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

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

DEFENDANTS' JOINT MOTION TO DISMISS
SECOND AMENDED COMPLAINT OF INTERVENOR-PLAINTIFFS

Defendants jointly move, by their attorneys, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Second Amended Complaint of Intervenor-Plaintiffs. The reasons for this motion are set forth in Defendants' Memorandum in Support of Joint Motion to Dismiss Second Amended Complaint of Intervenor-Plaintiffs.

In addition, Defendants move to dismiss the claims of Plaintiff Brian Trygg pursuant to F.R.C.P. 12(c) and seek judgment on the pleadings for the reason that the claims presented by Trygg are barred under the doctrine of claim preclusion.

1. Attached hereto as Exhibit 1 is a copy of Trygg's Petition for Administrative Review originally filed in May, 2013.

2. Attached hereto as Exhibit 2 is a copy of the Reply Brief filed by Trygg in the judicial review action in the Illinois Appellate Court for the 4th Judicial District.
3. Attached as Exhibit 3 is a copy of the Appellate Court opinion in the judicial review action of *Trygg v. Illinois Labor Relations Board et al.*
4. Attached hereto as Exhibit 4 is a copy of the Final Administrative Decision of the Illinois Labor Relations Board issued on March 15, 2016.
5. Attached hereto as Exhibit 5 is a copy of Trygg's Exception to the Administrative Law Judge's Recommended Decision.
6. Attached as Exhibit 6 is a copy of Trygg's Response to Exception of Respondent-Union by Charging Party filed in the administrative hearing before the Illinois Labor Relations Board.
7. Plaintiff Trygg had every opportunity to litigate the issues now raised in the Second Amended Complaint. The Final Administrative Decision of the Illinois Labor Relations Board, State Panel, became final without appeal by any party.
8. Defendants further rely on their Memorandum of Law simultaneously filed in this cause.

WHEREFORE, Defendants pray that the Second Amended Complaint be dismissed.

Dated: August 15, 2016

Respectfully submitted,

FELDMANWASSER

/s/ Carl R. Draper
Carl R. Draper
1307 S. Seventh Street
Springfield, IL 62703
(217) 544-3403

Attorney for Defendant General Teamsters Professional & Technical Employees Local Union No. 916

LISA MADIGAN
Attorney General of Illinois

/s/ Richard S. Huszagh
Gary S. Caplan
R. Douglas Rees
Richard S. Huszagh
Assistant Attorneys General
100 West Randolph Street
Chicago, IL 60601
(312) 814-3498

Attorneys for Michael Hoffman, in his official capacity as Director of the Illinois Department of Central Management Services, and Intervenor-Defendant the People of the State of Illinois

DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH

/s/ Melissa J. Auerbach
Melissa J. Auerbach
Stephen A. Yokich
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603
(312) 372-1361

BREDHOFF & KAISER, P.L.L.C.

/s/ John M. West
John M. West
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Defendant American Federation of State, County, and Municipal Employees, Council 31, AFL-CIO

CERTIFICATE OF SERVICE

I, John M. West, an attorney, hereby certify that on August 15, 2016, I caused the foregoing **Defendants' Joint Motion to Dismiss Second 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 August 15, 2016, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ John M. West
John M. West

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

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT OF INTERVENOR-PLAINTIFFS

Introduction

The sole issue raised by the complaint of intervenor-plaintiffs ("plaintiffs") is whether statutory and contractual provisions allowing public-sector unions to assess fair-share (or "agency") fees from nonunion employees whom they represent in collective bargaining are unconstitutional under the First Amendment. That question, all sides agree, was resolved by the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of such assessments. Like the Governor, who originally initiated this action, plaintiffs nonetheless believe that *Abood* was wrongly decided, and indeed a year ago the Supreme Court granted certiorari to consider whether it should be overruled.

That issue has now been resolved. On March 29, 2016, the Court affirmed by an equally divided Court the decision of the Ninth Circuit upholding fair share fees under *Abood*, thus leaving the *Abood* precedent undisturbed. *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016). Subsequently, by order of June 28, the Court denied the *Friedrichs* plaintiffs' petition for rehearing, which had asked the Court to reconsider its decision next Term once the Court returns to full strength. 136 S. Ct. 2545 (2016). Accordingly, *Abood* remains valid and binding precedent, and this Court has no option but to dismiss plaintiffs' complaint for failure to state a claim. In addition, the claim of plaintiff Brian Trygg is due to be dismissed on *res judicata* grounds as well.

