaining positions in a very public manner," such as by having union agents "appear [at] and disrupt Governor Quinn's public speaking engagements, political events, and even his private birthday party/fundraiser." *Id.* at 14. AFSCME's purpose was to "make public [its] displeasure with the Governor and to pressure the Governor to provide more favorable contract terms." *Id.*

[18] *See, e.g.*, Joe Cahill, *The State's Pension Reality Gap Is about to Get Wider*, CRAIN'S CHICAGO BUS. (Aug. 10, 2016),

actions during collective bargaining demonstrate that, "unlike in a labor dispute between a private company and its unionized workforce, the very issues being negotiated are matters of an inherently public and political nature." *Dep't of CMS*, 33 PERI ¶ 67, ALJD at 172.

Of course, *Abood's* propriety does not turn on these facets of the case. *Abood* is wrongly decided, and Illinois's agency fee law is unconstitutional, regardless of how AFSCME calculates its agency fee or wages its political battle with Governor Rauner. AFSCME's conduct does, however, aptly demonstrate that this Court's observations in *Harris* were correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

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https://goo.gl/GBWG3m (last visited Mar. 31, 2017); David Schaper, *Shortfall Threatens Illinois Pension System*, NPR (Mar. 24, 2010), https://goo.gl/8XopCF (last visited Mar. 31, 2017); Kim Geiger, *Rauner Scores Big Win over Union on Contract*, CHI. TRIB. (Nov. 16, 2016), https://goo.gl/wa1cWQ (last visited Mar. 31, 2017); Kim Geiger, Monique Garcia & Haley BeMiller, *Union Authorizes Strike, Rauner Doesn't Budge*, CHI. TRIB. (Feb. 23, 2017), https://goo.gl/VLWo7J (last visited Mar. 31, 2017).

Respectfully submitted,

DAN K. WEBB
JOSEPH J. TORRES
LAWRENCE R. DESIDERI
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

JACOB H. HUEBERT
JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1500
Chicago, IL 60603
(312) 263-7668

WILLIAM L. MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

June 6, 2017

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-3638

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Defendants-Appellees,

and

LISA MADIGAN, Attorney General of the State of Illinois,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15 C 1235 – Robert W. Gettleman, *Judge*.

ARGUED MARCH 1, 2017 – DECIDED MARCH 21, 2017

Before POSNER, SYKES, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court upheld, against a challenge based on the First Amendment, a Michigan law that allowed a public employer

(in that case a municipal board of education), whose employees (public-school teachers) were represented by a union, to require those of its employees who did not join the union nevertheless to pay fees to it because they benefited from the union's collective bargaining agreement with the employer. The fees could only be great enough to cover the cost of the union's activities that benefited them; they could not be expanded to enable the union to use a portion of them "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235–36. For were that permitted, the workers who disagreed with the political views embraced by the union would be unwilling contributors to expenditures for promoting political views anathema to them, and the law requiring those contributions would thereby have infringed their constitutional right of free speech.

Illinois has a law, similar to the Michigan law, called the Illinois Public Relations Act, 5 ILCS 315 *et seq.*, under which a union representing public employees collects dues from its members, but only "fair share" fees (a proportionate share of the costs of collective bargaining and contract administration) from non-member employees on whose behalf the union also negotiates. See 5 ILCS 315/6. But in 2015 the governor of Illinois filed suit in federal district court to halt the unions' collecting these fees, his ground being that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.

The district court dismissed the governor's complaint, however, on the ground that he had no standing to sue because he had nothing to gain from

eliminating the compulsory fees, as he is not subject to them. But two public employees—Mark Janus and Brian Trygg—had already moved to intervene in the suit as plaintiffs seeking the overruling of *Abood*. Of course, only the Supreme Court has the power, if it so chooses, to overrule *Abood*. Janus and Trygg acknowledge that they therefore cannot prevail either in the district court or in our court—that their case must travel through both lower courts—district court and court of appeals—before they can seek review by the Supreme Court.

While dismissing the governor's complaint for lack of standing, the district court granted the employees' motion to intervene and declared that the complaint appended to their motion would be a valid substitute for Governor Rauner's dismissed complaint. Technically, of course, there was nothing for Janus and Trygg to intervene in, given the dismissal of the governor's complaint. But to reject intervention by Janus and Trygg on that ground would be a waste of time, for if forbidden to intervene the two of them would simply file their own complaint when Rauner's was dismissed. As there would be no material difference between intervening in Rauner's suit and bringing their own suit in the same court, the efficient approach was, as the district court ruled, to deem Rauner's suit superseded by a motion to intervene that was the equivalent of the filing of a new suit. See *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007).

But we need to distinguish between the two plaintiffs, Janus and Trygg, because while Janus has never before challenged the requirement that he pay the union "fair share" fees, Trygg has. First before the Illinois Labor Relations Board and then before the

Illinois Appellate Court, Trygg complained that the union bargaining on his behalf (the Teamsters Local No. 916, one of the defendants in this case) was ignoring a provision of the Illinois law that allows a person who has religious objections to paying a fee to a union to instead pay the fee to a charity. 5 ILCS 315-6(g). The Illinois court agreed, and on remand to the Board Trygg obtained the relief he sought: instead of paying the fair-share fee to the union, he could pay the same amount to a charity of his choice. The defendants (the unions that bargain on behalf of Janus and Trygg, respectively—AFSCME for Janus, the Teamsters for Trygg—the Director of the Illinois Department of Central Management Services, which is the state agency that has collective bargaining agreements with both unions; and the Attorney General of Illinois intervening on the side of the defendants) argue that Trygg's claim in the present suit is precluded by his earlier litigation.

