UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SCOTT SOLOMON, Plaintiff, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 37, AFL-CIO, Defendant.	)	No. 2:19-cv-06823-GBD Hon. George B. Daniels

MEMORANDUM OF DEFENDANT AFSCME DISTRICT COUNCIL 37 IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This lawsuit is one of dozens filed across the country since the Supreme Court's June 2018 decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in which plaintiffs seek to recover "fair-share fees" (also called "agency fees") they paid to the union that represented them in collective bargaining in accordance with the requirements of state law. In *Janus*, the Supreme Court overruled its 40-year-old precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court had held that public employees who declined to become dues-paying union members could, consistent with the First Amendment, be required as a condition of employment to contribute their proportionate share of the union's costs of collective bargaining and contract administration. Overturning that precedent, *Janus* held that such fair-share requirements are unconstitutional in the public sector. In this lawsuit, Plaintiff, on behalf of himself and a putative class of public employees who paid fair-share fees to Defendant AFSCME District Council 37 prior to *Janus*, seeks an award of damages in the amount of the fair-share fees remitted to the Union. In other words, Plaintiff seeks to hold the Union liable for the assessment and collection of fair-share fees at a time when fair-share fees were expressly authorized by New York law and constitutional under controlling Supreme Court precedent.

Circuit precedent forecloses such claims for the repayment of pre-*Janus* fair-share fees. In *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), the Second Circuit affirmed a district court's dismissal of a claim indistinguishable from the claim in this case, holding that "a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under [42 U.S.C.] § 1983." *Id.* at 334. Plaintiff's damages claim therefore must be dismissed under Rule 12(b)(6). And Plaintiff's tagalong claim for a declaratory judgment must be dismissed under Rule 12(b)(1) for lack of standing, as Plaintiff does not allege any ongoing constitutional violation that this Court could remedy.

BACKGROUND

1. The New York Public Employees' Fair Employment Act, N.Y. Civil Service Law § 200 *et seq.* ("the Act"), like the laws of many other states, allows for public employees to organize and bargain collectively with their public employer, through a representative organization of their choosing, over the terms and conditions of their employment. Defendant AFSCME District Council 37 ("the Union") is a labor organization chosen and certified as exclusive representative by a bargaining unit of certain employees of New York City. Complaint (ECF No. 6) ¶ 7.[1] That certification brings with it the legal duty to represent equally the interests of all employees in the bargaining unit, in collective bargaining and grievance administration, whether they are dues-paying members of the union or not. N.Y. Civ. Serv. Law § 209-a(2)(c).

Recognizing that the imposition of this "duty of fair representation" with respect to non-members of the union was not cost-free, the Act further authorized a union certified as an exclusive representative to request that a fair-share fee be deducted from the paychecks of non-members of the bargaining unit. N.Y. Civ. Serv. Law § 208(b) (2018). The fair-share fee that nonmembers were required to pay consisted of the amount of the union's membership dues, less a pro rata share of the union's political and ideological expenditures. *Id.*

The fair-share fee provisions of the Act were first enacted several months after the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977),[2] which explicitly had upheld the constitutionality of such fair-share requirements in the public sector, as long as the nonmember's required payment was (as here) limited to the portion of union dues that went for

[1] For purposes of this motion to dismiss, the Union assumes the facts pleaded in Plaintiff's Complaint as true. *See, e.g.*, *Kolbasyuk v. Capital Mgmt. Servs., LP*, 918 F.3d 236, 239 (2d Cir. 2019).

[2] *Compare Abood* (decided May 23, 1977), *with New Paltz United Teachers*, 11 PERB ¶ 4518 (N.Y. PERB 1978) (noting that fair-share fee deductions were first authorized by the State Legislature on August 3, 1977).

negotiating and enforcing the collective bargaining agreement, to the exclusion of any political or ideological expenditures. *See* 431 U.S. at 223-37.