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, 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 that same order, 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. Dkt. #116, at 4-6. The Court held, however, that 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 intervenor-plaintiffs' complaint as the operative pleading. *Id.* at 8-9.

In light of the Supreme Court's grant of certiorari in the *Friedrichs* case, however, this Court stayed all proceedings. Dkt. #139. Following the Supreme Court's disposition of *Friedrichs*, this Court, by order of July 7, 2016, allowed plaintiffs to file an amended complaint and established a briefing schedule for defendants' motion to dismiss. Dkt. #144.

As amended, Dkt. #145, the plaintiffs' complaint ("Second Am. Compl.") is brought against the two unions (of the 25 originally named in the Governor's complaint) that represent the bargaining units of which the two plaintiffs are a part – AFSCME Council 31 and Teamsters

Local 916 – as well as the director of the Illinois Department of Central Management Services.[1] Plaintiffs allege that they are state employees, are not currently dues-paying members of the unions that represent them in collective bargaining, 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." Second Am. Compl., ¶¶ 1, 42-47. 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, on the ground that fair-share requirements in the public sector are unconstitutional under the First Amendment. Alleging only that the fair-share requirement is unconstitutional on its face, the complaint does not raise any other issue.

Argument

I. The Complaint Must be Dismissed as to All Defendants under *Abood*, which Establishes the Constitutionality of Fair-Share Fees in Public-Sector Employment.

Because the sole issue raised by the complaint is controlled by the Supreme Court's decision in *Abood*, it is dispositive that this precedent remains good law, which is binding on this Court. And, in any case, *Abood* was correctly decided – both well reasoned and entirely consistent with the Supreme Court's First Amendment jurisprudence generally.

A. *Abood* Remains Controlling Precedent, Which is Binding on this Court.

The issue presented by the plaintiffs' complaint – whether fair-share requirements, such as those to which the plaintiffs are subject, are constitutional in public-sector employment – was squarely addressed and decided by the United States Supreme Court nearly 40 years ago in *Abood*. The Court previously had upheld the constitutionality of fair-share requirements in the

[1] The Second Amended Complaint differs from the First Amended Complaint, Dkt. #120, only in that it omits allegations concerning one of the three original intervenor-plaintiffs.

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 plaintiffs recognize this point, as they must, acknowledging in their complaint that "[i]n *Abood*, the Supreme Court held the seizure [sic] of compulsory fees in the public sector to be constitutional ...." Second Am. Compl., ¶ 50.

That concession is fatal to the plaintiffs' complaint. Although the plaintiffs argue that two years ago, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), "a majority of the Supreme Court questioned *Abood*'s continued validity on several grounds," *id.*, ¶ 56, 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.[2]

[2] Although the Court's majority opinions in *Harris* and in *Knox v. Service Employees*, 132 S. Ct. 2277 (2012), could not "resist taking potshots at *Abood*," *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting), neither changed the status of that decision as controlling precedent – notwithstanding that the issue of overruling *Abood* was squarely presented in *Harris*. Rather, recognizing 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, the Court held 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. *Harris* 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 in *Abood*. *See id.* at 2635-37. *Harris* thus left undisturbed the constitutionality of fair-share requirements for "full-fledged public employees" like those at issue in this case. And, while *Harris* cited the Court's statement two years earlier in *Knox* that "free-rider arguments ... are generally insufficient to overcome First Amendment objections," 134 S. Ct. at 2627 (quoting *Knox*, 132 S. Ct. at 2289), the Court specifically acknowledged that, insofar as "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly," it was "one that we have found to be justified." *Knox*, 132 S. Ct. at 2290.

What the plaintiffs assert is, instead, simply their view that "*Abood* was wrongly decided and should be overturned by the Supreme Court." Second Am. Compl., ¶ 65. But that is not a basis on which the plaintiffs' complaint could be sustained. 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).

In any event, the Supreme Court – after granting certiorari in *Friedrichs* to address precisely the question whether *Abood* should be overruled – has declined to take that step. Its March 29 decision affirming by an equally divided Court the lower court's ruling upholding the constitutionality of public-sector fair-share fees in reliance on *Abood*, coupled with the Court's refusal to reconsider the *Friedrichs* case next Term, leaves *Abood* fully intact as controlling precedent, which is binding on this and all other lower courts. Accordingly, this Court has no option but to dismiss the plaintiffs' complaint for failure to state a claim.