Claim preclusion is designed to prevent multiple lawsuits between the same parties where the facts and issues are the same in all of the suits, and 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to a state court judgment that it would be given by the courts of the state in question. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). Trygg's First Amendment claim and his earlier Illinois statutory claim arise from the same fact: the existence of an Illinois law requiring that he pay fees to the Teamsters, the union required to bargain on his behalf. But the parties disagree as to whether Trygg could have raised his First Amendment claim in the earlier litigation. It's true that the Illinois Labor Relations Board could not have entertained a constitutional challenge to the statute, but Trygg could have included the claim in his appeal from the

Board's decision to the court, because it presented an issue relevant to the legality of the Board's action. See *Reich v. City of Freeport*, 527 F.2d 666, 671–72 (7th Cir. 1975). He did not do so; and because he had a "full and fair opportunity" to do so, he is precluded by Illinois law from litigating the claim in the present suit. See *Abner v. Illinois Department of Transportation*, 674 F.3d 716, 719 (7th Cir. 2012). He missed his chance.

Janus's claim was also properly dismissed, though on a different ground: that he failed to state a valid claim because, as we said earlier, neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim.

The judgment of the district court dismissing the complaint is therefore

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed 09/13/16]

Case No. 15 C 1235

MARK JANUS and BRIAN TRYGG,

Plaintiff,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/ PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; MICHAEL HOFFMAN, Director of the Illinois Department of Central Management Services, in his official capacity,

Defendants.

LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant.

Judge Robert W. Gettleman

ORDER

Plaintiffs Mark Janus and Brian Trygg have brought a second amended complaint challenging the constitutionality of the compulsory collection of union fees under the Illinois Public Labor Relations Act ("IPLRA"),

52 ILCS 315/6. Defendants have moved to dismiss, arguing that the case is controlled by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of such assessments. Plaintiffs brought the suit hoping that *Abood* would be reversed in a matter then pending before the Supreme Court in which the continued validity of *Abood* was challenged. *Friedrichs v. California Teachers Association*, __ U.S. __, 136 S.Ct. 1083 (2016). In *Friedrichs* an equally divided Supreme Court affirmed the Ninth Circuit's decision upholding fair share fees based on the reasoning in *Abood*. *Id.* As a result, *Abood* remains valid and binding precedent.

Plaintiffs continue to argue that *Abood* was wrongly decided, but recognize that it remains controlling in the instant case. Consequently, defendants' motion to dismiss (Doc. 146) is granted.

ENTER: September 13, 2016

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed 07/27/16]

No. 1:15-CV-01235

MARK JANUS and BRIAN TRYGG,

Plaintiffs,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; MICHAEL HOFFMAN, Director of the Illinois Department of Central Management Services, in his official capacity,

Defendants,

LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant.

Judge Robert W. Gettleman
Magistrate Daniel G. Martin

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs, MARK JANUS and BRIAN TRYGG, for their Second Amended Complaint, allege as follows:

1. Plaintiffs are employed by the State of Illinois. They are each exclusively represented by one of the Defendant unions (the "Unions"), but they are not

members of the Unions. Plaintiffs are being forced to pay compulsory union fees to the Unions as a condition of their employment pursuant to Illinois' Public Labor Relations Act ("IPLRA"), 5 ILCS 315/6.

2. Plaintiffs submit that this collection of compulsory fees from them violates their rights under the First Amendment to the United States Constitution. They seek: (a) a declaratory judgment against the Director of Central Management Services and the Unions (collectively, "Defendants") to this effect; (b) injunctive relief that prohibits Defendants from seizing compulsory fees from them in the future; and (c) damages from the Unions for compulsory fees wrongfully seized from them.

JURISDICTION AND VENUE

3. This is an action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiffs by the Constitution of the United States, particularly the First and Fourteenth Amendments.

4. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, because they arise under the United States Constitution, and 28 U.S.C. § 1343, because Plaintiffs seek relief under 42 U.S.C. § 1983. This Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief based thereon.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claim occurred in this district, and because the Unions operate or do business in this judicial district, thus residing in this district for purposes of 28 U.S.C. §§ 1391(c)(2) and 1391(d).

PARTIES

6. Plaintiff Mark Janus resides in Sangamon County, Illinois. He is employed by Illinois' Department of Healthcare and Family Services in a bargaining unit exclusively represented by AFSCME Council 31. However, Janus is not a member of the Union.

7. Plaintiff Brian Trygg resides in Edgar County, Illinois. He is employed by Illinois' Department of Transportation in a bargaining unit exclusively represented by Teamsters Local 916. However, Trygg is not a member of the Union.

8. Defendant American Federation of State, County, and Municipal Employees Council 31 ("AFSCME Council 31"), AFL-CIO, is a labor union that exclusively represents over 35,000 public employees in Illinois, and has an office located at 205 N. Michigan Ave., Suite 2100, Chicago, Illinois 60601.

9. Defendant General Teamsters/Professional & Technical Employees Local Union No. 916 ("Teamsters Local 916") is a labor union that exclusively represents over 2,700 public employees in Illinois, and has an office located at 3361 Teamster Way, Springfield, Illinois 62702.

10. On information and belief, the Illinois Department of Central Management Services ("CMS"), under the control and direction of its Director, administers programs and services to state agencies. The Bureau of Personnel within the Department develops and administers the State's Personnel Code, Personnel Rules, Pay Plan, Position Classification Plan, current collective bargaining agreements, and other applicable laws.

11. CMS is a party to the collective bargaining agreements under which the Plaintiffs pay compulsory union fees.

12. Defendant Michael Hoffman is the Director of CMS, with an office located at JRTC Suite 4-500, 100 W. Randolph Street, Chicago IL, 60601-3219.

