No. 19-3413
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

James M. Sweeney and International Union of Operating Engineers Local 150, AFL-CIO,	)
Plaintiffs-Appellants,	)
v.	)
Kwame Raoul, in his official capacity as Attorney General for the State of Illinois; and Kimberly Stevens, in her official capacity as Executive Director of the Illinois Labor Relations Board,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 18-cv-1362
The Honorable Judge Sharon Johnson Coleman

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

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DISCLOSURE STATEMENTS

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Appellate Court No: 19-3413

Short Caption: James M. Sweeney, et al. v. Kwame Raoul, et al.

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Dale D. Pierson Date: December 18, 2019

Attorney's Printed Name: Dale D. Pierson, General Counsel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Robert A. Paszta Date: December 18, 2019

Attorney's Printed Name: Robert A. Paszta

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ James Connolly, Jr. Date: December 18, 2019

Attorney's Printed Name: James Connolly, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Kara M. Principe Date: December 18, 2019

Attorney's Printed Name: Kara M. Principe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Joseph P. Sweeney Date: December 18, 2019

Attorney's Printed Name: Joseph P. Sweeney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction of the case that was docketed as No. 18-cv-1310 pursuant to 42 U.S.C. §§ 1983, *et seq.* because the action arose under the Constitution and laws of the United States. The District Court had jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331. The District Court had the authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57, Fed. R. Civ. P. 57.

This Court has appellate jurisdiction of this case because it is an appeal from a final judgment rendered by the United States District Court for the Northern District of Illinois, which is a district court within its geographic coverage. 28 U.S.C. § 1291.

This appeal is timely because it was filed within 30 days from the date of the order denying Appellants' motion for summary judgment under Rule 56, Fed. R. Civ. P. 56. Federal Rules of Appellate Procedure 4(a)(1) and 4(a)(4)(A)(iv). The District Court's final judgment was rendered November 12, 2019 (Doc. #82, filed 11/12/19). The 30th day following the date of the District Court's entry of the Order was Thursday, December 12, 2019. Therefore, the Notice of Appeal was timely filed on Monday December 9, 2019 (Doc. #83, filed 12/09/19).

STATEMENT OF THE ISSUE

Whether the District Court erred in interpreting Local 150's claims as a challenge to exclusive representation generally, rather than address the Union's claim that after the Supreme Court's decision in *Janus v. AFSCME Council 31*, 585 U.S. ___, 138 S.Ct. 2448 (2018), unions who represent public sector employees and their members have the First Amendment right to charge public sector nonmembers for the cost of representing them in grievances or refuse to represent them altogether.

STATEMENT OF THE CASE

A. Public Sector Collective Bargaining in Illinois

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court ruled that unions representing public employees could constitutionally assess nonmembers an "agency fee" for representing them in collective bargaining. *Janus*, 138 S.Ct. at 2460-2461. While unions could not require nonmembers to support political causes with which they disagreed, the *Abood* Court held that the First Amendment did not bar compelled payments of fees to be used in support of collective bargaining, contract-administration, and enforcement. *Id.*

In the wake of *Abood*, many states including Illinois enacted legislation that would regulate labor relations and collective bargaining in the public sector. Specifically, in 1984, "Illinois granted public employees legally protected bargaining rights through the enactment of the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA)." Sally J. Whiteside, *et al.*, *Illinois Public Labor Relations Law: A Commentary and Analysis*, 60 Chi.-Kent L. Rev. 883 (1984). In so doing, "the legislature…expressly stated that it intended to follow the National Labor Relations Act (NLRA) to the extent feasible." *Id.*

The Illinois legislature followed federal labor law in several ways. It adopted the "majority rule" model of the NLRA which provided for employer recognition of an exclusive bargaining representative of its employees voluntarily based upon a showing of majority support or after a state labor board-conducted secret-ballot election. Whiteside, *supra* at 892-896; 5 ILCS 315/6(c). It also adopted a "duty of fair representation" provision which "reflects judicial rulings in fair representation cases in the private sector." Whiteside, *supra* at 923; 5 ILCS 315/6(d). And the legislature authorized public employers and exclusive representatives "to negotiate for a provision…requiring 'fair share' payments from non-union members." Whiteside, *supra* at 924; 5 ILCS 315/6(e). As the District Court observed in its preliminary decision in *Sweeney v. Madigan*, 359 F. Supp. 3d 585, 588 (N.D. Ill. 2019) (Required Short Appendix of Plaintiffs-Appellants ("App.") at 7):

> In exchange for conferring this exclusivity, the IPLRA requires that exclusive representatives must represent all public employees in a bargaining unit, including those who are not union members. 5 ILCS 315/6(d). To offset this burden, IPLRA allowed a labor union that is an exclusive representative to charge non-member bargaining unit employees agency fees, commonly described as "fair share" fees, to compensate for activities germane to the collective bargaining process. 5 ILCS 315/6(e).

According to the Whiteside commentators, "it was the legislature's expressed intention that the fair share provisions in both Acts comport with existing judicial precedent" and in reliance upon *Abood*. Whiteside, *supra* at 924 and fn. 264.

B. Local 150's Representation of Public Employees

Plaintiff-Appellant Local 150 of the International Union of Operating Engineers, AFL-CIO ("Local 150" or the "Union"), is a labor organization and unincorporated association with its primary office in Countryside, Illinois (ECF Doc. #76, Defendants' Response to Local 150's

Statement of Uncontested Material Facts, ("Facts") ¶ 1 at p. 1, App. at 14).[1] Local 150 represents over 23,000 members, over 3,000 of whom are employees covered by the IPLRA, 5 ILCS 315/1, *et seq.* (*id.*). Plaintiff James M. Sweeney is the President-Business Manager of Local 150 and a member of the Union (ECF Doc. #76, Facts ¶ 2 at p. 1, App. at 14).

In about 1989-1990, Local 150 began organizing public employees outside the City of Chicago (ECF Doc. #76, Facts ¶ 9 at p. 3, App. at 16). It was the Union's experience that as communities in the Chicago suburbs and elsewhere in Illinois matured, they began to self-perform maintenance of roads, sewer and water systems, and a variety of other tasks which involved the operation of heavy construction equipment (*id.*). Since 1989, Local 150 has organized and represented employees in the public works, sewer and water, and other departments in municipalities throughout northern Illinois and northwest Indiana (ECF Doc. #76, Facts ¶ 10 at p. 3, App. at 16). Local 150 currently represents approximately 3,300 employees in about 133 bargaining units of public employees employed by municipalities and other units of local government (*id.*).

Local 150 employs nine staff members in the Union's Public Sector Department to represent public employees (ECF Doc. #76, Facts ¶ 11 at pp. 3-4, App. at 16-17). That Department consists of three attorneys whose primary responsibilities include litigation before state agencies including the Illinois Labor Relations Board (ILRB) and state and federal courts; contract negotiations with public employers; and arbitration of contract disputes (*id.*). It also includes four Business Agents who represent employees in resolving day-to-day disputes, assisting employees in resolving grievances, and responding to employer information requests (*id.*). At least two

[1] For the most part, the State Defendants did not dispute Local 150's Facts (ECF Doc. #76, App. at 14-20).

clerical employees also serve this department (*id.*). These staff members report to Sweeney as well as two other Officers of the Union working out of the Countryside Union Hall (*id.*).

The total cost of Local 150's Public Sector Department in 2018 was $5,083,445.00 (ECF Doc. #76, Facts ¶ 12 at p. 4, App. at 17). This includes employees' salaries and benefits; prorated costs of office space, utilities, and other charges; automobiles used by staff to service the public employee bargaining units; and costs associated with representing employees in arbitration and litigation (*id.*).

Throughout the time Local 150 has represented public employees in Illinois, it has negotiated union security clauses into the collective bargaining agreements with public employers which include "fair share" provisions (ECF Doc. #76, Facts ¶ 13 at p. 4). Those provisions typically read (*id.*):

> Fair Share
>
> Any present employee who is not a member of Local Union #150 shall, as a condition of employment, be required to pay a Fair Share (not to exceed the amount of Union dues) of the cost of the collective bargaining process, contract administration in pursuing matters affecting wages, hours, and other conditions of employment, but not to exceed the amount of dues uniformly required by members. All employees hired on or after the effective date of this Agreement and who have not made application for membership shall, on or after the thirtieth (30th) day of their employment, also be required to pay a Fair Share as defined above.