B. *Abood* was, in Any Event, Correctly Decided.

This Court need go no further. Taken together, *Abood* and the *Rodriguez* line of cases compel the conclusion that the plaintiffs' complaint fails to state a claim.

Although the relief sought by the plaintiffs' complaint is thus beyond the authority of this Court to consider, we would be remiss if we left the Court with the impression that there were

any principled basis for a court to reconsider and overrule *Abood*, even if it had the authority to do so. The complaint endeavors to portray *Abood* as an ill-considered and problematic outlier, both with regard to its own subject and with regard to First Amendment law generally, *see* Second Am. Compl. ¶¶ 50-58, 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, "[t]he 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 541-42, 550 (opinion of Marshall, J.); *id.* at 550, 552-53, 556 (opinion of Scalia, J.); *id.* at 563 (opinion of Kennedy, J.).

Abood has, moreover, become a foundational precedent for First Amendment cases addressing 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." Such cases were to be decided by "proper application of the rule in *Abood*." *Id*. at 413-14. And the Court explained in *Board of Regents v. Southworth,* 529 U.S. 217, 231 (2000), that "[t]he principles outlined in *Abood* provided the foundation for our later 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, 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 public employees' partisan activities and associations).

Thus, it is not availing for plaintiffs to point to what they characterize as "the inherently political nature of collective bargaining," Second Am. Compl., ¶ 66, and to assert their disagreement with some of the positions their unions have adopted in collective bargaining. *Id.*, ¶¶ 42-47. 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 231-32. 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).

Finally, whatever its merits as a matter of first impression, there would be no justification whatever for departing from the 40-year-old *Abood* precedent. The doctrine of *stare decisis* is "a foundation stone of the rule of law," and "'any departure' from the doctrine 'demands special justification.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)). No such "special justification" is apparent here.[3] *Abood* is, as discussed above, a foundational precedent and is fully in accord with the body of law addressing the interplay of public employment and the First Amendment. Its overruling would call into question a score or more of precedents and would invalidate laws of nearly half the states allowing public-sector agency fees, as well as thousands of collective bargaining agreements 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 plaintiffs 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 has no basis in the law.

[3] In particular, the plaintiffs' assertion that the Supreme Court has "struggled repeatedly" with the distinction between "chargeable" and "non-chargeable" expenditures, Second Am. Compl., ¶ 53 (quoting *Harris*, 134 S. Ct. at 2633), is entirely off the mark. The plaintiffs point to only a single case on this issue that has reached the Supreme Court in the quarter century since *Lehnert* settled the fundamental issues of chargeability – and the Court was able to resolve that case, *Locke v. Karass*, 555 U.S. 207 (2009), 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.

II. Plaintiff Trygg's Claims Are Also Barred By Claim Preclusion.

Plaintiff Brian Trygg's claims are barred by the doctrine of claim preclusion, often referred to as *res judicata*, because in earlier proceedings in the Illinois Labor Relations Board ("ILRB") and the Illinois Appellate Court that involved the same parties and arose out of the same facts as this case, a final judgment was entered adjudicating Trygg's challenge to paying the Teamsters fair-share fees withheld from his compensation. The outcome of those proceedings was an order under which fair-share fees are withheld from his compensation but are paid to a charity of his choice, instead of to the Teamsters. In those proceedings, Trygg could have, but did not, advance the same legal theory and seek the same relief he seeks in this case — that no fair-share fees be withheld from him at all. As a result, asserting that theory and seeking that relief in a new action is barred by Illinois preclusion principles, which apply in this Court under the Full Faith and Credit Act, 28 U.S.C. § 1738. Thus, Trygg's claims in this action must be dismissed.

A. In December 2009, Trygg was notified that his employment position was being included in a collective bargaining unit that the Teamsters represented in dealings with the Illinois Department of Transportation and the Department of Central Management Services ("CMS"). He promptly objected and claimed a right of non-association with a union, asking that his fair-share fees not be delivered to the Teamsters. (A compete chronology is provided in the Appellate Court opinion *Trygg v. Illinois Labor Relations Board, State Panel*, 2014 IL App. (4th) 130505, attached as Exhibit 3 to the Motion to Dismiss.)