13. Intervenor-Defendant Lisa Madigan is the Attorney General of the State of Illinois.

FACTUAL ALLEGATIONS

I. Plaintiffs Are Forced to Pay Compulsory Union Fees Pursuant to State Law and Union Contracts.

14. Section 6 of IPLRA, 5 ILCS 315/6, grants a designated or recognized union the legal authority to act as "the exclusive representative for the employees of [a bargaining] unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act." 5 ILCS 315/6(c). These terms and conditions of employment include, among other things, health care coverage, retirement benefits, and pensions.

15. The mandatory and permissive subjects of collective bargaining under the IPLRA concern matters of political and public concern over which employees and other citizens may have divergent views and opinions.

16. On information and belief, exclusive representation is not necessary to maintain order and peace amongst employees in public workplaces because, among other things, public employers have other means to ensure workplace discipline.

17. On information and belief, exclusive representation assists unions with recruiting and retaining members because, among other things: (a) employees are more likely to join and support a union that has authority over their terms of employment, as opposed to a union that does not; (b) exclusive representatives are entitled to information about all employees in the unit; and (c) exclusive representatives can negotiate contract terms that facilitate recruiting and retaining members, such as contract terms providing for union orientations for all employees and automatic deduction of union dues from employees' paychecks.

18. Under Section 6 of the IPLRA, collective bargaining agreements covered by the IPLRA may require state employees who are not full members of the Unions ("nonmembers") to pay compulsory union fees. Specifically, Section 6(e) provides that:

> When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3(g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings

> of the nonmember employees and paid to the employee organization.

5 ILCS 315/6(e). The union fee seizures authorized by § 6(e) of the IPLRA shall hereinafter be referred to as "compulsory fees."

19. With the exception of the public employer of public employees who are court reporters, "public employer" or "employer" is defined in § 3(o) of the IPLRA Section as:

> the State of Illinois; any political subdivision of the State, unit of local government or school district; authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities; and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees.

5 ILCS 315/3(o).

20. CMS, an Illinois state agency within the direction and control of the Governor of Illinois, has entered into collective bargaining agreements under the IPLRA with the Unions that require the deduction of compulsory fees from the earnings of the nonmembers, with the fees then paid to the Unions (hereinafter, "Fair Share Contract Provisions").

21. CMS was a party to a collective bargaining agreement with AFSCME Council 31 effective from June 30, 2012, to June 30, 2015, which is incorporated by reference herein.[1] The contract required semi-

[1] The document is available at http://www.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf (last visited July 15, 2016), and is attached as Exhibit 1.

monthly deduction of compulsory fees from the earnings of nonmember employees. *Id.* at Art. IV, § 3.

22. CMS is a party to a collective bargaining agreement with Teamsters Local 916 effective from June 1, 2015, to June 30, 2019, which is incorporated by reference herein.[2] The contract requires that compulsory fees be deducted from the earnings of nonmember employees. *Id.* at Art. III, § 1.

23. Since times before June 30, 2012, Plaintiffs have had compulsory fees deducted from their earnings pursuant to the aforementioned contracts or predecessor contracts.

24. On information and belief, CMS directly or indirectly made these deductions, acting under the direction and control of Defendant Hoffman or his predecessor Directors at CMS.

25. Janus currently has $44.58 deducted from his paycheck every month, and estimates that several thousand dollars of compulsory fees have been deducted in total.

26. Trygg currently has $48.98 deducted from his paycheck every pay period, and estimates that approximately $8,900 of compulsory fees have been deducted in total.

27. Section 6(f) of the IPLRA requires that "[w]here a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement . . . the employer shall continue to honor and abide by any dues deduction or fair share clause contained

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[2] The document is available at http://www.illinois.gov/cms/Employees/Personnel/Documents/emp_pt916.pdf (last visited July 15, 2016), and is attached as Exhibit 2.

therein until a new agreement is reached including dues deduction or a fair share clause." 5 ILCS 315/6(f).

28. Accordingly, Illinois law requires that Plaintiffs continue to pay compulsory fees to AFSCME Council 31 and Teamsters Local 916 after the aforementioned contracts expire.

29. On information and belief, compulsory fees are not necessary to maintain order or labor peace in the workplace, because, among other reasons, exclusive representation does not depend on the right to collect a fee from non-members.

30. Even those nonmembers who object to the payment of the compulsory fees because of bona fide religious beliefs may nonetheless "be required to pay an amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise pay such service fee." 5 ILCS 315/6(g).

II. Union Fee Calculations and Procedures.

31. When a union collects compulsory fees from an employee, it must annually provide the employee with a "*Hudson*" notice that, among other things, explains how the union calculated the fee. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). A union calculates a compulsory fee by first defining which types of activities it will deem "chargeable" and "non-chargeable" to nonmember employees, and by then determining what percentage of the union's expenses in a prior fiscal year were chargeable and non-chargeable. The compulsory fee is set at the prior fiscal year's chargeable percentage.

32. The above calculation must be based on an audit of union expenditures. However, auditors do not confirm whether the union has properly classified its expenditures as chargeable or non-chargeable.

33. If a non-member disagrees with a union's classification of expenses as chargeable, the non-member may challenge the classification either through arbitration or in a court of law.

34. On information and belief, CMS directly deducts compulsory fees, in the amount set by a union, from the earnings of State employees and remits those monies to the union. The Unions here act under color of state law by causing, participating in, and accepting the compulsory deduction of fees from monies owed to non-member State employees.

35. On information and belief, rather than sending individual *Hudson* notices to every employee, AFSCME Council 31 posts a "Notice to All Nonmember Fair Share Fee Payors" ("AFSCME Notice") on union bulletin boards in some workplaces. AFSCME's Notice is attached as Exhibit 3 and is hereby incorporated by reference into this pleading.