Plaintiff Scott Solomon worked as a city planner for the City of New York, a position that is part of the bargaining unit represented by Defendant AFSCME District Council 37, from October 2014 to July 2018. Complaint ¶¶ 2, 7. During this period, Plaintiff was not a member of the Union. *Id.* ¶ 9. Consistent with New York law and *Abood*, Plaintiff had a fair-share fee deducted from his wages and remitted to the Union until June 27, 2018, *id.* ¶¶ 9-10—the date on which the Supreme Court decided *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

2. In *Janus*, the Supreme Court overruled *Abood*, holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486. The Court ordered no specific relief, but rather directed that the case should be "remanded for further proceedings consistent with this opinion." *Id.*

On July 23, 2019, more than a year after the *Janus* decision, this lawsuit was filed by the same attorneys and the same advocacy organizations that litigated the *Janus* case. Plaintiff, who seeks to represent a class of all City employees who were required to pay fair-share fees to the Union prior to June 27, 2018, recognizes that the *Janus* decision has resolved prospectively the constitutionality of fair-share fees, and he advances no contention that he—or anyone else in the bargaining unit—has been required to pay fair-share fees since the *Janus* decision. Rather, he seeks damages under 42 U.S.C. § 1983 for violation of his First Amendment rights based on the fair-share fees he was required to pay *before* the Supreme Court's decision in *Janus*, at a time when fair-share requirements were explicitly authorized by New York law and consistent with controlling Supreme Court precedent. Complaint, Prayer for Relief, subsection (c). Plaintiff also seeks a declaratory judgment that the Union violated his First Amendment rights by receiving fair-share fees before *Janus*. *Id.*, subsection (b).

ARGUMENT

I. Plaintiff's Damages Claim for the Repayment of Pre-*Janus* Fair-Share Fees Is Foreclosed by the Second Circuit's Decision in *Wholean*.

The only monetary relief Plaintiff seeks on behalf of himself and the putative class is "actual damages in the full amount of fair share fees and assessments seized from their wages . . . for violations of their First Amendment rights" prior to *Janus*. Complaint, Prayer for Relief, subsection (c); *see also id.* ¶¶ 9-10. This relief is foreclosed as a matter of law by the Second Circuit's recent decision in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020).

In *Wholean*, another lawsuit litigated by one of the advocacy organizations that represents Plaintiff in this case, the plaintiffs sought "the return pursuant to 42 U.S.C. § 1983 of all fair-share fees collected by [the defendant union] pre-*Janus*," which were specifically authorized by Connecticut law and the Supreme Court's decision in *Abood*. *Id.* at 334 (citing Conn. Gen. Stat. § 5-280). The district court granted the union's motion to dismiss, holding that the union could assert a good-faith defense to the plaintiffs' claim for damages based on the union's reliance on existing law. *Id.*

The Second Circuit affirmed. The Court first noted that the Supreme Court, in *Wyatt v. Cole*, 504 U.S. 158 (1992), had suggested that private parties could assert a good-faith defense to Section 1983 claims for monetary liability when they relied on a state statute. *See* 955 F.3d at 334-35. Such a good-faith defense, the Second Circuit held, shielded the defendant union in *Wholean* from the plaintiffs' claim for damages: "Because Appellees collected fair-share fees in reliance on directly controlling Supreme Court precedent and then-valid state statutes, their reliance was objectively reasonable, and they are entitled to a 'good-faith' defense as a matter of law." *Id.* at 336. In so holding, the Second Circuit joined the other courts of appeals that have addressed Section 1983

claims seeking the repayment of pre-*Janus* fair-share fees, with all four circuits rejecting such claims as a matter of law. *Id.* at 335 & n.2 (citing cases).[3]

Wholean compels the dismissal of Plaintiff's Section 1983 claim for the repayment of fair-share fees in this action, as AFSCME District Council 37—like the defendant union in *Wholean*—relied on state law and controlling Supreme Court precedent in receiving fair-share fees prior to *Janus*. In sum, the Union's "reliance was objectively reasonable, and [the Union is] entitled to a 'good-faith' defense as a matter of law." *Wholean*, 955 F.3d at 336; *see also Pellegrino v. N.Y. State United Teachers*, 2020 WL 2079386, at *2 (E.D.N.Y. Apr. 30, 2020) (claim against union seeking the repayment of pre-*Janus* fair-share fees received under New York law "completely foreclose[d]" by *Wholean* and thereby dismissed).