In the proceeding he initiated before the ILRB against the Teamsters and CMS (the same defendants he sues in this case), Trygg asserted his right to not associate with the Teamsters. (Petition for Administrative Review (Motion to Dismiss Exhibit 1)). During those proceedings, Trygg specifically argued that he had no obligation to pay any money to a union with whom he

did not wish to associate. (*See*, *e.g.*, Exception to the Administrative Law Judge's Recommended Decision at page 4, paragraph 16 (Motion to Dismiss Exhibit 5); Response to Exception of Respondent-Union by Charging Party in the Administrative Hearing (Motion to Dismiss Exhibit 6).) While Trygg asserted in the ILRB that the constitutionality of fair-share fees was not at issue for it to decide, he specifically noted the pendency before the Supreme Court of *Freidrichs v. California Teachers Association*, No. 13-57095. (Exhibit 6, p.5.) The ILRB dismissed his claim, and Trygg filed an action for judicial review, as provided by Illinois law. The Illinois Appellate Court ruled in Trygg's favor, finding that the ILRB erred when it dismissed his unfair labor practices charge, and directing that the matter proceed to an administrative hearing. (Motion to Dismiss Exhibit 3.) On remand, the Administrative Law Judge issued a Recommended Decision and Order in Trygg's favor, ordering that no fair-share fees be remitted to the Teamsters and that all fees withheld from Trygg be paid to a charitable organization of his choosing. Ultimately, the ILRB affirmed the decision of the Administrative Law Judge in an order issued on March 15, 2016. (Motion to Dismiss Exhibit 4.) Thus, in the state administrative and court proceedings, Trygg prevailed and obtained all of the relief he sought — the ability to pay the equivalent of his fair-share fees to the charity of his choice, not the Teamsters.

Now, in federal court, Trygg relies on the same facts he asserted in the state proceedings but seeks a different remedy that is inconsistent with the final relief he obtained in those proceedings. Here, Trygg again complains about fair-share fees and being associated with the Teamsters. Second Am. Comp. ¶ 30. The only difference is the legal theory he invokes and the precise relief he requests. Thus, in this case he contends that the Illinois law authorizing fair-share fees is unconstitutional under the First Amendment, arguing that *Abood* was wrongly decided. *Id.*, ¶ 65. And he seeks an injunction against any further withholding of fair-share fees,

as well as a recovery of all fees he has paid, including fees paid to a charity as a result of the state court proceedings. *Id*. (ad damnum).

B. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must give the same preclusive effect to a state court judgment that it would be given by a court of that state. *Kremer v. Chem. Constr. Corp*., 456 U.S. 461, 466 (1982). Thus, if (1) under the law of the state that rendered the judgment at issue — here, Illinois — the judgment would be given preclusive effect, and (2) the party against whom preclusion is sought had a "full and fair opportunity" to raise the current federal claim in the state case, the federal court must give the state judgment the same preclusive effect. *Abner v. Ill. Dep't of Transp*., 674 F.3d 716, 719 (7th Cir. 2012).

Under Illinois law, claim preclusion bars a plaintiff from pursuing a claim if: (1) a court of competent jurisdiction rendered a final judgment on the merits of a claim; (2) there was an identity of causes of action between the case in which the judgment was rendered and the current case; and (3) there was an identity of parties or their privies between the prior and current cases. *Lutkauskas v. Ricker*, 28 N.E.3d 727, 738 (Ill. 2015); *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 889 (Ill. 1998). *Res judicata* applies not only to all matters that were actually asserted and decided in the original action, but also to all matters that could have been asserted. *Lutkauskas*, 28 N.E.3d at 738; *River Park, Inc.*, 184 Ill.2d at 302. For purposes of identifying the scope a claim, Illinois has adopted the "transactional test," under which "'separate claims are considered the same cause of action for claim preclusion purposes if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.'" *Lutkauskas*, 28 N.E.3d at 738 (quoting *River Park, Inc.*, 703 N.E.2d at 893); see also *Little v. Illinois Dep't of Revenue*, 626 Fed. Appx. 160, 162 (7th Cir. 2015) (nonprecedential disposition). Thus, "simply alleging a new theory of recovery is insufficient to assert a different cause of action, where multiple theories of recovery are predicated on the same core of operative facts."

