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

Mark Janus, *et al.*,	)	
	)	
Intervenor-Plaintiffs,	)	
	)	
v.	)	No. 1:15-CV-01235
	)	
American Federation of State, County, and Municipal Employees, Council 31, *et al.*,	)	Judge: Hon. Robert W. Gettleman
	)	
	)	Magistrate Judge:
Defendants,	)	Hon. Daniel G. Martin
	)	
and	)	
	)	
Lisa Madigan, Attorney General of the State of Illinois,	)	
	)	
	)	
Intervenor-Defendant.	)	

DEFENDANT AFSCME COUNCIL 31's
MOTION TO DISMISS FIRST AMENDED
COMPLAINT OF INTERVENOR-PLAINTIFFS

Defendant AFSCME Council 31, by its attorneys, pursuant to Federal Rule of Civil Procedure 12(b)(6), moves to dismiss the First Amended Complaint of Intervenor-Plaintiffs. The reasons for this motion are set forth in Defendant AFSCME Council 31's Memorandum in Support of Motion To Dismiss First Amended Complaint of Intervenor-Plaintiffs.

WHEREFORE, Defendant AFSCME Council 31 prays that the First Amended Complaint be dismissed.

Dated: July 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Melissa J. Auerbach, an attorney, hereby certify that on July 2, 2015, I caused the foregoing **Defendant AFSCME Council 31's Motion To Dismiss First Amended Complaint of Intervenor-plaintiffs** 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 July 2, 2015, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ Melissa J. Auerbach
Melissa J. Auerbach

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Defendants,	)	
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Lisa Madigan, Attorney General of the State of Illinois,	)	
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Intervenor-Defendant.	)	

DEFENDANT AFSCME COUNCIL 31's
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT OF INTERVENOR-PLAINTIFFS

Having dismissed the complaint originally filed by Governor Rauner for lack of subject matter jurisdiction and lack of standing, the Court allowed three individual state employees to pursue the merits of the Governor's claims by filing a complaint in intervention. Although the intervenors avoid the Governor's jurisdictional problems, their complaint is equally flawed on the merits and requires dismissal under Rule 12(b)(6) for failure to state a claim. As did the Governor, the intervenors ask this Court to do something that it has no authority to do – to overrule a controlling decision of the United States Supreme Court.

Background

Governor Rauner initiated this action by his Complaint for Declaratory Judgment filed on February 9, 2015, the same day on which the Governor issued an Executive Order that directed state agencies to disregard provisions of state law by ceasing to enforce the fair-share contractual provisions in collective bargaining agreements governing state employees. In his complaint, the Governor asked this Court to approve his action and to hold that contractual provisions requiring all members of a public-sector bargaining unit to pay their fair share of the costs of collective bargaining were unconstitutional.

As the Court explained in its Memorandum Opinion and Order of May 19, 2015, the labor organizations named as defendants in the Governor's complaint were certified as the exclusive representatives of their respective bargaining units, and as such were required by state law to represent the interests of all employees in the bargaining unit, whether union members or not. As authorized by the Illinois Public Labor Relations Act ("IPLRA"), the unions' collective bargaining agreements with agencies of the State of Illinois required those members of the bargaining unit who declined to become union members to contribute a fair-share fee to help defray the costs of collective bargaining and contract enforcement. Dkt. #116, at 1-3; *see* 5 ILCS 315/6(c)-(e).

By order of May 19, 2015, the Court dismissed the Governor's complaint for lack of jurisdiction, both because the declaratory judgment action did not arise under federal law and because the Governor had no personal interest at stake and thus lacked standing to pursue his claims. The Court held, however, that the three individual employees who had moved to intervene had both standing and a separate and independent jurisdictional basis for their complaint in intervention. The

Court therefore allowed the action to proceed with the intervenors' complaint as the operative pleading. Dkt. #116.

As amended, Dkt. #120 ("Am. Compl."), the intervenors' complaint is brought against the two unions (of the 25 originally named in the Govenor's complaint) that represent the bargaining units of which the three intervenor employees are a part – AFSCME Council 31 and Teamsters Local 916. The intervenors allege that they are state employees, that they are not currently dues-paying members of the unions that represent them in collective bargaining, that they are required under applicable collective bargaining agreements to pay fair-share fees to their bargaining representative, and that they "object[] to many of the public-policy positions that [the union] advocates, including the positions that [it] advocates for in collective bargaining." Am. Compl., ¶¶ 1, 42-50. They seek declaratory and injunctive relief invalidating those provisions of Illinois law and their collective bargaining agreements that require or allow the assessment of fair-share fees, as well as nominal and compensatory damages, on the ground that fair-share requirements in the public sector are unconstitutional under the First Amendment.