Since the decision by the Supreme Court in *Janus*, approximately 30 public employees represented by Local 150 have resigned their membership in the Union and/or ceased paying fair share (ECF Doc. #76, Facts ¶ 14 at p. 4). Full dues and fees paid by each public sector member to Local 150 averaged $1,680.00 for the year of 2018 (ECF Doc. #76, Facts ¶ 17 at p. 5). The dues or fair share fees lost to Local 150 easily exceed $50,000.00 per year (*id.*). Nevertheless, despite this loss of revenue, Local 150's staff has remained unchanged and its costs have incrementally increased (*id.*).

Resignation letters received by President-Business Manager Sweeney's office from public employees represented by Local 150 include, in part, the request that the Union "immediately cease deducting all dues, fees, and political contributions from my wages, as is my constitutional right in light of the U.S. Supreme Court's ruling in *Janus v. AFSCME*." (ECF Doc. #76, Facts ¶ 19 at p. 6, App. at 19). These letters also include the demand that despite their refusal to pay "all dues, fees, and political contributions," "the union must continue to represent me fairly and without discrimination in dealings with my employer and cannot, under any circumstances, deny me any wages, benefits, or protections provided under the collective bargaining agreement with my employer." (*id.*).

Local 150 objects to the compelled representation imposed upon it by Illinois law in processing grievances for nonmembers who refuse to pay full dues or fair share fees (ECF Doc. #76, Facts ¶ 20 at p. 6, App. at 19). The Union's members are now required to subsidize speech on behalf of nonmembers and associate with them in violation of their First Amendment rights. After *Janus*, the provisions of the IPLRA compelling Local 150 and its members to process grievances for nonmembers are unconstitutional.

C. Local 150's Lawsuit Challenging the Obligation to Represent Nonmembers in Grievances for Free

Anticipating the decision at which the Supreme Court ultimately arrived in *Janus*, on February 22, 2018, Plaintiffs Sweeney and Local 150 filed this lawsuit (Doc. #1, later amended April 9, 2018 (Doc. #21)). Local 150 alleged that if the Supreme Court ruled that "fair share" fees nonmembers of public employee unions were required to pay under Illinois law are unconstitutional, then the corresponding duty of Illinois public employee unions to represent nonmembers fairly in grievance-arbitration proceedings is likewise unconstitutional (ECF Doc. #1, Complaint ¶ 13 at 4, ¶ 28 at 7, ¶ 31 at 8-9).

On August 10, 2018, the State Defendants moved to dismiss the Second Amended Complaint primarily on standing and ripeness grounds (Doc. # 31, Motion to Dismiss, at p. 1). On February 6, 2019, the District Court denied Defendants' Motion to Dismiss (Doc. #52, App. at 6). In its decision, the Court found that Local 150 had standing to bring its Complaint, and that its claims were ripe for review as facial challenges to the IPLRA. *Sweeney v. Madigan*, 359 F. Supp. 3d 585 (N.D. Ill. 2019). As the District Court explained (*id.* at 590, App. at 10):

> Although it may be true that nothing has changed except for the Supreme Court's decision in *Janus*, that decision altered the nature of the plaintiffs' preexisting statutory obligations and created the imminent constitutional injury alleged to exist here. This injury is sufficient to establish both that standing exists and that there is a dispute ripe for resolution with respect to the plaintiffs' claims arising directly from their duty of representation.

On April 19, 2019, the District Court ordered the parties to file cross-motions for summary judgment (Doc. #65).[2] Local 150 argued that once the Supreme Court found a First Amendment right of nonmembers not to support their bargaining representative, the First Amendment rights of members to refrain from supporting nonmembers necessarily follows. In other words, if nonmembers can no longer be compelled to subsidize union speech with which they disagree, unions and their members may not be forced to subsidize the speech of free-riding nonmembers. Local 150 relied on the Supreme Court's statement that "compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Janus*, 138 S.Ct. 2464 (emphasis in original); and that "[e]ven union speech in the handling of grievances may be of substantial public importance." *Id.* at 2476. Because the IPLRA compels Local 150 and its members to subsidize the speech of nonmembers pursuing grievances, 5 ILCS § 315/10(b)(1),

[2] The Court also suggested that Local 150 file an amended complaint recognizing the fact that the Supreme Court had decided *Janus* since the original filing (Doc. #52, Order entered 02/06/19). On February 25, 2019, the Union filed its Third Amended Complaint, deleting the counts rejected by the Court and refiling the case as *Sweeney v. Raoul, et al.*, in light of the election of Kwame Raoul as Illinois Attorney General (ECF Doc. #56).

Local 150 argued that compulsion is unconstitutional. Instead, Local 150 argued that the less restrictive alternative to fair share fees identified in *Janus* should be allowed: "individual nonmembers could be required to pay for [representation in disciplinary matters] or could be denied representation altogether." 138 S.Ct. at 2468-2469.

After full briefing, on November 12, 2019, the District Court entered its "Memorandum Opinion and Order," granting Defendants' summary judgment motion and denying that of Local 150 (ECF Doc. #81, 2019 WL 5892981 *1 (November 12, 2019). In so doing, the Court observed (*id.* at Page 2 of 5, App. at 2):

> In *Janus*, the Supreme Court held that compulsory fair-share or agency fee arrangements under the IPLRA violated the First Amendment "free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. Local 150 now argues that after *Janus*, the designation of Illinois public employee unions as the exclusive representative for a bargaining unit, and the concomitant duty of Illinois unions to represent nonmembers fairly, is also unconstitutional under the First Amendment. Specifically, Local 150 argues that the reasoning in *Janus* allows unions to refuse to represent non-union members because "unions and union members have the right under the First Amendment to refuse to associate with free-riding nonmembers. These free-riders increase the financial burden on dues-paying members and adversely affect the members[sic] ability to pursue collective efforts." In making this argument, Local 150 asks the Court to read *Janus* too broadly and ignore recent Seventh Circuit precedent.

Nowhere in the proceedings before the District Court did Local 150 argue that the foundational principle of exclusive representation is unconstitutional. Relying on *Janus*, 138 S.Ct. at 2468-2469, throughout its briefs, the Union argued that the "narrowly tailored" alternative to fair share fees allowed the Union to refuse to represent nonmembers in handling grievances or could charge them for their services (ECF Doc. #71, Local 150's Brief in Support of Summary Judgment, at p. 1; ECF Doc. #74, Local 150's Response in Opposition to Defendants' Motion for Summary Judgment at pp. 1, 3-4; ECF Doc. #78, Local 150's Reply Brief in Support of Its Motion for Summary Judgment at pp. 1-3).

The District Court mischaracterized Local 150's argument as a challenge to exclusive representation, then correctly applied existing Supreme Court and Seventh Circuit caselaw to reject such a challenge. In doing so, however, the District Court decided a different case. This was an error.

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Janus* constitutionalizes the free speech and association rights of public sector employees and their unions. Without an affirmative right to organize and support unions financially, there can be no right to refrain from doing so. *See Janus*, 138 S.Ct. at 2459-2460 (the Illinois law which "forced" public employees to subsidize a union "violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern."). If, as *Janus* holds, nonmembers have a First Amendment right not to "subsidize" private speech, then surely public sector union members have a First Amendment right to support that speech.

Labor relations in the United States is based upon the principle of exclusive representation. *E.g.*, 29 U.S.C. § 159(a). In its debates over the passage of the National Labor Relations Act (NLRA), for example, Congress adopted the policy of "Majority Rule." Hence, once a majority of the employees in any given bargaining unit vote for a particular representative, that representative has the exclusive right to bargain with their employer. *See also* Railway Labor Act (RLA), 45 U.S.C. § 152, Fourth. To protect the rights of minorities, the Supreme Court soon thereafter recognized that exclusive representation implied an obligation to represent all members of the bargaining unit fairly, regardless of their race or support for the union. *Steele v. Louisville R.R.*, 323 U.S. 192 (1944); *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The IPLRA adopted

both the principles of exclusive representation and the duty of fair representation. 5 ILCS 315/6(c)-(d).