Lutkauskas, 28 N.E.3d at 739; *see also Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (holding that plaintiff may not engage in "claim splitting" to avoid *res judicata)*.

Res judicata prevents inconsistent judgments on the same issues, conserves judicial resources, and protects defendants from the burdens of having to defend against multiple lawsuits. *River Park, Inc.*, 703 N.E.2d at 889; *Cooney v. Rossiter, 2012 IL 113227, ¶ 35.* It likewise "preserves the integrity of judgments and protects those who rely on them" by preventing parties from raising claims or defenses in a second proceeding that would undermine rights adjudicated in the first proceeding. *Henry v. Farmer City State Bank* , 808 F.2d 1228, 1232-37 (7th Cir. 1986) (applying Illinois law).

Under Illinois law, even though an administrative agency lacks the power to declare a statute unconstitutional, a party may raise such a claim in the agency and make a factual record necessary to support it, and it may then be asserted in an action for judicial review of the agency's decision. *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1975) (applying Illinois law); *Bd. of Educ. v. Brown*, 724 N.E. 2d 956, 965 (Ill. App. 1999); *Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill. App. 1976); *see also Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1020 (Ill. 2008). Thus, in his action for administrative review of the ILRB's first decision, Trygg could have claimed that the Illinois statute authorizing the withholding of fair-share fees was unconstitutional and that, under the First Amendment, *no such fees* could be withheld from his compensation, even if they went to a charity of his choice. Consequently, under Illinois *res judicata* principles, Trygg is barred from asserting that claim in this case. *See Durgins v. City of E. St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001); *Little*, 626 Fed. Appx. at 162 (nonprecedential decision).

Trygg had not only the opportunity, but also the duty, to raise all of his First Amendment claims in his action for judicial review of the IRLB's administrative decision. Trygg's claims in

that proceeding arise from the same group of operative facts as his claims here — he objects to fair-share fees based on his claimed right not to associate with a labor union. And he specifically invoked those facts in the prior state administrative and judicial proceedings, successfully claiming that he had no obligation to contribute any money to the Teamsters. Although Trygg never specifically asked the Illinois Appellate Court to declare any portion of the governing Illinois law unconstitutional, he had the opportunity to do so. Thus, even if they rely on a distinct legal theory and seek different relief, his claims in this case, based on the same core of operative facts, are barred as a matter of law under the doctrine of claim preclusion.

That conclusion is all the more obvious because Trygg's claim in this case, if successful, would conflict with the relief he obtained in the earlier proceedings and thus undermine the rights established in those proceedings. That relief allowed the withholding of funds from Trygg's compensation equal to the fair-share fees that would have been paid to the Teamsters, but required that they be paid instead to a charity of his choice. In this case, however, he demands that there be no such withholding at all. That relief cannot coexist with the relief he already obtained, and it would improperly undermine the rights established in the earlier proceedings and defeat the reliance interests established in them. *See Henry*, 808 F.2d at 1232-37. For these reasons, Trygg's claims should be dismissed.

Conclusion

The intervenor-plaintiffs' complaint should be dismissed.

Dated: August 15, 2016

Respectfully submitted,

FELDMANWASSER

/s/ Carl R. Draper
Carl R. Draper
1307 S. Seventh Street
Springfield, IL 62703
(217) 544-3403

Attorney for Defendant General Teamsters Professional & Technical Employees Local Union No. 916

LISA MADIGAN
Attorney General of Illinois

/s/ Richard S. Huszagh
Gary S. Caplan
R. Douglas Rees
Richard S. Huszagh
Assistant Attorneys General
100 West Randolph Street
Chicago, IL 60601
(312) 814-3498

Attorneys for Michael Hoffman, in his official capacity as Director of the Illinois Department of Central Management Services, and Intervenor-Defendant the People of the State of Illinois

DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH

/s/ Melissa J. Auerbach
Melissa J. Auerbach
Stephen A. Yokich
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603
(312) 372-1361

BREDHOFF & KAISER, P.L.L.C.

/s/ John M. West
John M. West
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600

Attorneys for Defendant American Federation of State, County, and Municipal Employees, Council 31, AFL-CIO

CERTIFICATE OF SERVICE

I, John M. West, an attorney, hereby certify that on August 15, 2016, I caused the foregoing **Defendants' Memorandum in Support of Joint Motion to Dismiss Second 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 August 15, 2016, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ John M. West
John M. West