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

MARK JANUS, MARIE QUIGLEY, and BRIAN TRYGG, Plaintiffs, v. AMERICAN FEDERATION OF STATE, CITY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/ PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; and TOM TYRRELL 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.	No.: 1:15 – CV – 01235 Judge Robert W. Gettlemen Magistrate Daniel G. Martin

MOTION TO DISMISS BY TEAMSTERS 916

Now come General Teamsters/Professional & Technical Employees Local Union No. 916, ("Teamsters"), by Carl R. Draper, one of their attorneys, and hereby files its Motion to Dismiss as set forth herein.

Plaintiffs' First Amended Complaint [D/E 120] should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for the failure to state a claim upon which this relief can be granted.

In support of this Motion, defendant Teamsters is filing a Memorandum of Law in Support of Teamsters' Motion to Dismiss. The First Amended Complaint filed by the

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individual plaintiffs raises a facial challenge to Illinois law concerning "fair share" payments from non-union members to unions representing public employees. The Complaint seeks a declaration of law that is contrary to decisions of the United States Supreme Court. This court does not have the power to overrule or disregard well-settled precedent from higher courts and, consequently, the only legal course of action is to dismiss the First Amended Complaint.

Respectfully submitted,

General Teamsters/ Professional & Technical Employees Local Union No. 916,

By: /s/Carl R. Draper
One of its attorneys

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MEMORANDUM OF LAW IN SUPPORT OF TEAMSTERS' MOTION TO DISMISS

Now come General Teamsters/Professional & Technical Employees Local Union No. 916, ("Teamsters"), by Carl R. Draper, one of their attorneys, and hereby offers this court a Memorandum of Law in Support of Teamsters' Motion to Dismiss as set forth herein.

INTRODUCTION AND FACT ALLEGATIONS

Taking the allegations of Plaintiffs' First Amended Complaint (D/E#120) as true, for the purposes of this motion, three individual plaintiffs have filed a complaint against the American Federation of State, County, and Municipal Employees, Council 31 ("AFSCME") and Teamsters, together with the Director of

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the Illinois Department of Central Management Services, Tom Tyrrell, asserting that their individual rights under the First Amendment of the Constitution of the United States are infringed by Illinois State Law and collective bargaining agreements that compel them to pay "fair share" payments to the unions in exchange for the obligation of the unions to provide representation and collective bargaining services to employees like plaintiffs.

The First Amended Complaint raises only a facial challenge to the constitutionality of the Illinois statutory scheme and the collective bargaining agreements authorized by state law and asks this court to declare certain portions of the law unconstitutional under the First Amendment. The Complaint recognizes that the relief sought is foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). It further seeks an order requiring the Illinois Department of Central Management Services to cease collection of fair share payments that are then turned over to the public sector union defendants.

Plaintiffs' First Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for the failure to state a claim upon which this relief can be granted.

In relation to defendant Teamsters, the allegations of the complaint by plaintiff Brian Trygg raise the relevant issues for Teamsters' Motion to Dismiss. The other plaintiffs have no relationship with Teamsters and raise their claims against AFSCME. The common allegations and specific allegations of Trygg recognizes the general process for the deduction of fair share fees in accordance

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with the decision of the United States Supreme Court in *Chicago Teachers Union v. Hudson,* 475 U.S. 292(1986). Trygg recognizes that *Hudson* requires notice that explains how the union calculates a fair share fee; and provides a procedure when a non-member disagrees with the classification such that the non-member like Trygg may challenge the classification either through arbitration or in court. (Complaint, D/E 120, ¶33–36.) Trygg's Complaint is squarely directed at the constitutionality of fair share fees in any form or amount.

Trygg objects to Teamsters' public policy positions that are advocated through collective bargaining because he objects to the efforts by the union to represent employees in the collective bargaining agreement for protection against employer imposition of furlough days. Trygg alleges that he would not pay any fees but for Illinois law. Finally, Trygg supports the Executive Order 15–13 issued by Governor Bruce Rauner ordering CMS and state agencies to cease enforcement of the collective fee agreements. (Complaint D/E 120, ¶48 – 51.) A copy of the Executive Order supported by Trygg was previously filed as Exhibit 1 in D/E 83-1 in this cause.