Congress has always recognized at least one significant exception to exclusive representation. Under both the RLA and the NLRA, individual employees are authorized to present their own grievances to their employers. 42 U.S.C. § 153, First(i)(j); 29 U.S.C. § 9(a). States such as Illinois have incorporated that exception into their public labor relations laws (5 ILCS 315/6(b)):

> Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

Consistent with this exception to exclusive representation and the historic concern for "free-riders," the Supreme Court in *Janus* recognized an alternative "less restrictive" of employee First Amendment rights than the "forced" payment of fair share fees: "Individual nonmembers could be required to pay for [representation in disciplinary matters] or could be denied representation altogether." 138 S.Ct. at 2468-2469. It is that "less restrictive" alternative which Local 150 seeks in this case. No challenge to exclusive representation is presented here.

STANDARD OF REVIEW

A district court's decision on cross-motions for summary judgment is reviewed *de novo*. *Calumet River Fleeting, Inc. v. IUOE Local 150*, 824 F.3d 645, 647-8 (7th Cir. 2016). The general standards for summary judgment do not change with cross-motions. The Court construes all facts and inferences therefrom "in favor of the party against whom the motion under consideration is made." *Id.*, quoting, *In re United Airlines Inc.*, 453 F.3d 463, 468 (7th Cir. 2006).

ARGUMENT

This case presents an issue that is the mirror image of *Janus*: Whether the Union and its individual dues-paying members can be compelled by the State to subsidize the speech of nonmembers and/or associate with them in processing grievances? The holding in *Janus* is therefore controlling (138 S.Ct. at 2459-2460):

> [The Illinois law which] forced [public employees] to subsidize a union, even if they chose not to join and strongly object to the positions the union takes in collective bargaining and related activities…violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern.

That same Illinois law which compels Local 150 and its public sector members over their objections to subsidize the speech of nonmembers and associate with them in processing grievances and representing them in arbitrations is likewise unconstitutional.

A. The Supreme Court's Decision in *Janus* Constitutionalizes the Rights of Unions and Their Members.

The *Janus* decision made clear that collective bargaining is speech, that representation by a union is an associational right, and that both are protected by the First Amendment. 138 S.Ct. at 2475-2477; U.S. Const. amend. 1, XIV. However, Section 10(b)(1)(ii) of the IPLRA as written, compels unions to speak on behalf of and associate with nonmembers. 5 ILCS 315/10(b)(1)(ii). The Union and its members have the same First Amendment rights as *Janus* granted to nonmembers. The appropriate remedy in this case is to strike down Section 10(b)(1)(ii) of the IPLRA as unconstitutional to the extent it requires the Union to represent nonmembers in grievance proceedings for free. *Janus*, 138 S.Ct. at 2468-2469.

The rights of individual employees to organize unions have long been considered "fundamental," *Jones & Laughlin Steel, Inc. v. NLRB*, 301 U.S. 1, 33 (1937) ("the right of employees to self-organization and to select representatives of their own choosing for collective

bargaining or other mutual protection without restraint or coercion by their employer…is a fundamental right."). In *Thomas v. Collins*, 323 U.S. 516, 532 (1945), the Supreme Court explained why union activity is protected by the First Amendment:

> Free discussion concerning the condition in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society…The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly.

Unions themselves have free speech rights protected by the First Amendment. *Knox v. SEIU Local 1000*, 567 U.S. 298, 321-322 (2012), *relying on Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). It is now clear that union members and nonmembers need not associate with each other, *Janus*, 138 S.Ct. at 2463-2464; nor can they be compelled to support each other's speech. *Id.*

In *Janus*, the U.S. Supreme Court held that a union's representation of a public sector bargaining unit was speech, *Janus*, 138 S.Ct. at 2464, and that "[e]ven union speech in the handling of grievances may be of substantial public importance." *Id.* at 2476. The Court then held that a "fair share scheme" compelling a nonmember to subsidize the speech of the union violated the First Amendment. *Id.* "In simple terms," the Court explained, "the First Amendment does not permit the government to compel a person to pay for another's speech just because the government thinks that speech furthers the interests of the person who does not want to pay." *Id.* at 2467.

The principle upon which the Supreme Court based its holding in *Janus* is fundamental. The First Amendment rights to speak and associate include the rights not to do so. *Janus*, 138 S.Ct. at 2463, *relying on Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association…plainly presupposes

a freedom not to associate"); *see also Hill v. Service Employees International Union*, 850 F.3d 861, 863 (7th Cir. 2017). In *Roberts*, the Supreme Court added (*id.* at 623) (internal citations omitted):

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

In *Janus*, the Supreme Court recognized that unions have alterative means "significantly less restrictive of associational freedoms" than the imposition of agency fees in the representation of nonmembers in disciplinary matters. 138 S.Ct. at 2468. Ordinarily, "the union is required by law to provide fair representation for all employees in the unit, members and non-members alike." *Id.* at 2460. The Court recognized, however, that "as a practical matter" when a union controls the grievance process, "it may…effectively subordinate 'the interests of [an] individual employee…to the collective interests of all employees in the bargaining unit.'" *Id.* at 2468, *quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974); *citing with approval Mahoney v. Chicago*, 293 Ill. App. 3d 69, 73-74 (1st Dist. 1997) (union has discretion to refuse to process a grievance provided it does not act arbitrarily or in bad faith (internal quotations omitted)). Hence, the Court concluded (*id.* at 2468-2469) (internal citation omitted):

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees… Individual nonmembers could be required to pay for that service or could be denied union representation altogether.

Relying in part on Section 6(g) of the IPLRA which allows unions to charge religious objector nonmembers an equivalent service fee, 5 ILCS § 315/6(g), the Supreme Court noted that, "This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights." *Janus*, 138 S.Ct. at 2469, n.6.

The State of Illinois compels Local 150 and its public sector members to speak for nonmembers and to associate with them. The IPLRA adopts the common labor relations regime of "exclusive representation." 5 ILCS 315/6(d) (ECF Doc. #67, Facts ¶¶ 6 at 2). As this Court observed in its follow-up decision last year (*Janus v. AFSCME Council 31*, 942 F.3d 352, 354 (7th Cir. 2019)):

> The principle of exclusive union representation lies at the heart of our system of industrial relations; it is reflected in both the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-165 (first enacted in 1926), and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (first enacted in 1935). In its quest to provide for "industrial peace and stabilized labor-management relations," Congress authorized employers and labor organizations to enter into agreements under which employees could be required either to be union members or to contribute to the costs of representation—so-called "agency-shop" arrangements. See 29 U.S.C. §§ 157, 158(a)(3); 45 U.S.C. § 152 Eleventh. Unions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, "fairly, equitably, and in good faith." H.R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4.

Described by Congress in the debates over the NLRA in 1935 as "Majority Rule," S. Rep. No. 74-573 at 47 (1935), so long as the union represents a majority of the employees in any given bargaining unit, the employees in the minority cannot represent themselves or choose another agent without first displacing the original. *See, e.g., Stahulak v. City of Chicago*, 184 Ill. 2d 176, 184 (1998) ("In exchange for benefits provided by collective bargaining agreement, [employee] gave up his individual right to bargain with the City"); *DelCostello v. Teamsters*, 462 U.S. 151, 161, n.14 (1983) (duty of fair representation exists because it is the national labor policy to allow a single organization to represent all employees in a unit "thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative.").

In order to protect the rights of the minority, the IPLRA adopted the duty of fair representation. 5 ILCS 315/10(b)(1)(ii). The exclusive bargaining representative cannot discriminate against nonmembers, and must represent them fairly, honestly, and in good faith. 5

ILCS 315/6(d), 10(b)(1)(ii); *Metro. All. of Police v. State Labor Relations Bd., Local Panel*, 345 Ill. App. 3d 579, 587 (1st Dist. 2003); *c.f.*, *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (a breach of the duty of fair representation occurs only when a union's conduct towards a bargaining unit member is "arbitrary, discriminatory, or in bad faith"); *Steele*, 323 U.S. at 202-203 (under the RLA, 45 U.S.C. § 151, *et seq.*, exclusive representative of employees has "duty to exercise fairly the power conferred upon it on behalf of all for whom it acts without hostile discrimination against them.").