Plaintiff cannot salvage his claim through the allegation that, even though the Supreme Court's decision in *Abood* was the law of the land until it was overruled in *Janus*, the Union "should have known" that its receipt of fair-share fees before *Janus* "likely violated the First Amendment." Complaint ¶ 11. This allegation appears to refer to the fact that, prior to *Janus*, the Supreme Court had suggested in dicta that it might at some point revisit *Abood*. *See Harris v. Quinn*, 573 U.S. 616 (2014). The argument that unions should have stopped collecting fair-share fees in anticipation of a possible overruling of *Abood* was made by the plaintiffs in *Wholean*, and it was squarely rejected by the Second Circuit:

> Contrary to Appellants' second argument on appeal [that Appellees should have anticipated *Janus*], Appellees cannot reasonably be deemed to have forecasted whether, when, and how *Abood* might be overruled. Instead, they were entitled to rely on directly controlling Supreme Court precedent, and in good faith, they did so. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) (holding that courts, and by extension citizens, should "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions").

[3] The Second Circuit reached this result assuming *arguendo* that the Supreme Court intended for its decision in *Janus* to have retroactive effect. 955 F.3d at 336. As the Second Circuit noted, however, "nothing in *Janus* suggests that the Supreme Court intended its ruling to be retroactive." *Id.*

955 F.3d at 336 (second alteration in original); *see also Janus v. AFSCME Council 31*, 942 F.3d 352, 366 (7th Cir. 2019) (on remand) ("We realize that there were signals from some Justices during the years leading up to *Janus* [ ] that indicated they were willing to reconsider *Abood*, but that is hardly unique to this area. Sometimes such reconsideration happens, and sometimes, despite the most confident predictions, it does not. The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future." (citations omitted)), *petition for cert. filed*, No. 19-1104 (U.S. Mar. 9, 2020).

For these reasons, Plaintiff's Section 1983 claim for the repayment of fair-share fees remitted to the Union prior to *Janus* should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

II. Plaintiff Does Not Have Standing To Seek Declaratory Relief.

In his prayer for relief, Plaintiff also asks the Court to "[e]nter a judgment declaring that District Council 37 violated Plaintiff's and class members' constitutional rights" when it received fair-share fees prior to *Janus*. Complaint, Prayer for Relief, subsection (b). Plaintiff does not allege any ongoing constitutional violation at the time he filed his lawsuit. On the contrary, the Complaint acknowledges that the deduction of fair-share fees by the City and the transmission of those fees to the Union ceased more than a year before this action was filed. *Id.* ¶¶ 9-10.

Under these circumstances, Plaintiff lacks standing to seek a judgment declaring that the Union's prior conduct was unconstitutional. The courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Thus, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the [Article III] injury requirement but must show a likelihood that he or she will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998).

As a court cannot issue a declaratory judgment absent an ongoing injury, it should not be surprising that every district court to address a claim for a declaratory judgment in a circumstance similar to that at issue here—when a union received fair-share fees before *Janus* but stopped receiving such fees after *Janus*—has held such a claim to be non-justiciable.[4] As Judge Failla put it recently in dismissing such a claim for lack of subject-matter jurisdiction, because "the only facts [plaintiffs] allege[d] are that they were subjected to unlawful conduct prior to *Janus*," they "cannot rely on that prior unlawful conduct to establish standing for prospective relief." *Seidemann v. Prof'l Staff Cong. Local 2334*, 2020 WL 127583, at *5 (S.D.N.Y. Jan. 10, 2020).