36. On information and belief, the attached AFSCME Notice is the current notice posted by AFSCME Council 31, and is the basis for the compulsory fees it collected in 2014 and through 2015 to date. Also on information and belief, the attached AFSCME Notice accurately describes AFSCME Council 31's compulsory fees, its calculation thereof, and union's policies related to those fees.

37. AFSCME states in the AFSCME Notice that, among other uses, its compulsory fees are used for "lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement,"

"paying technicians in labor law, economics, and other subjects for services used (a) in negotiating and administering collective bargaining agreements; and (b) in processing grievances," "supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share payor's employment," "organizing within the bargaining unit in which fair share fee payors are employed," "organizing other bargaining units," "seeking to gain representation rights in units not represented by AFSCME," and "lobbying for purposes other than the negotiation, ratification, or implementation of a collective bargaining agreement."

38. On information and belief, AFSCME charges nonmembers compulsory fees equal to approximately 79% of the total dues charged to members.

39. In February 2016, Teamsters Local 916 mailed to Trygg a "Notice to Public Fair Share Employees" ("Teamsters Notice"). The Teamsters Notice is attached as Exhibit 4 and is hereby incorporated by reference into this pleading.

40. On information and belief, the attached Teamsters Notice is Teamsters Local 916's current *Hudson* notice and is the basis for the compulsory fees it collected from March 2016 to date. Also on information and belief, the attached Teamsters Notice accurately describes Teamsters Local 916's current compulsory fees, its calculation thereof, and union's policies related to those fees.

41. On information and belief, Teamsters Local 916 charged nonmembers compulsory fees equal to approximately 98% of the total dues charged to members in 2014 and through February 2016. On information and belief, from March 2016 to date, Teamsters Local 916

charges nonmembers compulsory fees equal to approximately 79% of the total dues charged to members.

III. Plaintiffs Oppose Being Forced to Pay Compulsory Fees to the Unions.

42. Janus objects to many of the public policy positions that AFSCME advocates, including the positions that AFSCME advocates for in collective bargaining.

43. For example, he does not agree with what he views as the union's one-sided politicking for only its point of view. Janus also believes that AFSCME's behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens.

44. But for Illinois law requiring compulsory fees, Janus would not pay any fees or otherwise subsidize AFSCME.

45. Trygg objects to many of Teamsters Local 916's public policy positions, including the positions that it advocates for in collective bargaining.

46. Trygg has sincere religious objections to associating with Teamsters Local 916 and its agenda. Trygg also believes that Teamsters Local 916 harms Illinois residents by objecting to efforts by the State to reduce costs that would allow public funds to be made available for more important uses. For example, the Union resists any furlough days, despite the State's budget issues.

47. But for Illinois law requiring compulsory fees, Trygg would not pay any fees or otherwise subsidize Teamsters Local 916.

48. On February 9, 2015, Illinois Governor Bruce Rauner issued Executive Order 15-13. The Executive Order directs CMS and other State agencies to cease

enforcement of compulsory fee agreements and to direct all compulsory fee deductions into an escrow account until it is determined if those fees are constitutional.

49. On information and belief, enforcement of Executive Order 15-13 has been effectively suspended or deferred, with compulsory fees continuing to be deducted (including from the paychecks of Plaintiffs) and remitted to public employee unions.

50. Under the IPLRA, it is currently permissible for collective bargaining agreements covered by the IPLRA to require nonmembers to pay compulsory union fees. See 5 ILCS 315/6. The constitutionality of such provisions was first considered by the United States Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Supreme Court held the seizure of compulsory fees in the public sector to be constitutional because the fees were justified by state interests in labor peace and avoiding free riders. However, the *Abood* court failed to subject these ostensible justifications to requisite constitutional scrutiny.

51. Since *Abood*, the Supreme Court has repeatedly acknowledged that compelling a state employee to financially support a public sector union seriously impinges upon free speech and association interests protected by the First Amendment of the United States Constitution.

52. The Supreme Court in *Abood* also distinguished between "chargeable" union expenditures, which may be recouped even from employees who choose not to join a union, and "non-chargeable" expenditures, which can be recouped only from the union's members.

53. But in the years following the *Abood* decision, the Supreme Court "struggled repeatedly with" interpreting *Abood* and determining what qualified as a "chargeable" expenditure and what qualified as a "nonchargeable," or political and ideological, expenditure. *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 2633 (2014) (citing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Teachers v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009)).

54. In addition, in *Knox v. Service Employees International Union, Local 1000*, __ U.S. __, 132 S. Ct. 2277, 2289 (2012), the Supreme Court also recognized that "a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." For that reason, "compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Id.* (internal quotation marks omitted). *Knox* emphasized the "general rule" that "individuals should not be compelled to subsidize private groups or private speech." *Id.* "[C]ompulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy." *Id.* (citation omitted). "Such situations are exceedingly rare because . . . mandatory associations are permissible only when they serve a compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citation omitted).

55. "Second, even in the rare case where a mandatory association can be justified, compulsory fees can

be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (citation omitted).

56. More recently, in *Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618 (2014), a majority of the Supreme Court questioned *Abood's* continued validity on several grounds, and outlined an interpretation of the First Amendment that, in light of the current circumstances of Illinois public sector collective bargaining, is incompatible with nonmembers being compelled to pay compulsory fees such as those required by the Fair Share Contract Provisions.