Section 10(b)(1)(ii) of the IPLRA requires public sector unions to represent nonmembers fairly during collective bargaining and throughout any grievance procedure. 5 ILCS 315/10(b)(1)(ii); *see also Cintron v. AFSCME, Council 31*, No. S-CB-16-032, p. 1, 34 PERI ¶ 105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"). The same "fair representation" section of the IPLRA allows unions to negotiate provisions requiring payment of fair share fees that it can charge nonmembers for the cost of representation as a condition of employment. 5 ILCS 315/5(d)(e); 5 ILCS 315/10(b)(1)(ii). Under this fair share structure, each employee in the bargaining unit pays his or her equal share of the cost of representation, and no employee is forced to subsidize the representation of another employee. The proximity of these two subsections, and the legislative history, shows the obligations of fair representation and payment of fair share fees were mutual. *Janus* disrupts this mutuality and unconstitutionally shifts the cost of representing nonmembers to union members alone.

B. After *Janus*, Public Sector Unions Can Require Nonmembers to Pay for Services or Deny Them Representation.

Following the *Janus* decision, the cost of the Union's representation shifted from each employee in the public sector bargaining unit to only those who are union members. The presence

of one or more nonmembers in a bargaining unit does not increase the costs associated with negotiating a contract for the entire bargaining unit. There are certain fixed costs associated with negotiating a labor agreement and these costs do not increase if some members in the bargaining unit choose not to pay union dues. Employees and unions provide representation principally to negotiate an agreement. That process is conducted on a regular basis—customarily every three years, but not necessarily so. The timing of this expense is fixed by contract-expiration dates for which the union can budget.

In contrast, a union incurs variable costs representing a nonmember in grievance arbitration that it will never recoup. The arbitration of individual employee disciplinary grievances can be an expensive enterprise (ECF Doc. #67, Facts ¶ 18 at p. 5). Such cases can routinely exceed $5,000.00 in out-of-pocket costs alone (*id.*). Such costs are variable because the number of grievances in any given year is unpredictable. Whether to pursue any given grievance, how to staff it, and whether to settle are all within the union's discretion—subject to its duty of fair representation. In this scenario, a non-dues-paying member will receive statutorily mandated services from a union at no cost. This is the classic definition of a free-rider.

It is unconstitutional, however, for the union and its public sector members to be forced to subsidize nonmembers in resolving their individual disputes. Post-*Janus*, nonmembers are taking the position that unions are now forced to represent them under penalty of an unfair labor practice proceeding (ECF Doc. #76, Facts § 19, at p. 6, App. at 19). Forced representation of public sector nonmembers in an arbitration proceeding violates the First Amendment rights of the union and its members. By statutorily requiring the Union to represent nonmembers via Section 10(b)(1)(ii) of the IPLRA, the members and/or Union would be forced to subsidize the speech of the nonmembers in the bargaining unit. These free-riders increase the financial burden on dues-paying members

and adversely affect the members' ability to pursue collective efforts. The alternative is to reduce services as revenues decline. But this too violates the rights of the Union and its members by burdening their speech.

Local 150 fully intends to honor its obligations as the exclusive representative of the employees it represents in negotiating contracts for its public sector units which apply equally to everyone (ECF Doc. #67, Facts ¶ 22, at p. 6). If Section 10(b)(1)(ii) of the IPLRA were struck down as unconstitutional at least with respect to grievance-processing on behalf of free-riding nonmembers, Local 150 and its members would be permitted to exercise freely their right to speak and associate without the consequence of being penalized for violating the IPLRA.

The Supreme Court's suggested "less restrictive alternative" is an appropriate way to avoid the Constitutional problem presented by the IPLRA's duty of fair representation provisions. "Individual nonmembers could be required to pay for [representation in disciplinary matters] or could be denied union representation altogether." *Janus*, 138 S.Ct. 2468-2469. Now that the fair share fee component of the statute has been eliminated, the reciprocal requirement of fair representation of nonmembers—at least with respect to grievance-processing for free—should likewise fall. The result would be a regime in which unions would only be forced to represent dues-paying members; nonmembers get the services for which they pay.

C. The Right of Individual Employees to Pursue Their Own Grievances Is an Exception to Exclusive Representation.

The Supreme Court's distinction in *Janus* between the obligations of an exclusive bargaining representative in contract negotiations and grievance-handling is consistent with the IPLRA and longstanding historical precedent. Section 6(b) of the IPLRA expressly grants individual employees the right to advance grievances through the contractual grievance procedure culminating in binding arbitration independent of the union. 5 ILCS 315/6(b). It states:

> Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.

This provision is based upon historical precedent found in the RLA, as well as the NLRA. The RLA guarantees to individual employees the right to progress their own grievances to arbitration without their union's consent and without their union's representation. 45 U.S.C. § 153, First (i), (j); *Essary v. Chicago & N.W. Ry. Co.*, 618 F.2d 13, 17, n.6 (7th Cir. 1980) (employee ability to appeal grievance to the Adjustment Board himself distinguishes case from *Vaca* where union has "sole power to invoke the stages of the grievance procedure").

Similarly, Section 9(a) of the NLRA provides that: "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect," and the bargaining representative is allowed to be present. 29 U.S.C. § 9(a). According to the NLRB, in *Hughes Tool Co.*, 56 NLRB 981, 982-983 (1944):

> We interpret the proviso to Section 9(a) of the Act to mean that individual employees and groups of employees are permitted "to present grievances to their employer" by appearing in[sic] behalf of themselves—although not through any labor organization other than the exclusive representative—at every stage of the grievance procedure, but that the exclusive representative is entitled to be present and negotiate at each such stage concerning the disposition to be made of the grievance. If, at any level of the established grievance procedure, there is an agreement between the employer, the exclusive representative, and the individual or group, disposition of the grievance is thereby achieved. Failing agreement of all three parties, any dissatisfied party may carry the grievance through subsequent machinery until the established grievance procedure is exhausted.

Such provisions are also common to state public labor relations laws throughout the United States. *See, e.g.*, Minnesota, Minn. Stat. Ann. § 176.16 ("provided, that any individual employee or group

of employees shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing."); Washington, Wash. Rev. Code Ann. § 41.56.080 ("PROVIDED, that any public employee at any time may present his or her grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative…"); *see also Cone v. Nevada Service Employees Union/SEIU Local 1107*, 116 Nev. 473, 477-478 (2000) (exclusive representative status does not prohibit unions from charging non-union members service fees for individual representation; implicit in statute which authorizes individual to forge union representation and act on his own behalf is that he pay for his own grievance).

Modeled after the NLRA as it is, the IPLRA makes the rights of individual employees explicit: "Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization." 5 ILCS 315/6(b). "Nothing in this Act" obviously includes the union's exclusive representative status.[3] *Janus* reinforces this right not to associate with the union by giving it First Amendment protection. That right, on behalf of the union and its members, is reciprocal.

The ability of individual employees to advance grievances themselves is therefore an exception to the exclusive representation provision of the IPLRA. In their discussion of whether a breach of the duty of fair representation would constitute an unfair labor practice under Section 6(d) of the IPLRA, the Whiteside commentators suggested that "a factor in that determination would be whether the employee has the right to invoke grievance arbitration independently of the exclusive representative." Whiteside, *supra*, at 923. They concluded that, "If employees are

[3] This is consistent with post-*Janus* advice offered by the Illinois Attorney General's office. In the Press Release issued July 20, 2018, the Attorney General stated that "*Janus* does not change any of the other rights and obligations regarding public and educational employment under Illinois law" (ECF Doc. #72, Additional Facts ¶ 1, Ex. B, at p. 1).

granted independent access to the grievance resolution process it is less likely that an unwarranted refusal by a representative to seek redress of an employee's grievance would amount to an unfair labor practice." *Id.*

The Illinois commentators were correct in 1984 when they suggested individual employee access to the grievance procedure made it "less likely that an unwarranted refusal" by the union to process an employee's grievance would amount to an unfair labor practice for breach of the duty of fair representation. The IPLRA already authorizes Illinois unions to refuse to process unmeritorious grievances. 5 ILCS 315/6(d). So too does the federal common law. *Vaca*, 386 U.S. at 190. And while in *Vaca* the Supreme Court extended the federal duty of fair representation to the union's handling of grievances, its formulation that unions could not refuse to process grievances for reasons that were "arbitrary, discriminatory, or in bad faith" is consistent with a refusal to process grievances for free.