Accordingly, Plaintiff's request for a declaratory judgment should be dismissed pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction.

CONCLUSION

Defendant AFSCME District Council 37's motion to dismiss should be granted.

---

[4] *See Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1337-40 (W.D. Wash. 2018), *aff'd*, 945 F.3d 1096 (9th Cir. 2019), *petition for cert. filed*, No. 19-1130 (U.S. Mar. 12, 2020); *Yohn v. Cal. Teachers Ass'n*, 2018 WL 5264076, at *3-*4 (N.D. Cal. Sept. 28, 2018); *Lamberty v. Conn. State Police Union*, 2018 WL 5115559, at *6-*8 (D. Conn. Oct. 19, 2018); *Babb v. Calif. Teachers Ass'n*, 2018 WL 7501267, at *1 (C.D. Cal. Dec. 7, 2018), *appeal pending*, No. 19-55692 (9th Cir.); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1189-90 (D. Or. 2019), *appeal pending*, No. 19-35191 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1227 (W.D. Wash. 2019), *appeal pending*, No. 19-35290 (9th Cir.); *Berman v. N.Y. State Pub. Emp. Fed'n*, 2019 WL 1472582, at *3-*4 (E.D.N.Y. Mar. 31, 2019); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021, at *2-*3 (D. Conn. Apr. 26, 2019), *aff'd*, 955 F.3d 332 (2d Cir. 2020); *Hartnett v. Pa. State Educ. Ass'n*, 390 F. Supp. 3d 592, 600-02 (M.D. Pa. 2019), *appeal pending*, No. 19-2391 (3d Cir.); *Smith v. Bieker*, 2019 WL 2476679, at *1 (N.D. Cal. June 13, 2019), *appeal pending*, No. 19-16381; *Hamidi v. SEIU Local 1000*, 386 F. Supp. 3d 1289, 1295-98 (E.D. Cal. 2019), *appeal pending*, No. 19-17442 (9th Cir.); *Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361, 383-94 (W.D. Pa. 2019), *appeal pending*, No. 19-2812 (3d Cir.); *Wenzig v. SEIU Local 668*, 426 F. Supp. 3d 88, 100-01 (M.D. Pa. 2019), *appeal pending*, No. 19-3906 (3d Cir.); *Seidemann v. Prof'l Staff Cong. Local 2334*, 2020 WL 127583, at *4-*6 (S.D.N.Y. Jan. 10, 2020), *appeal pending*, No. 20-460 (2d Cir.); *Penning v. SEIU Local 1021*, 424 F. Supp. 3d 684, 685 (N.D. Cal. 2020), *appeal pending*, No. 20-15226 (9th Cir.); *Chambers v. AFSCME*, 2020 WL 1527904, at *6 (D. Or. Mar. 31, 2020), *appeal pending*, No. 20-35355 (9th Cir.); *Mattos v. AFSCME Council 3*, 2020 WL 2027365, at *3 (D. Md. Apr. 27, 2020), *appeal pending*, No. 20-1531 (4th Cir.).

Respectfully submitted,

/s/ Jacob Karabell
Jacob Karabell (admitted *pro hac vice*)
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street N.W., Suite 1000
Washington, DC 20005
(202) 842-2600
jkarabell@bredhoff.com

Robin I. Roach
General Counsel
AFSCME, District Council 37, AFL-CIO
125 Barclay Street
New York, New York 10007
(212) 815-1450
rroach@dc37.net

Counsel for Defendant AFSCME District Council 37

Dated: May 26, 2020

CERTIFICATE OF SERVICE

I, Jacob Karabell, an attorney, hereby certify that on May 26, 2020, I caused the foregoing Memorandum of Defendant AFSCME District Council 37 in Support of Motion to Dismiss to be filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. I further certify that as of May 26, 2020, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ Jacob Karabell
Jacob Karabell