57. Regarding the "fair share" provisions at issue in that case, the *Harris* majority noted that "'[t]he primary purpose' of permitting unions to collect fees from nonmembers is 'to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Harris*, 134 S. Ct. at 2627 (quoting *Knox*, 132 S. Ct. at 2289). The Court continued, however, that "'[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections.'" *Harris*, 134 S. Ct. at 2627 (quoting *Knox*, 132 S. Ct. at 2289).

58. A majority of the Supreme Court also recognized in *Harris* that "fair share" provisions in public employee collective bargaining agreements impose First Amendment concerns not necessarily presented in the private sector, because the collective bargaining process itself is political when taxpayer funds go to pay the negotiated wages and benefits, especially given the great power of unions in electoral politics and the size of public employee payrolls.

59. On information and belief, in coordination with their express political advocacy, the Unions routinely take positions in the collective-bargaining process that greatly affect the State's budget.

60. On information and belief, since *Abood*, the facts and circumstances of Illinois public sector bargaining since its inception in 1984 under the IPLRA have caused the Fair Share Contract Provisions to impose a significant infringement on the First Amendment rights of Illinois state employees who do not wish to become members of the Unions and other public employee unions in Illinois.

61. On information and belief, when the Unions expend dollars collected pursuant to the Fair Share Contact Provisions to lobby or bargain against reductions to their own benefits packages or to shift more significant reductions to other state programs or services, there is no principled distinction between the Unions and the various special interest groups who must expend money on political activities to protect their own favored programs and services.

62. On information and belief, Illinois public sector labor costs have imposed and will continue to impose a significant impact on the State's financial condition, clearly demonstrating the degree to which Illinois state employee collective bargaining is an inherently political activity.

63. Like the petitioners in *Harris*, Plaintiffs have "the right not to be forced to contribute to the union, with which they broadly disagree." *Harris*, 134 S. Ct. at 2640.

64. The Fair Share Contract Provisions, while permitted by the IPLRA, are nonetheless unconstitu-

tional because they significantly infringe on nonmember Illinois state employees' First Amendment rights, while serving no compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. Compulsory fees infringe on the First Amendment rights of Plaintiffs and other employees because compulsory fee requirements compel employees to support speech and petitioning against their will, and to associate with a union against their will.

65. Plaintiffs submit that *Abood* was wrongly decided and should be overturned by the Supreme Court, and that the seizure of compulsory fees is unconstitutional under the First Amendment. Among other things, there is no justification, much less a compelling one, for mandating that the nonmembers support the Unions, which, on information and belief, are some of the most powerful and politically active organizations in the State.

66. In addition, the inherently political nature of collective bargaining and its consequences in Illinois has further infringed on nonmembers' First Amendment rights to refrain from supporting public sector unions in their organization and collective bargaining activities. Therefore, the First Amendment forbids coercing any money from the nonmembers to pay fees pursuant to Fair Share Contract Provisions.

67. In light of these circumstances, these nonmember fee deductions are coerced political speech, in violation of the First Amendment of the United States Constitution.

68. Under the Supremacy Clause contained in Article VI of the United States Constitution, the First Amendment supersedes any inconsistent purported

requirements within Illinois statutes, thus rendering ultra vires any public union collective bargaining agreement provision that would violate nonmembers' First Amendment rights.

COUNT I

(Compulsory Union Fees Violate 42 U.S.C. § 1983 and the United States Constitution)

69. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

70. By requiring under color of state law that Plaintiffs pay compulsory fees as a condition of their employment, and by causing such compulsory fees to be withheld from Plaintiffs' wages and remitted to the Unions, CMS under the control and direction of its Director, AFSCME Council 31, and Teamsters Local 916 are violating Plaintiffs' First Amendment rights to free speech, petitioning, and association, as secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

71. As a result, Plaintiffs are suffering the irreparable harm and injury inherent in a violation of First Amendment rights for which there is no adequate remedy at law. Unless enjoined by this Court, Plaintiffs will continue to suffer irreparable harm and injury.

72. The following Illinois laws that authorize compulsory fees are unconstitutional, both on their face and as applied to the Plaintiffs: 5 ILCS 315/3(g), 5 ILCS 315/6(a) (final sentence only), 5 ILCS 315/6(e), 5 ILCS 315/6(f), 5 ILCS 315/10(a)(2) (final sentence only), and 5 ILCS 315/10(b)(1) (reference to "fair share" only).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

A. Issue a declaratory judgment against the Director of CMS, in his official capacity, AFSCME Council 31, and Teamsters Local 916 that:

   1. it is unconstitutional under the First Amendment, as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to seize or require payment of compulsory fees from Plaintiffs and other public employees;

   2. the following statutory provisions are unconstitutional under the First Amendment, as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, and null, and void: 5 ILCS 315/3(g), 315/6(a) (final sentence only), 5 ILCS 315/6(e), 5 ILCS 315/6(f), 5 ILCS 315/10(a)(2) (final sentence only), and 5 ILCS 315/10(b)(1) (reference to "fair share" only).

   3. The sections of AFSCME Council 31's and Teamsters Local 916's contracts with the State that require the seizure of compulsory fees are unconstitutional under the First Amendment, as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, and are null and void.

B. Issue preliminary and permanent injunctions against the Director of CMS, in his official capacity, AFSCME Council 31, and Teamsters Local 916 that prohibit the parties from seizing compulsory fees from Plaintiffs or otherwise requiring that they pay compulsory fees to a union as a condition of their employment.

C. Award Plaintiff Mark Janus nominal and compensatory damages from AFSCME Council 31, and award Plaintiff Brian Trygg nominal and compensatory damages from Teamsters Local 916, for all compulsory fees seized from them under color of state law from the beginning of the applicable statute of limitations to the date of the said award.

D. Pursuant to 42 U.S.C. § 1988, award Plaintiffs their costs, including reasonable attorneys' fees incurred in the litigation of this case.