Under Illinois law, the public sector exclusive bargaining representative cannot discriminate against nonmembers, and must represent them fairly, honestly, and in good faith. 5 ILCS 315/6(d), 10(b)(1)(ii); *Metro. All. of Police,* 345 Ill. App. 3d at 587; *c.f.*, *Vaca*, 386 U.S. at 190 (a breach of the duty of fair representation occurs only when a union's conduct towards a bargaining unit member is "arbitrary, discriminatory, or in bad faith"). After *Janus*, a public sector union's refusal to process a grievance on behalf of a free-riding nonmember can no longer breach its duty of fair representation ("DFR").

As used in DFR jurisprudence, a decision is "arbitrary" if it is outside the "wide range of reasonableness" afforded union decision-makers. *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 338 (1953). Certainly, a union can take into account the costs of processing grievances in its decisions to pursue them—costs imposed on the union's treasury itself funded by member dues. *See Moore*

v. Sun Beam Corp., 459 F.2d 811, 820 (7th Cir. 1972). Assessing whether costs of representation are reasonable is routinely done by lawyers and courts in fee-shifting contexts. *E.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (the "lodestar" method of calculating reasonable attorney's fees is the market rate of attorney fees multiplied by the reasonableness of hours expended on the matter.). Basing a decision on whether the individual grievant has paid for the union's services is not unreasonable or in any way arbitrary.

The "discrimination" forbidden under the DFR standards is, at its roots, invidious discrimination. *See, e.g., Steele*, 323 U.S. at 199-201 (prohibiting discrimination based on race); *see also Roberts*, 468 U.S. at 623 (freedom not to associate outweighed by gender discrimination). In *Steele*, the Supreme Court's focus was on the obligation of the union as the exclusive representative not to discriminate based upon race of nonmembers in negotiating a contract. 323 U.S. at 199. "Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent, but wholly from the command of the Act." *Id*. Hence, the Court explained (*id.* at 201):

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their intersts[sic], or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.

It would defeat the purpose of the RLA to avoid "any interruption of commerce" or "the operation of any carrier engaged therein," moreover, "if a substantial minority of the craft were denied the right to have their interests considered at the conference table." *Id.* at 199-200. The Court added, "if the final result of the bargaining process were to be to sacrifice of the interests of the minority by the action of the representation of the majority…the only recourse of the minority would be to

strike, with the attendant interruption of commerce, which the Act seeks to avoid." *Id.* at 200; *see also Vaca*, 386 U.S. at 191-192 (individual employee has no absolute right to have grievances taken to arbitration, "the most costly and time consuming step in the grievance procedure").

There is nothing unlawfully discriminatory about charging public sector nonmembers the cost of representing them in grievances. Members' dues in this context are analogous to insurance premiums; members may never need the union's representation in an individual grievance but reap the advantages of pooled resources when they do and peace of mind if they do not. Nonmembers can assume the entire risk, hoping they never need to process a grievance at all, or paying for it themselves as is their right under the IPLRA. But if they want the union's help, it is not unlawful discrimination to make them pay for it like everybody else.

Nor is it "bad faith" to assess the costs of representation in grievance-handling to nonmembers. "Bad faith" in the DFR context usually connotes dishonesty or deception on the part of the union representative. *Employee and Union Member Guide to Labor Law*, § 11:7 at 11-20 (Thomson Reuters, Rel. 32, 5/2019). The terms of such representation can easily be presented to nonmembers to make an informed, rational economic decision. Categories of out-of-pocket costs such as court reporters and arbitrators' per diem fees are known in advance. Fixed costs such as staff time, attorneys' fees, and other overhead can be reduced to hourly fees. Local 150's experience allows it to estimate the costs of a termination arbitration at about $5,000.00 plus staff time (ECF Doc. #67, Facts ¶ 18, at p. 5). Assessing such charges on nonmembers—advertised upfront and verified by audit later—are consistent with fair business practices generally and in no way amount to "bad faith."

The IPLRA imposes upon exclusive representatives a duty to represent all bargaining unit members fairly, as that concept is informed by private sector caselaw. Whiteside, *supra* at 923;

5 ILCS 315/6(d). Federal law posits that employees have no "absolute right" to have grievances taken to arbitration. *Vaca*, 386 U.S. at 191-192. The IPLRA, moreover, expressly recognizes the right of exclusive representatives "to refuse to process grievances of employees that are unmeritorious." 5 ILCS 315/6(d); and requires a showing of "intentional misconduct" in unfair labor practice cases charging a breach of the DFR. 5 ILCS 315/10(b)(1)(ii). Individual employees can pursue their own grievances without the help of the union. 5 ILCS 315/6(b). After *Janus*, the public sector union need not pay for those grievances.

D. The *Janus* Alternative Is an Accommodation to Unions for the Deprivation of Fair Share Fees and Does Not Undermine Exclusive Representation.

The District Court's reliance on *Minnesota v. Knight*, 465 U.S. 271 (1984), *Hill v. Service Employees International Union*, 850 F.3d 861 (7th Cir. 2017), cert. denied, 138 S.Ct. 446 (Nov. 13, 2017), and *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019), is misplaced. In its decision granting the State summary judgment, the District Court said (ECF Doc. #81, App. at 4):

> In *Knight*, the Supreme Court held that Minnesota's system of exclusive union representation did not violate First Amendment speech or associational rights of non-union members. *Id.* at 288. Based on *Knit*[sic], the Seventh Circuit has concluded "the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny." *Hill v. Service Employees Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017). *Knight* directly controls Local 150's arguments and is still binding upon the lower courts until the Supreme Court overrules it. *See, e.g., Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (citing *Agostini v. Felton*, 521 U.S. 203, 237-38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

In *Knight*, the Supreme Court held that "a Minnesota law giving elected bargaining units exclusive power to 'meet and confer' with employers did not interfere with the employees' First Amendment associational rights. [465 U.S.] at 273." *Hill*, 850 F.3d at 864. In *Hill*, this Court explained (*id.*):

> Similarly, here, appellants do not need to join the SEIU or financially support it in any way. They are also free to form their own groups, oppose the SEIU, and present

> their complaints to the State. Thus, under *Knight*, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny.

In *Janus*, the Supreme Court said, "In simple terms, the First Amendment does not permit the government to compel a person to pay for another's speech just because the government thinks that speech furthers the interests of the person who does not want to pay." 138 S.Ct. at 2467. The Court observed that the state requirements that a union serve as exclusive bargaining agent for its employees was "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 2478. But the Court added, "we simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views."[4] *Id.* at 2468.

Again, Local 150 is not challenging the principle of exclusive representation or its codification in 5 ILCS 315/6(c). The Union's challenge is to the duty of fair representation as it applies to individual employee grievances. Because individual employees are allowed by statute to present their own grievances, the Union's representation in this respect is not exclusive. This exception to exclusive representation should allow unions to decline to represent public sector nonmembers for free. Denying nonmembers the experience and skill of union representation in grievance-handling such as in disciplinary matters or charging them for such services is the

[4] Hence, like this Court in *Hill*, the federal courts have consistently rejected post-*Janus* challenges to exclusive representation based upon *Knight* and *Janus* itself. *See., e.g., Montele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019) (the court explained it was "unwilling to make [the] leap" that *Janus* overruled *Knight sub-silencio*, especially where the same passage in *Janus* relied on by nonmembers "goes on to expressly affirm the propriety of mandatory union representation."), *cert. pending*, *sub nom. Miller v. Inslee*, Case No. 18-1492; *Grossman v. Hawaii Government Employees Ass'n/AFSCME Local 152*, 382 F. Supp. 3d 1088 (D. Haw. 2019) ("Nothing in the *Janus* reasoning…calls into question the holding in *Knight* regarding exclusive representation."); *O'Callaghan v. Regents of the University of California*, 2019 WL 2635585 at *4 (C.D. Cal. 2019) (*Janus* suggests that state interest in labor peace "can still justify a union acting as an exclusive representative for members and nonmembers alike.").

solution to the free-rider problem "significantly less restrictive of associational freedoms" suggested by the Court in *Janus*. 138 S.Ct. at 2468-2469.