The First Amended Complaint raises legal arguments recognizing various decisions of the United States Supreme Court giving recognition to fair share provisions of public union collective bargaining agreements while recognizing procedural protections for the rights of dissenting employees. (See Complaint, D/E 120, ¶53 – 65). The Complaint concludes in paragraph 68 that the Supreme Court's Decision in *Abood* was wrongly decided and should be overturned and title Count

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I as official challenge stating "Compulsory Union Fees Violate 42 U.S.C. §1983 and the United States Constitution." Plaintiffs have also filed Plaintiffs' Notice of Constitutional Question (D/E 121) that makes clear that the issue presented is whether the Illinois Public Labor Relations Act provisions on compulsory fair share fees is unconstitutional. For this facial challenge to the law and the collective bargaining agreements governed thereby, this case must be dismissed based on the history of Supreme Court decisions.

ARGUMENT

THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF

The complaint seeks a declaration that the Fair Share Contract Provisions under the Illinois Public Labor Relations Act (5 ILCS 315 3(g), 6(a), 6(e), 6(f),10(a)(2), and 10(b)(1) are unconstitutional under the First Amendment. At the same time, the complaint recognizes *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a controlling precedent. It quotes the decision as holding "...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." (Complaint, Par. 53). "If a precedent of [the Supreme] Court has direct application in a case," the obligation of a lower court is to "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). There is no question that *Abood* squarely held that fair share agreements are constitutional "insofar as the service charge is used to finance expenditures by the Union for the

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purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225–26. And just recently, the Supreme Court refused to even consider the "argument that *Abood* should be overruled." *Harris v. Quinn*, 134 S. Ct. 2618, 2638 n.19 (2014).

The complaint suggests that *Abood* should be overruled, and was wrongly decided. (Complaint D/E 120 at ¶68).

Far from suggesting that *Abood* should be overruled, however, the Court's precedents have carefully erected a set of legal rules to ensure fair share agreements are applied in a manner that does not unduly infringe the First Amendment rights of fee payers. Plaintiffs attempt to portray *Abood* as a free-standing 'lone wolf' of a case, which should be simply set aside and overruled. To the contrary, the Supreme Court, since *Abood*, has recognized the continuing validity of the *Abood* holding, and has guided the implementation of safeguards to limit the application of fair share fees to appropriate subjects of collective bargaining. See, *e.g., Locke v. Karass*,129 S.Ct. 798 (2009); *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 519 (1991); *Teachers v. Hudson*, 475 U.S. 292, 301–302 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 455–457 (1984).

Thus, the Court has carefully distinguished the representational activities to which objecting fee payers can be compelled to contribute from other union activities to which they may not be compelled to contribute. See *Locke*, 555 U.S. at 217–21; *Lehnert,* 500 U.S. 507 (1991). And, the Court has described what sort of procedures a union must adopt to ensure that objecting fee payers are not

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compelled to contribute to nonrepresentational activities. See *Knox v. Service Employees*, 132 S.Ct. 2277 (2012); *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986). This long line of precedent demonstrates the Court's continued commitment to effectuating *Abood*'s holding that 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." 431 U.S. at 235.

The premise of the complaint is the Governor's assertion that "using compelled 'fair share' fees" to represent employees with regard to "mandatory subjects of collective bargaining," such as "wages, pensions, and benefits," violates the First Amendment. Ex. Ord. 15–13 at 2. But the whole point of the precedents elaborating on *Abood* has been to ensure that the compelled fees are used only for such bargaining. From the outset, there has never been any question that compelling represented employees to contribute to the costs of representation on matters germane to collective bargaining does not violate the First Amendment. Contrary to the plaintiffs' case analysis in paragraphs 56 – 60, no case, including *Harris*, suggests that the Supreme Court will overturn the decades of precedent.

The proper application and analysis of First Amendment rights, as with most rights guaranteed by the Bill of Rights, requires an identification of the public purposes served by the allegedly unconstitutional infringement, and a weighing of those interests against the level of infringement on the First Amendment rights of the plaintiffs. Few things in this world are absolute, the First Amendment among

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them. By way of example, the case law makes clear that time, place and manner restrictions on the exercise of free speech may be tolerated, "First amendment rights are not absolute, and reasonable time, place and manner restrictions on the exercise of those rights are well recognized. Narrow and reasonable regulation of the exercise of rights designed to keep the streets open and safe for travel is not prohibited by the First Amendment." *People v. Tosch*, 114 Ill. 2d 474, 480, 501 (1986) (Internal quotation marks omitted.)