E. Order any other legal or equitable relief deemed just and proper.

Dated: July 21, 2016

Respectfully submitted,

MARK JANUS and BRIAN TRYGG

By: /s/ Joseph J. Torres
One of Their Attorneys

Dan K. Webb
Lawrence R. Desideri Joseph J. Torres
Brook R. Long
WINSTON & STRAWN LLP
35 West Wacker Dr. Chicago, IL 60601
312.558.7334
312.558.5700 (fax)
dwebb@winston.com
ldesideri@winston.com
jtorres@winston.com
blong@winston.com

William L. Messenger
Aaron B. Solem (pro hac vice)
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION
8001 Braddock Rd., Suite 600
Springfield, VA 22160
703.321.8510
703.321.9319 (fax)
wlm@nrtw.org
abs@nrtw.org

Jacob H. Huebert Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle St., Suite 1500
Chicago, IL 60603
312.263.7668
312.263.7702 (fax)
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

NOTICE TO ALL NONMEMBER FAIR SHARE FEE PAYORS

This Notice is being provided to all individuals who pay agency fees or fair share fees to Council 31 of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") under collective bargaining agreements between AFSCME Council 31 and various public employers in the State of Illinois. Such Notice is required by the decision of the United States Supreme Court in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, el al. v. Hudson*, *et al.* PLEASE READ THIS NOTICE CAREFULLY IT CONTAINS IMPORTANT INFORMATION AND PROCEDURES CONCERNING YOUR LEGAL RIGHTS.

THE AFSCME COUNCIL 31 FAIR SHARE FEE

As a fair share payor, you are being charged a fair share fee which is equal to your proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wage hours and other conditions of employment. This charge is authorized by the Illinois Public Labor Relations Act. The U.S. Supreme Court has held that assessment of a fair share fee equal to a non-member's proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment is constitutional.

The Fair Share fee includes your pro rata share of the costs of the following activities of AFSCME International, AFSCME Council 31 and its affiliated local unions:

1. Gathering information in preparation for the negotiation of collective bargaining agreements.

2. Gathering information from employees concerning collective bargaining positions.
3. Negotiating collective bargaining agreements.
4. Administration of ballot procedures on the ratification of negotiated agreements.
5. The public advertising of AFSCME's positions on the negotiation, ratification, or implementation of collective bargaining agreements.
6. Lobbying for the negotiation, ratification or implementation of a collective bargaining agreement.
7. Adjusting grievances pursuant to the provisions of collective bargaining agreements, enforcing collective bargaining agreements, and representing employees in proceedings under civil service laws or regulations.
8. Purchasing books, reports, and advance sheets used in (a) negotiating and administering collective bargaining agreements, and (b) processing grievances.
9. Paying technicians in labor law, economics and other subjects for services used (a) in negotiating and administering collective bargaining agreements, and (b) in processing grievances.
10. Defending AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by AFSCME.
11. Proceedings regarding jurisdictional controversies under the AFL-CIO constitution.
12. Membership meetings and conventions held at least in part to determine the positions

of employees on collective bargaining issues, contract administration and other matters affecting wages, hours and working conditions, including the cost of sending representatives to such meetings and conventions.

13. Internal communications which concern collective bargaining issues, contract administration, public employment generally, employee development, unemployment, job opportunities, award programs and other matters affecting wages, hours and working conditions.

14. Impasse procedures, including fact finding, mediation, arbitration, strikes, slow-downs, and work stoppages, over provisions of collective bargaining agreements and the administration thereof, so long as they are legal under state law. These costs may include preparation for strikes, slow-downs, and work stoppages regardless of their legality under state law, so long as no illegal conduct actually occurs.

15. The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation or enforcement of collective bargaining agreements and any other litigation before agencies or in the courts which concerns bargaining unit employees which is normally conducted by an exclusive representative.

In addition your Fair Share fee includes your pro rata share of the expenses associated with the following activities which are chargeable to the extent that they are germane to collective bargaining activity, are justified by the government's vital policy interest in labor peace and avoiding free-riders, and do not significantly add to the burdening of free speech that

is inherent in the allowance of an agency or union shop.

16. Services provided by a parent organization to other bargaining units, which are provided from a pool of resources available to all units, and may ultimately inure to the benefit of the members of the local bargaining unit.

17. Purchasing books, reports, and advance sheets used in activities or for purposes other than negotiating collective bargaining agreements and processing grievances.

18. Paying technicians in labor law, economics and other subjects for services used in activities other than negotiating, implementing and administering collective bargaining agreements and processing grievances.

19. Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share fee payor's employment.

20. Membership meetings and conventions held for purposes other than to determine the positions of employees on collective bargaining issues, contract grievance adjustment or other matters affecting wages, hours, and working conditions.

21. Internal communications which concern subjects other than collective bargaining issues, contract administration, public employment generally, employment development, unemployment, job opportunities, award programs, or' other matters affecting wages, hours and working conditions.

22. Organizing within the bargaining unit in which fair share fee payors are employed.

23. Organizing other bargaining units.

24. Seeking to gain representation rights in units not represented by AFSCME, Including units where there is an existing designated representative.

25. Prosecution or defense of arbitration, litigation or charges involving matters other than ratification, interpretation, implementation or enforcement of collective bargaining agreements, or which relates to the maintenance of the union's associational or corporate existence.

26. Lobbying for purposes other than the negotiation, ratification, or implementation of a collective bargaining agreement.

27. Social and recreational activities.

28. Payment for insurance, medical care, retirement, disability, death, and related benefit plans for union employees, staff, and officers.

29. Administrative activities and expenses allocable to AFSCME's activities and expenses for which fair share fee payors are charged.