The historic linkage of compensating unions for their services as the solution for the free-rider problem demands this result. The Supreme Court's extensive discussion of the legislative history of the Taft-Hartley Amendments to the NLRA amply demonstrates that abolition of the "closed shop" was a key concern of the members of Congress. *Communications Workers of America v. Beck*, 487 U.S. 735, 747-748 (1988).[5] Nevertheless, that legislative history also demonstrates that Congress was "equally concerned" that its efforts would permit "free riders." *Id.* at 748. As the Supreme Court explained in *NLRB v. General Motors Corp.*, the Taft-Hartley Amendments "were intended to accomplish twin purposes" (373 U.S. 734, 740-741 (1963)):

> On the one hand the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision, "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their fair share of the costs"…[The] amendments were intended only to remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating free riders the right to continue such arrangements.

As Senator Taft explained (93 Cong. Rec. 3837, Leg. Hist. 1010), the legislation "in effect…say[s] that no one can get a free ride in such a shop. That meets one of the arguments for a union shop. The employee has to pay the dues." *Beck*, 487 U.S. at 749, n.5.

[5] Congress considered two distinct vehicles to prohibit the closed shop: amendments to the NLRA's § 8(a)(3) proviso that allowed such contracts; and so-called "Right-to-Work" laws which authorized states to pass legislation prohibiting them. Many states had already passed laws prohibiting the closed shop. In the run-up to the passage of Taft-Hartley, several more did so, many under the banner of the "Right-to-Work." *See, e.g.*, Arizona Ban on Closed Shop, 20 LRRM 3005 (1947); Iowa Ban on Closed Shop, 20 LRRM 3007 (1947); Virginia Anti-Closed Shop Law, 19 LRRM 3023 (1947); Tennessee Anti-Closed Shop Law, 19 LRRM 3034 (1947); North Dakota Ban on Closed Shop, 19 LRRM 3045 (1947); Georgia Ban on Closed Shop, 19 LRRM 3045 (1947).

In *Abood*, the Supreme Court ruled that unions representing public employees could constitutionally assess nonmembers an "agency fee" for representing them in collective bargaining. *Janus*, 138 S.Ct. at 2460-2461. While the unions could not require nonmembers to support political causes with which they disagreed, the First Amendment did not bar compelled payments of fees to be used in support of collective bargaining, contract-administration, and enforcement. *Id.*

The Court's decision in *Abood* became the fulcrum upon which the rights of dissenting members of various organizations were balanced against those of the organization majority. In *Beck*, the court sidestepped the First Amendment question and focused on a statutory construction of NLRA Section 8(a)(3). *Beck*, 487 U.S. at 761. In finding that its nearly identical language to Section 2, Eleventh, of the RLA prohibited the expenditure of compelled fees on political causes, the court nevertheless found that both were "designed to remedy inequities posed by 'free-riders' who would otherwise profit from the Taft-Hartley Act's abolition of the closed shop." 487 U.S. at 753-754. Hence, compelled payment of fair share fees for expenditures "germane to collective bargaining" become the model for labor relations in both the private and public sector. *See also Marquez v. Screen Actors Guild*, 525 U.S. 33, 46 (1998) ("After we stated that the statutory language [of NLRA § 8(a)(3)] incorporates an employee's right to pay for only representational activities," the Court cannot fault unions for framing union security clauses in that language). Illinois expressly relied on *Abood* in linking fair share payments to the duty of fair representation in the IPLRA.

When the Supreme Court found a new constitutional right in *Janus*, it gave short shrift to the Taft-Hartley compromise that required the payment for services received regardless of membership. Recognizing this dramatic departure, it offered its "less intrusive" alternative: unions

should be allowed to charge for their representational services in processing grievances or decline to represent nonmembers altogether. Simple fairness requires this Court to accept that alternative as it applies to the IPLRA.

CONCLUSION

For all the above reasons, the Court should reverse the decision of the District Court and direct it to enter judgment for Local 150.

Dated: January 21, 2020

Respectfully submitted,

By: /s/ Dale D. Pierson
One of the Attorneys for Plaintiffs-Appellants

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs-Appellants furnish the following in compliance with F.R.A.P Rule 32(a)(7):

1. I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font.

2. The length of this brief is 8,706 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (the corporate disclosure statement, tables of contents and citations, and certificates).

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on January 21, 2020, he electronically filed the foregoing with the Clerk of Court using the CM/CM/ECF system, which sent notification to the following:

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CIRCUIT RULE 30(D) STATEMENT

I certify that the short appendix contained in the Brief of Plaintiffs-Appellants contains all materials required by parts (a) and (b) of Circuit Rule 30.

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REQUIRED SHORT APPENDIX

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

JAMES M. SWEENEY, et. al.,	)	
	)	
Plaintiffs,	)	Case No. 18-cv-1362
	)	
v.	)	Judge Sharon Johnson Coleman
	)	
KWAME RAOUL, in his official capacity as Attorney General for the State of Illinois, et al.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs James M. Sweeney and the International Union of Operating Engineers, Local 150, AFL-CIO (collectively "Local 150") bring this lawsuit against defendants Attorney General of Illinois Kwame Raoul and Executive Director of the Illinois Labor Relations Board ("ILRB") Kimberly Stevens, alleging that part of the Illinois Public Labor Relations Act ("IPLRA") violates their First Amendment rights in light of the Supreme Court's ruling in *Janus v. AFSCME, Council 31*, ___ U.S. ___, 138 S.Ct. 2448, 201 L.E.2d 924 (2018). The parties have filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). For the reasons explained below, the Court grants defendants' motion and denies plaintiffs' motion.

Background

The IPLRA is a set of administrative laws under which the ILRB regulates labor relations between public employers and employees in Illinois. Under the IPLRA, if the majority of the employees in a bargaining unit vote to be represented by a union, the ILRB designates that union as the exclusive representative for collective bargaining purposes. *See* 5 ILCS 315/6(c). In exchange for conferring this exclusivity, the IPLRA requires that public unions must represent all public employees in a bargaining unit, including those who are not union members. *See* 5 ILCS 315/6(d).

Before *Janus*, the IPLRA authorized public sector unions to charge non-union members agency fees reflecting a proportionate share of union dues. *See* 5 ILCS 315/6(e).

Local 150 is a labor organization representing certain Illinois public sector employees. More specifically, Local 150 has organized and represented employees in public works, sewer and water, parks, and other departments in Illinois municipalities and governmental units. Currently, Local 150 represents approximately 3,300 employees in about 133 bargaining units. Sweeney is the President-Business Manager of Local 150 and a member of the union.

Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The parties' summary judgment motions present only questions of law.

Discussion

In *Janus*, the Supreme Court held that compulsory fair-share or agency fee arrangements under the IPLRA violated the First Amendment "free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. Local 150 now argues that after *Janus*, the designation of Illinois public employee unions as the exclusive representative for a bargaining unit, and the concomitant duty of Illinois unions to represent nonmembers fairly, is also unconstitutional under the First Amendment. Specifically, Local 150 argues that the reasoning in *Janus* allows unions to refuse to represent non-union members because "unions and union members have the right under the First Amendment to refuse to associate with free-riding nonmembers. These free-riders increase the financial burden on dues-paying members and adversely affect the members ability to pursue collective efforts." In making this argument,

Local 150 asks the Court to read *Janus* too broadly and ignore recent Seventh Circuit precedent.

At issue in *Janus* was the IPLRA's agency-fee scheme charging non-union employees dues—not a union's exclusive representation under the IPLRA. In discussing agency fees, the *Janus* Court noted that the "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees" are not "inextricably linked." *Id.* at 2465 (citing *Harris* v. *Quinn*, 573 U.S. 616, 649, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014)). The *Janus* Court further elaborated:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.... "[T]he State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.

Id. at 2478 (citations and quotation marks omitted). Based on this passage, the Ninth Circuit has concluded that "*Janus* is also clear that the degree of First Amendment infringement inherent in mandatory union representation is tolerated in the context of public sector labor schemes." *Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019); *see also Janus*, 138 U.S. at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.").