The law of defamation also involves a balancing of interests. Defamation claims are limited by the First Amendment rights of speakers and writers, and different tests are employed depending on the nature of the issue being discussed, and the status of the speaker/writer as a member of the media. See *e.g. Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion).

The Supreme Court cases since *Abood* have focused on the various interests of the State and the individuals who allege First Amendment infringements in an attempt to implement appropriate safeguards. The high court's most recent examination of a First Amendment challenge to fair-share fees appears in *Harris* — a case originating in Illinois, issued just one year ago.

In *Harris*, the State of Illinois adopted a program, utilizing federal Medicaid funds, to compensate persons who provided in-home care for patients who would otherwise be forced to live in a nursing home or other care facility. *Harris* at 2623-2615. This so-called "Rehabilitation Program" sought to prevent the unnecessary institutionalization of patients who could adequately and—less expensively—be

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cared for at home. *Id.* at 2623. The State specifically designed the Rehabilitation Program so that patients had wide latitude over their in-home treatment; the law expressly deemed a patient "*the* employer of the personal assistant." *Id.* at 2624 (emphasis original), quoting 89 Ill.Admin. Code § 676.30(b). And patients controlled all facets of his employment relationship, such as the hiring, firing, training, directing and duties of the personal assistants. *Id.* at 2624. Indeed, the law expressly stated that the State exercised no control over the patients' employment relationship with their personal assistants. *Id.* at 2624. The State's role was essentially limited to paying the personal assistants' salaries (subsidized by the federal Medicaid program) and setting some minimum qualifications for employment as a personal assistant. *Id.*

In 2003, the Illinois General Assembly amended the Illinois Public Labor Relations Act ("IPLRA") by re-classifying the Rehabilitation Program's personal assistants as "public employees" of the State, but that re-classification applied "solely for purposes of coverage under the [IPLRA]." *Id.* at 2626. State statute emphasized that the personal assistants were not State employees for any other reason, such as for purposes of vicarious liability or pension or health insurance benefits. *Id.* The State, then, designated one union, SEIU-HII, as the personal assistants' exclusive representative for collective bargaining. *Id.* Under the IPLRA, members of a collective bargaining unit who chose not to join a union may still pay a fee to the union—the so-called "fair-share" fee. *Id.* at 2625; 5 ILCS 315/6(e) (commonly known as the "fair share" provision). SEIU-HII and the State, later,

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entered into a collective bargaining agreement which compelled all non-union personal assistants to pay a fair share of union dues—dues that the State deducted directly from the personal assistants' compensation. *Id.* at 2626.

The *Harris* case was initiated by three such non-union personal assistants who objected to having to pay their fair-share fee to SEIU-HII, a union which they did not support. *Id.* The personal assistants, like Plaintiffs here, alleged that fair-share dues violated their First Amendment rights, because the law forced them to financially support a union whose mission they found objectionable. But the similarities between *Harris* and this case end there. While the *Harris* opinion, delivered by a five-justice majority, sided with the non-union personal assistants in declaring the personal assistants' fair-share fee unconstitutional, the decision hinges on the crucial fact that the State did not really employ the personal assistants. *Id*. at 2634-2644.

Admittedly, the *Harris* majority questioned the wisdom of the *Abood*-rule authorizing fair-share fees in the public sector context. *E.g. id.* at 2632 (calling *Abood*'s analysis "questionable.") But the *Harris* majority's criticism of *Abood* is mere dicta. And both the majority and the dissent acknowledged that fact. *Id.* at 2638, n. 19. ("It is therefore unnecessary for us to reach [the personal assistants'] argument that *Abood* should be overruled."); *id.* at 2658 (Kagan, J., dissenting) ("The [personal assistants] . . . asked this Court to . . . overrul[e] *Abood* and thus impos[e] a right-to-work regime for all government employees. The good news out of this case is clear: The majority declined that radical request.")