Argument

I. *Abood v. Detroit Board of Education* Establishes the Constitutionality of Fair-Share Fees in Public-Sector Employment, and This Court Has No Authority To Disregard that Controlling Precedent.

The sole issue presented by the intervenors' complaint is whether fair-share (or "agency fee") requirements, such as those to which the intervenors are subject, are constitutional in public-sector

employment.[1] That precise question, however, was squarely addressed and decided by the United States Supreme Court nearly 40 years ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The Court previously had upheld the constitutionality of fair-share requirements in the private sector, in cases arising under the Railway Labor Act, *see Railway Employes v. Hanson*, 351 U.S. 225 (1956), and in *Abood* it held that "[t]he same important government interests" it had recognized in its earlier cases equally justified the fair-share principle in the public sector. 431 U.S. at 225. The intervenors recognize this point, as they must, acknowledging in their complaint that in *Abood* "the Supreme Court held the seizure [sic] of compulsory fees in the public sector to be constitutional . . . ." Am. Compl., ¶ 53.

That concession is fatal to the intervenors' complaint. Although the intervenors argue that a year ago in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), "a majority of the Supreme Court questioned *Abood*'s continued validity on several grounds," Am. Compl., ¶ 59, they do not suggest that *Abood* is no longer good law. Nor could they: the *Harris* Court distinguished the facts of the case before it, *see* 134 S. Ct. at 2638 (refusing to "extend" *Abood* to persons who were not "full-fledged public employees"), and it specifically declined "to reach petitioners' argument that *Abood* should be overruled." *Id.* at 2638 n.19.

What the intervenors assert is, instead, simply their view that "*Abood* was wrongly decided [and] should be overturned by the Supreme Court." Am. Compl., ¶ 68. But that is not a basis on which the intervenors' complaint could be sustained – and that is so notwithstanding the Supreme Court's decision this week to grant certiorari in a case raising the question whether *Abood* should

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1 Alleging only that the fair-share requirement is unconstitutional on its face, the complaint does not raise any other issue.

be overruled. *Friedrichs v. California Teachers Ass'n*, No. 14-915 (June 30, 2015). As the Seventh Circuit has explained, the lower courts are to apply existing precedent "until the Justices themselves overrule it." *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010). That rule follows from repeated admonitions by the Supreme Court that the lower courts are to apply existing, on-point precedent, even when questions have been raised about its continued vitality: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 258 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

This Court need go no further. Taken together, *Abood* and the *Rodriguez* line of cases compel the conclusion that the intervenors' complaint must be dismissed for failure to state a claim.[2]

II. *Abood* was Correctly Decided, and There Is No Basis for the Supreme Court To Overturn That Precedent.

Although the question presented by the intervenors' complaint is, as just discussed, one that lies outside the authority of this Court to decide, we would be remiss – particularly in light of the Supreme Court's grant of certiorari to consider the issue – if we left the Court with the impression that there is any principled basis for the Supreme Court to overrule *Abood*. The complaint endeavors to portray *Abood* as an ill-considered and problematic outlier, both with regard to its own subject and

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2 As it appears likely that the Supreme Court's recent grant of certiorari in the *Friedrichs* case will result in a dispositive resolution of the Intervenor-Plaintiffs' contention that *Abood* should be overruled, the Court may, in the alternative, wish to consider staying further litigation of this matter until after the Supreme Court issues its ruling in *Friedrichs*.

with regard to First Amendment law generally, *see* Am. Compl. ¶¶ 53-61, but that is far from accurate. To the contrary, *Abood* is an eminently sound precedent that has become the basis for a considerable body of law and is fully consistent with general First Amendment principles.

Abood holds that a State may permit a public-sector exclusive bargaining representative to charge nonmembers a mandatory agency fee "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. That holding rests on two basic propositions. First,"[t]he principle of exclusive union representation," which is "a central element in the congressional structuring of industrial relations," *id.* at 220, is one that a State may properly "cho[ose] to establish for local government units." *Id*. at 223. Second, when a State makes that choice, "the designation of a union as exclusive representative carries with it great responsibilities." *Id.* at 221. "[A]dministering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money." *Id.* "Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . ., union and nonunion,' within the relevant unit." *Id.* (quoting *Machinists v. Street*, 367 U.S. 790, 761 (1961)).

It follows from the foregoing, the Court concluded, that it is consistent with the First Amendment to require all represented employees to pay a share of the union's expenses as their exclusive collective bargaining representative in order "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[] the incentive that employees might otherwise have to become 'free riders' – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. But objecting nonmembers

cannot be required to provide financial support "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." *Id.* at 235.