Meanwhile, on remand from the Supreme Court, Mark Janus sought damages in the amount of the fair-share or agency fees he paid to his union prior to the Supreme Court's *Janus* decision. In affirming the district court and rejecting this request, the Seventh Circuit thoroughly analyzed the Supreme Court's *Janus* holding and concluded that "the only right the *Janus*[] decision recognized is that of an objector not to pay *any* union fees." *Janus v. AFSCME, Council 31*, ___ F.3d ___, 2019 WL 5704367, at *4 (7th Cir. Nov. 9, 2019) (emphasis in original). In coming to this conclusion, the Seventh Circuit noted that after *Janus*, "even with payments of zero from objectors, the union still

enjoys the power and attendant privileges of being the exclusive representative of an employee unit." *Id.* When discussing the principles behind exclusive union representation, the Seventh Circuit noted that "[u]nions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, 'fairly, equitably, and in good faith.'" *Id.* at *1 (citation omitted).

Because *Janus* did not change a union's exclusive representation obligations under the IPLRA, the Court is left with controlling Supreme Court precedent enunciated in *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), which *Janus* did not overrule. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (The *Janus* "decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue."). In *Knight*, the Supreme Court held that Minnesota's system of exclusive union representation did not violate First Amendment speech or associational rights of non-union members. *Id.* at 288. Based on *Knit*, the Seventh Circuit has concluded "the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny." *Hill v. Service Employees Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017). *Knight* directly controls Local 150's arguments and is still binding upon the lower courts until the Supreme Court overrules it. *See, e.g., Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (citing *Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

Last, Local 150's argument that it has First Amendment rights not to be compelled to support non-members' speech based on the history and development of American labor relations is not persuasive, especially in light of the Seventh Circuit's recent discussion of the principles underlying exclusive union representation in *Janus*. *See Janus*, 2019 WL 5704367, at *1. As to Local 150's free rider arguments, *Janus* itself concluded that "avoiding free riders is not a compelling interest." *Id.* at 2466; *see also Janus*, 2019 WL 5704367, at *4 ("The Court's analysis focused on the

union rather than the nonmembers: the question was whether requiring a union to continue to represent those who do not pay even a fair-share fee would be sufficiently inequitable to establish a compelling interest, not whether requiring nonmembers to contribute to the unions would be inequitable."). Therefore, Local 150's argument that Illinois' exclusive-bargaining-representative scheme is unconstitutional under *Janus* fails.

Conclusion

Based on the foregoing, the Court grants defendants' summary judgment motion [68] and denies plaintiffs' summary judgment motion [66]. Plaintiffs' third amended complaint is dismissed with prejudice. Civil case terminated.

IT IS SO ORDERED.
Date: 11/12/2019

Entered: 
SHARON JOHNSON COLEMAN
United States District Court Judge

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

JAMES M. SWEENEY and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,	Case No. 18-cv-1362
Plaintiffs,	Judge Sharon Johnson Coleman
v.	
LISA M. MADIGAN, in her official capacity as Attorney General for the State of Illinois, and KIMBERLY STEVENS, in her official capacity as Executive Director of the Illinois Labor Relations Board,	
Defendants.	

MEMORANDUM OPINION AND ORDER

The plaintiffs, James M. Sweeney and the International Union of Operating Engineers, Local 150, AFL-CIO, bring this action against Attorney General of Illinois Lisa Madigan and Executive Director of the Illinois Labor Relations Board Kimberly Stevens, alleging that a portion of the Illinois Public Labor Relations Act violates their First and Fifth Amendment rights in light of the Supreme Court's ruling in *Janus v. American Federation of State, County, and Municipal Employees*, ___ U.S. ___, 138 S.Ct. 2448, 201 L.E.2d 924 (2018). The defendants now move to dismiss the plaintiffs' claims for lack of subject matter jurisdiction. For the reasons set forth herein, that motion [31] is granted in part and denied in part.

Background

The Illinois Public Labor Relations Act is a set of administrative laws under which the Illinois Labor Relations Board regulates labor relations between public employers and employees,

including collective bargaining. Under the IPLRA, a labor union may become the "exclusive representative" for the employees of a particular bargaining unit for purposes of collective bargaining. 5 ILCS 315/6(c). In exchange for conferring this exclusivity, the IPLRA requires that exclusive representatives must represent all public employees in a bargaining unit, including those who are not union members. 5 ILCS 315/6(d). To offset this burden, IPLRA allowed a labor union that is an exclusive representative to charge non-member bargaining unit employees agency fees, commonly described as "fair share" fees, to compensate for activities germane to the collective bargaining process. 5 ILCS 315/6(e). The sole exception to this requirement is in the case of non-members whose refusal to pay union dues is based on bona fide religious tenants, in which case the IPLRA provides for alternative payments to agreed upon charitable organizations. 5 ILCS 315/6(g). The IPLRA also defines what constitutes an unfair labor practice and imposes restrictions on the scope of matters subject to collective bargaining. 5 ILCS 315/10(b)(1)(i); 5 ILCS 315/4.

Past Supreme Court precedent permitted the imposition of agency fees such as those permitted under Illinois law. *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). *Janus*, however, overturned that precedent, holding that the imposition of agency fees did not satisfy the exacting scrutiny standard. In the wake of *Janus*, the plaintiffs assert that they will be required to represent non-members who refuse to compensate the Union for its representation. The plaintiffs seek declaratory judgment that the sections of the ILPRA requiring them to represent non-members without compensation violate the First Amendment, that the requirements that they represent non-members in the absence of a fair share agreement and those non-members with religious objections to paying the fair share fee violates the First and Fifth Amendments, and that the limits on the scope of collective bargaining violates their First Amendment rights.

Legal Standard

A Rule 12(b)(1) motion seeks dismissal of an action over which a court allegedly lacks subject-matter jurisdiction.

> While it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution, we accept as true all of the allegations contained in a complaint.... Likewise, subject-matter jurisdiction must be secure at all times, regardless of whether the parties raise the issue, and no matter how much has been invested in a case.

Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853 (7th Cir. 2012) (internal citations omitted). In order to determine whether subject matter jurisdiction in fact exists, this Court may properly look beyond the allegations in the complaint and consider whatever evidence has been submitted on the issue. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993); *see also Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).

Discussion

Under Article III of the United States Constitution, federal courts cannot render advisory opinions where a case or controversy does not yet exist. *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992). A case is not ripe for resolution when it is based on hypothetical, speculative, or illusory disputes as opposed to actual and concrete conflicts. *Id.* The rationale of the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In assessing whether a case is ripe for adjudication, the Court considers the fitness of the issues for judicial decision and the hardship to the parties of withholding

judicial consideration. *Texas v. United States*, 523 U.S. 296, 300–01, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998).

The defendants appear to contend that the plaintiffs' claims are not ripe because there is no allegation that the Union plans to engage in conduct that would trigger the filing of an unfair labor practice claim against it for violating the duty of fair representation and no indication how the state Labor Board or subsequent reviewing courts would rule on such a claim. It is well-established, however, that challenges to unconstitutional regulations are ripe for challenge prior to their enforcement when the injury in question is certainly impending. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923)).

In a somewhat similar vein, in order to have standing to sue a plaintiff must be able to show (1) that she has suffered an "injury in fact" that is both concrete and particularized and actual or imminent, (2) that the injury is fairly traceable to the challenged action, and (3) that the injury is likely and not just speculative that a favorable decision will redress the injury. *Sierra Club v. Franklin County Power of Illinois, LLC,* 546 F.3d 918, 925 (7th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Here, the plaintiffs primarily contend that, as a result of *Janus*, the agency fee incorporated into the IPLRA will no longer be enforceable. Because the remainder of that statute, including the duty to provide fair representation to non-members, remains enforceable, the plaintiffs assert that they, and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights.[1] Indeed, the provisions of the IPLRA in question expressly require such speech and expressly limit the plaintiffs' ability to receive reimbursement for

[1] The defendants briefly note that *Janus* discussed the relationship between fair share fees and the duty to provide fair representation to all bargaining unit members. Although such an argument would be relevant to the merits of the plaintiffs' claims, the defendants' conclusory aside is not sufficient to place that portion of *Janus* at issue in the present ruling.

that speech to the fair share payments that the Supreme Court ruled unconstitutional in *Janus*. The plaintiffs' alleged injury is accordingly far from speculative. Although the defendants claim that any injury is hypothetical at this juncture, they argue that the duty of fair representation of non-members remains binding upon the plaintiffs, and thus effectively concede that prosecution would result if the plaintiffs ended their compliance with the statute. Although it may be true that nothing has changed except for the Supreme Court's decision in *Janus*, that decision altered the nature of the plaintiffs' preexisting statutory obligations and created the imminent constitutional injury alleged to exist here. This injury is sufficient to establish both that standing exists and that there is a dispute ripe for resolution with respect to the plaintiffs' claims arising directly from their duty of representation. *See Lujan*, 504 U.S. at 560–61; *Babbitt*, 442 U.S. at 298.