The Fair share fee does not include any expenses for the following activities.

30. Training in voter registration, get-out-the-vote, and political campaign techniques.

31. Supporting and contributing to charitable organizations.

32. Supporting and contributing to political organizations and candidates for public office.

33. Supporting and contributing to ideological causes.

34. Supporting and contributing to international affairs.

35. The public advertising of AFSCME's position on issues other than negotiation, ratification, or implementation of collective bargaining agreements.

36. Member-only benefits.

In determining the 2011 fair share fee, the expenditures of AFSCME International, AFSCME Council 31 and its affiliated locals during calendar year 2009 were used in the calculation. Applying the criteria set forth above for determining chargeable and non-chargeable expenditures, the percentage of chargeable expenses for AFSCME International was determined to be 57.53% and for AFSCME Council 31 the percentage of chargeable expenses was determined to be 89.71%. These percentages are based on the audited financial information provided below, which sets forth the major categories of expenditures of AFSCME International and AFSCME Council 31 and states the amount of the expenditures which are chargeable to fair share fee payors.

AFSCME Council 31 has approximately 281 affiliated local unions. The percentage of chargeable expenses for affiliated locals of Council 31 was based upon a review and verification of the financial records of a representative sample consisting of a majority of those locals, including summaries of financial reports, by an independent actuary and was determined to be 75.80%. This percentage is based on the total expenditures of the affiliated locals within the representative sample. Financial information which sets forth the major categories of expenditures of affiliated locals

and states the amount of the expenditures which a re chargeable to fair share fee payors, is provided below.

Applying percentage of chargeable expenditures for AFSCM, AFSCME Council 31 and its affiliated local unions to the revenues collected on behalf of each during calendar year 2009, resulted in a weighted average chargeable fair share percentage of 78.06% that is applicable to non-members. This percentage will remain in effect until the earlier of December 31, 2011, or the issuance of a new Notice.

The following table illustrates the calculation of the chargeable percentage for fair share fee payors.

Union Level	**Total Revenue Collected by AFSCME Council 31**	**Chargeable Percentage**	**Chargeable Fair Share Revenues**
AFSCME International	$9,511,908	57.73%	$5,471,915
AFSCME Council 31	18,357,735	89.71%	16,468,724
AFSCME 31 Affiliated Locals	8,149,005	75.80%	6,176,946
TOTALS	**$36,018,648**		**$28,117,585**
Overall Percentage		78.06%	

AFSCME Illinois Council 31
Account Detail
Fairshare Allocation 2011

	Adjusted Audited Expense*	**Administration Expense**	**Chargeable Expense Excluding Administration**
Salary and benefits	$14,718,708	$403,973	$11,830,230
Travel and allowance	1,114,385	33,833	990,398
Solidarity Expenses	141.053	--	--
Project help	48,753	--	45,211
Depreciation	525,027	525,027	--
Furniture and equip-ment repairs	284,635	284,635	--
Equipment rental	22,501	19,310	--
Office, printing, supplies and adver-tising	148,272	4,393	127,959
Postage and freight	373,509	6,891	268,107
Organizing supplies	20,409	--	10,529
Books and Subscriptions	30,635	--	29,324
Rent	575,707	569,509	--
Telephone	214,820	6,617	192,721
Utilities	75,771	75,771	--
Conference	428,035	--	394,512

and meeting space			
Other insurance	129,442	129,442	--
Editorial service	302,287	--	117,016
Legal and accounting	408,006	--	408,006
Charitable and non-political contributions	151,755	--	--
Outside services	171,116	--	162,829
Miscellaneous	6,665	6,007	--
Real estate taxes	30,000	30,000	--
Grants	3,000	--	--
Membership fees	14,058	--	7,776
Building repairs and maintenance	55,980	55,980	--
Minor furniture & equipment purchases	3,427	3,427	--
Arbitration	154,120	--	154,120
Convention expense	268,855	--	268,855
Advertising	164,635	--	62,991
TOTALS	**$20,615,566**	**$2,154,815**	**$15,130,629**

Total expense less administrative expense and international grants received	$16,866,867
Total chargeable expenses excluding administrative expenses	$15,130,629
Portion of expenses chargeable	89.71%
Total administrative expenses	$2,154,815
Administration portion chargeable	$1,933,084
TOTAL CHARGEABLE	$17,063,713
Total Council 31 portion of expenses chargeable to Fair share fee payors	89.71%

*The Council 31 calculation was audited by Stone Carlie & Company, L.L.C., Certified Public Accountants. A copy of the audit report is available upon request.

AFSCME International Financial Information of the Year Ended 12/31/2009

International Expenses	**Total 2009 International Expense***	**Allocated Non-chargeable Expense**	**Total Chargeable Expense**
Field services	$43,001,215	$414,615	$42,586,600
Assistance to affiliates	18,854,032	7,127,899	11,726,133
Education	5,503,928	(298,307)	5,802,235
Research	8,260,676	845,064	7,415,612
Legislation	6,509,830	5,282,633	1,227,197
Political Action & PEOPLE	34,099,310	34,130,924	(31,614)
Retirees	1,569,450	113,417	1,456,033
Public Affairs	8,265,588	3,787,007	4,478,581

President's office	2,459,435	664,960	1,794,475
Inter-Union affiliations	20,246,124	20,238,224	7,900
International relations	609,089	609,089	--
General counsel	2,802,806	324,437	2,478,369
Executive board	989,847	--	989,847
Human resources	1,141,394	308,176	833,218
Secretary-Treasurer's office	1,218,342	328,952	889,390
Financial Services	12,957,163	3,498,434	9,458,729
Auditing	2,009,891	--	2,009,891
Information systems	6,715,011	1,813,053	4,901,958
Judicial panel	1,040,142	--	1,040,142
General operative and building services	7,823,385	5,000	7,818,385
Conference and travel services	1,043,374	281,711	761,663
TOTALS	**$187,120,032**	**$79,475,288**	**$107,644,744**
Total Chargeable expense	107,644,744 ÷		
Total International Expense	$187,120,032		= 57.53%

*The International calculation was audited by Bond Beebe, Certified Public Accountants. A copy of the audit report is available upon request.