Subsequently, in a line of cases from *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), through *Locke v. Karass*, 555 U.S. 207 (2009), the Court repeatedly, and unanimously, reaffirmed the "general First Amendment principle" established in *Abood* – that "[t]he First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment." *Locke*, 555 U.S. at 213. Thus, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court fashioned procedures to "protect[] the basic distinction drawn in *Abood*," between "collective-bargaining activities," as to which all employees may be required to pay their share of the costs, and "ideological activity," which objecting nonmembers cannot be required to support. *Id.* at 302 (quoting *Abood,* 431 U.S. at 237). And in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), where the Court was called upon to consider in greater detail the principles that determine whether objecting nonmembers may constitutionally be required to provide financial support for union activities, all members of the Court agreed that employees may properly be required to pay their share of the expenses of the exclusive representative's collective bargaining activities. *See id.* at 519, 522-23, 526 (opinion of the Court); *id*. at 541-41, 550 (opinion of Marshall, J.); *id.* at 550, 552-53, 556 (opinion of Scalia, J.); *id.* at 563 (opinion of Kennedy, J.).

In particular, although Justice Scalia disagreed with the *Lehnert* majority's test for determining chargeability, he agreed that *Abood* had properly identified "the state interest in

compelling dues," *id.* at 552 (opinion of Scalia, J.), and he explained what "justifies th[e] constitutional rule" established in *Abood*:

> Where the state imposes upon the union a duty to deliver services it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests.

Id. at 556 (emphasis in original).

More broadly, *Abood* has become a foundational precedent for a range of First Amendment cases addressing related issues of compulsory financial support for private entities, ranging from integrated bar associations to agricultural market stabilization programs. Thus, in *United States v. United Foods, Inc.,* 533 U.S. 405, 413 (2001), the Court recognized *Abood* as the leading case setting out "the First Amendment principles" for "cases involving expression by groups which include persons who object to the speech, but who nevertheless must remain members of the group by law or necessity." The Court held that such cases were to be decided by "proper application of the rule in *Abood*." *Id*. at 413-14. And, as the Court recognized in *Board of Regents v. Southworth,* 529 U.S. 217, 231 (2000), "[t]he principles outlined in *Abood* provided the foundation for the Court's decision in *Keller* [*v. State Bar of California,* 496 U.S. 1 (1990)]," upholding mandatory bar dues.

In holding that the state could permissibly adopt for its own workforce the same fair-share system that the Court previously had approved for private sector employers in *Hanson*, *Abood* is entirely consistent with the fundamentals of the Court's First Amendment jurisprudence – in particular, the well-established framework the Court applies in assessing whether conditions of public employment violate First Amendment rights. In that context, the Court has consistently held that "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.); *see generally Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973). As the Court put it in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591 (2008), "there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Id.* at 598 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). In the latter context – assuming the subject of the speech is a matter of "public concern" so that a constitutional issue is presented in the first place – the Court balances the interests of the employee and those of the government, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In the context of fair-share requirements, the government's interests "as an employer" in the "labor stability" that it reasonably could believe "will be served by a system of exclusive representation and the permissive use of an agency shop," *Abood*, 431 U.S. at 229, and in avoiding a situation in which union members were required to bear the costs of "free rider" nonmembers whom the union nonetheless is required to represent, *see Lehnert*, 500 U.S. at 556 (opinion of Scalia, J.), are more than sufficient to justify any impingement on First Amendment rights of speech and

association that results from a fair-share system. Indeed, in conducting that balance, the Court has upheld far greater and more direct impingements on speech interests than are even arguably presented by a fair-share requirement. *See*, *e.g.*, *Letter Carriers*, 413 U.S. at 564 (upholding broad ban on partisan activities and associations).

Thus, it is not availing for the intervenors to point to what they characterize as "the inherently political nature of collective bargaining," Am. Compl., ¶ 69, and to assert their disagreement with some of the positions their unions have adopted in collective bargaining. *Id.*, ¶¶ 42-50. That public-sector bargaining may have political elements is fully taken into account by the *Pickering* balancing test; indeed, if the subject of the speech in question is *not* a matter of "public concern," it enjoys no First Amendment protection in the public-employment context at all. *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Nor is the argument that public-sector bargaining has political implications one that *Abood* overlooked:

> There can be no quarrel with the truism that because public employee unions attempt to influence governmental policy-making, their activities – and the views of members who disagree with them – may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees . . . . Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs . . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

431 U.S. at 232. Thus, an employee's desire not to fund certain speech, like employee speech itself, "is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern"; rather, it must be balanced against competing interests. *Lane v. Franks,* 134 S. Ct. 2369, 2380 (2014).