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Significantly, *Harris* declined to extend *Abood*'s public sector fair-share fees approval to situations involving workers who were not "full-fledged state employees." *Id.* at 2628. And the personal assistants in *Harris*, the Court reasoned, were less than full State employees, because their employment relationship was with the patient and not the State. *Id.* at 2634-2640. In so concluding, the Court emphasized that Illinois law explicitly stated that the patients, and not the State, were the personal assistants' employer for all purposes other than collective bargaining. *Id.* at 2634-2639. In addition, the Court's analysis hinges on the facts that the patients—and not the State—hired, fired and directed the personal assistants (while the State did not even have the right to enter the home where the personal assistants were employed in order to check on their job performance). *Id.* at 2635. And the personal assistants had no right to statutory retirement and other benefits generally available to State employees. *Id.* Moreover, the Court pointed out that the State's so-called employer status for collective bargaining was significantly limited: "Under the governing Illinois statute, collective bargaining can occur only for "terms and conditions of employment that are within the State's control. That is not very much." *Id.* at 2635.

That is, *Harris* invalidated the fair-share fees applied to the personal assistants, because they were not full-fledged State employees, but instead were employed by the patients inside whose homes they worked. *Id.* at 2638. In doing so, the Court warned of the proverbial slippery slope: "If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see

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just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged state employees." *Id.* at 2638.

The *Harris* Court did not find fault with what it described as "the best argument . . . in support of *Abood*," *Id.* at 2637 n. 18 (opinion of the Court). That argument holds that "[w]hat justifies the agency fee . . . is the fact that the State compels the union to promote and protect the interests of nonmembers." *Id.* at 2636. As *Harris* observed, Justice Scalia expressed that view in his separate opinion in *Lehnert*. *Id.* (citing *Lehnert*, 500 U.S. at 556 (opinion of Scalia, J.)). In that opinion, Justice Scalia explained that, although the government normally cannot compel individuals to provide financial support to a private organization even though they may benefit from the organization's activities, "[w]hat is distinctive … 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." *Lehnert*, 500 U.S. at 556 (opinion of Scalia, J.) (emphasis in original). Justice Scalia identified this as "[t]he 'compelling state interest' that justifies th[e] constitutional rule" permitting a requirement that nonmembers must pay their share of the union's bargaining-related expenses. *Id.*

Far from rejecting that conclusion, in *Harris* the Court stated that "[t]his argument has little force in the situation now before us," *Harris*, at 2637 (emphasis added) – a situation where the individuals in the bargaining unit (personal assistants who provided in-home care to disabled persons) were "quite different from full-fledged public employees." *Id.* at 2638. The *Harris* Court declined to

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extend *Abood* to that situation precisely because, in the Court's view, the personal assistants' union did not have representational obligations comparable to those of unions in traditional public employment settings such as had been presented in *Abood*. See *id.* at 2635 – 37. *Harris* casts no doubt on the constitutionality of agency fees for unions that represent "full-fledged public employees." *Id.* at 2638. *Harris*, and its criticism of *Abood*, is simply inapplicable here, because the instant case involves full-fledged public employees. And with respect to full-fledged State employees, *Abood*'s approval of fair-share union fees remains intact.

In sum, the authorization of fair-share provisions by the Illinois Public Labor Relations Act is clearly constitutional.

CONCLUSION

The individual plaintiffs in this case have clearly filed a complaint that attacks the Illinois Public Labor Relations Act concerning any of its provisions that authorize a collective bargaining agreement to include a provision for non-union members to be required to pay fair share fees. The complaint asks for a declaratory ruling that these provisions of Illinois law are unconstitutional and requests a preliminary injunction prohibiting the seizure of any compulsory fees from non-union members. The plaintiffs candidly claim that the United States Supreme Court reached the wrong conclusion in several of the rulings that serve as precedent in this case, primarily focusing on *Abood, supra.* This court has no authority to issue any ruling contrary to the teachings of *Abood* or the other Supreme Court cases analyzed in plaintiffs' complaint. In order for the plaintiffs to obtain the relief

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that they wish, it is necessary for this court to grant the Motion to Dismiss which, in turn, would allow plaintiffs to proceed on appeal and ultimately seek a petition for certiorari before the United States Supreme Court.

This court should grant the relief that the plaintiffs obviously seek by granting the Motion to Dismiss. The direct rulings of the Supreme Court dictate dismissal. As a consequence, there is no set of facts under which plaintiffs could prevail under the allegations of this complaint consistent with existing law. The Motion to Dismiss filed by Teamsters should be granted.

Respectfully submitted,

General Teamsters / Professional & Technical Employees Local Union No. 916,

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