AFSCME Council 31
Local Expenditures
Fairshare Allocation 2011

Description	**Total Expense***	**Nonchargeable Expense**	**Chargeable Expense**
Lobbying	$132,376	$126,403	$5,973
Social activities			
Including fair share	458,369	--	458,369
Excluding fair share	187,694	187,694	--
Newsletter	60,040	33,297	26,743
Affiliations	339,784	339,784	--
Political or ideological	168,541	168,541	--
All other	4,246,872	497,922	3,748,950
TOTAL EXPENSE	**$5,593,676**	**$1,353,641**	**$4,240,085**
CHARGE-ABLE PORTION			75.80%

*The Council 31 calculation was audited by Stone Carlie & Company, L.L.C., Certified Public Accountants. A copy of the audit report is available upon request.

IF YOU WISH TO CHALLENGE THE FAIR SHARE FEE THAT YOU WILL BE REQUIRED TO PAY EFFECTIVE JANUARY 1, 2011, YOU MUST COMPLY WITH THE CHALLENGE PROCEDURE SET FORTH BELOW.

AFSCME COUNCIL 31 PROCEDURE FOR CHALLENGING THE AMOUNT OF THE FAIR SHARE FEE

AFSCME Council 31 has established the following procedure for individual fair share fee payors who wish to challenge the forgoing calculation and the amount of the AFSCME fair share fee. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO CHALLENGE THE COUNCIL 31 FAIR SHARE FEE.

A. Challenges

Fair share fee payors must inform Council 31 of their challenge to the amount of the fair share fee in writing by mail. The written challenge must include the challenging fair share fee payors ("challenger's") name, address, work location and local affiliation if known.

The written challenge must be received by Council 31 at the following address and be postmarked no later than 30 days from your date of hire or 30 days from transfer into an AFSCME Council 31 bargaining unit position.

Fair Share Challenges
c/o Catherine L. Struzynski
AFSCME Council 31
205 North Michigan Avenue, Suite 2100
Chicago, Illinoi 60601

Challengers must file the written challenges on an annual basis. Thus, a written challenge filed to a fair share free for a previous year will not be considered a challenge for the 2011 fair share fee.

B. Arbitration Procedure

AFSCME Council 31 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Free. This procedure will result in an expeditious decision on the challenge by an impartial decision maker. The decision maker will be an arbitrator selected by the American Arbitration Association. An arbitration proceeding will be conducted by the arbitrator pursuant to the rules of the American Arbitration Association governing fair share cases. AFSCME will have the burden of proving that the fair share fee is proper. Challengers will have a chance to appear before the arbitrator to state their objections to the fair share free. The arbitrator will issue a decision regarding challenges to the amount of the fair share free 90 days after submission of final arguments regarding the amount of the fee. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

C. Escrow of Fair Share Fees

Upon receipt of a written challenge AFSCME Council 31 shall place an amount equal to 100% of the Challenger's fair share fees in an interest bearing escrow account. The fair share fees shall remain in escrow until the arbitration award is issued and shall be distributed to Council 31 and the Challenger pursuant to the arbitrator's ruling.

RELIGIOUS OBJECTIONS

Fair share fee payors who object to payment of fair share fees because of bonafide religious tenants or teaching of a church or religious body of which said fee payor is a member may pay an amount equal to their fair share fee to a non-religious charitable organization as provided in section 6(g) of the Illinois Public Labor Relations Act. Contract Catherine L. Struzynski at the above address for details concerning this procedure.

APPENDIX D
Illinois Public Labor Relations Act
(Relevant Provisions)

5 Ill. Comp. Stat. 315/6. Right to organize and bargain collectively; exclusive representation; and fair share arrangements.

(a) Employees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois and employees excluded from the definition of "public employee" under subsection (n) of Section 3 of this Act, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities. Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).

(b) Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity

to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

(c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

(d) Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

(e) When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3 (g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization.

(f) Only the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments. Except as provided in subsection (e) of this Section, any such deductions shall only be made upon an employee's written authorization, and continued until revoked in writing in the same manner or until the termination date of an applicable collective bargaining agreement. Such payments shall be paid to the exclusive representative.

Where a collective bargaining agreement is terminated, or continues in effect beyond its scheduled expiration date pending the negotiation of a successor agreement or the resolution of an impasse under Section 14, the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached

including dues deduction or a fair share clause. For the benefit of any successor exclusive representative certified under this Act, this provision shall be applicable, provided the successor exclusive representative: (i) certifies to the employer the amount constituting each non-member's proportionate share under subsection (e); or (ii) presents the employer with employee written authorizations for the deduction of dues, assessments, and fees under this subsection. Failure to so honor and abide by dues deduction or fair share clauses for the benefit of any exclusive representative, including a successor, shall be a violation of the duty to bargain and an unfair labor practice.

(g) Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body of which such employees are members. Such employees may be required to pay an amount equal to their fair share, determined under a lawful fair share agreement, to a nonreligious charitable organization mutually agreed upon by the employees affected and the exclusive bargaining representative to which such employees would otherwise pay such service fee. If the affected employees and the bargaining representative are unable to reach an agreement on the matter, the Board may establish an approved list of charitable organizations to which such payments may be made.