Notwithstanding the assertions of the complaint, nothing in last Term's decision in *Harris* portends a different result. To the contrary, the *Harris* Court specifically declined to revisit *Abood*, notwithstanding that the question was squarely presented to it. Justice Kagan accurately described in her dissenting opinion what the majority opinion did and did not do:

> As this case came to us, the principal question it presented was whether to overrule *Abood*: The petitioners devoted the lion's share of their briefing and argument to urging us to overturn that nearly 40-year-old precedent (and the respondents and *amici* countered in the same vein). Today's majority cannot resist taking potshots at *Abood*, . . . but it ignores the petitioners' invitation to depart from principles of *stare decisis*. And the essential work in the majority's opinion comes from its extended (though mistaken) distinction of *Abood*, . . . not from its gratuitous dicta critiquing *Abood*'s foundations.

134 S. Ct. at 2645 (Kagan, J., dissenting). Indeed, acknowledging Justice Scalia's analysis in *Lehnert*, *see supra* p. 7, the *Harris* majority recognized that "[w]hat justifies the agency fee . . . is the fact that the State compels the union to promote and protect the interests of nonmembers." 134 S. Ct. at 2636. Rather than rejecting Justice Scalia's justification of the agency fee, the Court held simply that "[t]his argument has little force *in the situation now before us*," *id.* at 2637 (emphasis added), in which the members of the bargaining unit (state-compensated home-care providers) were "quite different from full-fledged public employees." *Id.* at 2638. The *Harris* Court declined to extend *Abood* to that situation precisely because, in the Court's view, the union representing the home-care providers did not have representational obligations comparable to those of unions in traditional public employment settings as had been presented in *Abood*. *See id.* at 2635-37. *Harris*

casts no doubt on the continued constitutionality of fair-share requirements for "full-fledged public employees."[3]

Finally, even if – contrary to what we have seen above – *Abood* were believed to have been wrongly decided, there still would be no justification whatever, under settled principles of *stare decisis*, for overruling that decision. The Court recently described the doctrine of *stare decisis* as "a foundation stone of the rule of law," and it therefore "has always held that 'any departure' from the doctrine 'demands special justification.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)). No such "special justification" is apparent here.[4] *Abood* is, as discussed above, a foundational precedent, and one that is fully in accord with the body of law addressing the interplay of public employment and the First Amendment. Its overruling would not only call into question a score or more of precedents, but

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3 As the intervenors' complaint points out, Am. Compl. ¶ 60, *Harris* cited the Court's statement two years earlier in *Knox v. Service Employees*, 132 S. Ct. 2277 (2012), that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Harris*, 134 S. Ct. at 2627 (citing *Knox*, 132 S. Ct. at 2289). *Harris* did not, however, conclude from that proposition that Justice Scalia's rationale for the agency fee was incorrect. Nor could it, for Justice Scalia's point was precisely that the state-imposed obligation that the union represent nonmembers in its bargaining unit takes the fair-share requirement outside of the "general[]" rule. Rather, as *Knox* acknowledged, insofar as "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues presents something of an anomaly," it was "one that we have found to be justified." 132 S. Ct. at 2290.

4 In particular, the intervenors' assertion that the Supreme Court has "struggled repeatedly" with the distinction between "chargeable" and "non-chargeable" expenditures, Am. Compl., ¶ 56 (quoting *Harris*, 134 S. Ct. at 2633), is entirely off the mark. The intervenors point to only a single case on this issue that has reached the Supreme Court in the nearly quarter-century since *Lehnert* settled the fundamental issues of chargeability – and the Court was able to resolve that case, *Locke v. Karass*, unanimously. Nor, in any event, does the fact that "difficult problems in drawing lines" might arise, as the *Abood* Court itself anticipated, 431 U.S. at 236, significantly distinguish this area of the law from any other.

would invalidate the laws of nearly half the states that allow for agency fees for public employees, as well as thousands of collective bargaining agreements, that have been enacted in reliance on *Abood*. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) ("the demands of [*stare decisis*] are 'at their acme . . . where reliance interests are involved'") (quoting *Payne* v. *Tennessee,* 501 U. S. 808, 828 (1991)).

In short, the relief the intervenors seek from this Court – overturning *Abood* and declaring fair-share requirements in public-sector employment unconstitutional – not only is beyond the power of this Court to provide, but in any event it has no basis in the law.

Conclusion

The First Amended Complaint of the intervenor-plaintiffs should be dismissed.

Dated: July 2, 2015

Respectfully submitted,

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I further certify that as of July 2, 2015, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ Melissa J. Auerbach
Melissa J. Auerbach