The plaintiffs, however, also challenge the limitations on the scope of collective bargaining that Illinois law imposes in light of Janus' supposed holding that all union speech is inherently political. The IPLRA provides that employers are required to bargain collectively about policy matters directly affecting wages, hours, and terms and conditions of employment, but not about "matters of inherent managerial policy," such as "the functions of the employer, standards of services, its overall budget, the organizational structure, and the selection of new employees." 5 ILCS 315/4. The plaintiffs contend that, in the wake of *Janus*, these restrictions are no longer constitutionally tenable because they impose a constraint on the scope of the plaintiffs' speech. This claim, unlike those previously discussed, is not ripe for pre-enforcement consideration. The plaintiffs' constitutional challenges to the duty of fair representation derive directly from undisputed changes to the operative statutory scheme that fundamentally alter the plaintiffs' operations. The present claim, by contrast, stems from dicta providing the plaintiffs with the opportunity to advance novel legal arguments and does not reflect changed factual circumstance. Accordingly, the Court does not believe that it is appropriately the subject of a pre-enforcement challenge.

The Court turns its attention to the arguments presented in the amicus curiae brief filed by Brian Trygg. Trygg argued that the claims based on the anticipated outcome of *Janus* are unripe because the plaintiff's allegations are hypothetical in nature. Because the operative complaint was filed before *Janus* was decided, it is true that the plaintiffs' allegations concerning *Janus* were speculative in nature, being based on the plaintiff's expectations as to the outcome of that case. When considering matters of jurisdiction, however, this Court may consider matters outside the pleadings. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993). *Janus* has been decided and its resolution substantially comports with the plaintiffs' expectations. Accordingly, the plaintiffs' claims are no longer speculative, even if the phrasing of the complaint is outdated in that respect.[2]

Trygg also presents a compelling point as to the plaintiffs' claims that are premised on IPLRA sections 6(e) and 6(g) (counts III and IV). Section 6(e) provides that exclusive representatives and bargaining organizations may enter into fair share arrangements. Section 6(g) contains the religious exemption that allows non-member employees with religious objections to make their service fee payments to non-religious charitable organizations.

The plaintiffs allege that these provisions, which require it to provide services and representation without receiving compensation, violate the Fifth Amendment Takings Clause and First Amendment Freedom of Association. Sections 6(e) and 6(g), however, both concern the implementation and collection of agency fees. *Janus* expressly held such fees to be unconstitutional, abrogating the portions of the IPLRA giving rise to the plaintiffs' claims. *Janus* thus renders those claims moot, depriving the plaintiffs of standing to pursue them. *See Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203,

[2] The Court appreciates the plaintiffs' zeal to pursue this case. Such enthusiasm, however, does not excuse the fact that, by rushing to file their complaint before *Janus* was decided, the plaintiffs have presented this Court with an ambiguous complaint and have made no effort to subsequently narrow it in light of the Supreme Court's ruling. The Court encourages the plaintiffs to seek leave to amend their complaint so that it may be brought up to date at the earliest opportunity.

89 S.Ct. 361, 21 L.Ed.2d 344 (1968)) (recognizing that a case becomes moot when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur); *see also Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (recognizing Supreme Court precedent establishing that the repeal, expiration, or amendment of challenged legislation ends the ongoing controversy and moots a plaintiff's claims). Although the plaintiffs' constitutional claims might be based on their duty of fair representation, that duty is not established by the provisions identified. Accordingly, the Court agrees with amicus curiae that Counts III and IV must be dismissed as moot considering the Supreme Court's holding in *Janus*.

As a final matter, the Court turns to the defendants' argument that the Attorney General is not a proper party to this case. The Eleventh Amendment generally bars actions in federal court against a state, state agencies, and state officials acting in their official capacities. *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007). Under the *Ex Parte Young* doctrine, however, a state official may be sued for prospective equitable relief based on ongoing violations of federal law. *Id.* (quoting *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997)). In order for such relief to be available, the state official must have "some connection" with the enforcement of the law or conduct being challenged. *Ex Parte Young*, 209 U.S. 123, 157, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

The defendants assert that the Attorney General has no prosecutorial authority over the IPLRA, which is enforced by the Illinois Labor Relations Board. The Attorney General, however, is responsible for prosecuting violations of Illinois Labor Relations Board orders and for seeking injunctive relief in Illinois' courts on behalf of parties complaining of Labor Act violations. Although tangential to the enforcement role of the Illinois Labor Relations Board, the Court considers these powers sufficient to establish a connection to the enforcement of the IPLRA. The

Attorney General, moreover, appears to have conceded the plaintiffs' argument on this point by failing to offer any opposition to it in reply brief. Accordingly, the Court declines to dismiss the Attorney General from this action.

Conclusion

For the foregoing reasons, the defendants' motion to dismiss [31] is granted in part and denied in part. The Court dismisses Counts III and IV to the extent that they are premised on the provisions of 5 ILCS 315/6(e) and (g), and dismisses the plaintiffs' claims premised on the restrictions on collective bargaining imposed by 5 ILCS 315/4. The defendants' motion to dismiss is denied in all other respects.

Date: 2/6/2019

Entered: 

SHARON JOHNSON COLEMAN
United States District Court Judge

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

James M. Sweeney, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18 C 1362
	)	
Kwame Raoul, *et al.*,	)	Judge Sharon Johnson Coleman
	)	
Defendants.	)	

DEFENDANTS' RESPONSES TO LOCAL 150'S STATEMENT OF UNCONTESTED MATERIAL FACTS

The Defendants, Kwame Raoul, Attorney General of Illinois, and Kimberly Stevens, Executive Director of the Illinois Labor Relations Board, hereby respond to Local 150's Statement of Uncontested Material Facts as follows. These responses are submitted solely for purposes of the summary judgment record.

1. Plaintiff Local 150 of the International Union of Operating Engineers, AFL-CIO ("Local 150" or the "Union"), is a labor organization and unincorporated association with its primary office in Countryside, Illinois (Second Amended Complaint ("SAC"), Doc. #21/Answer, Doc. #62, ¶ 4). Union Plaintiffs represent over 23,000 members, over 3,000 of whom are employees covered by the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/1, et seq. (SAC ¶ 4; Second Certification of James M. Sweeney dated July 17, 2019 ("Second Sweeney Cert.") ¶¶ 2, 6) (attached hereto as Exhibit A).

RESPONSE: Undisputed.

2. Plaintiff James M. Sweeney is the President-Business Manager of Local 150 and a member of the Union (SAC/Answer ¶ 3; Second Sweeney Cert. ¶¶ 1, 3).

RESPONSE: Undisputed.

3. Defendant Kwame Raoul is the Attorney General of the State of Illinois, tasked with the responsibility for enforcing Illinois law and assisting local prosecutors (SAC/Answer ¶

5). Defendant Kimberly Stevens is the Executive Director of the Illinois Labor Relations Board (ILRB) which is responsible for enforcing and resolving disputes arising under the IPLRA, 5 ILCS 315/5 (SAC/Answer ¶ 6).

RESPONSE: Undisputed.

4. The IPLRA is a set of administrative laws by which the ILRB "regulates labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours, and other conditions of employment, and resolution of disputes arising under collective bargaining agreements," 5 ILCS 315/2 (SAC/Answer ¶ 17).

RESPONSE: Undisputed that this is a partial quotation of the statute.

5. Under the IPLRA, a labor organization becomes the "exclusive representative" for the employees of a particular bargaining unit for purposes of collective bargaining when it is "designated by the ILRB as a representative of the majority of [a unit of] public employees," or "recognized as such by a public employer," 5 ILCS 315/6(c) (SAC/Answer ¶ 18).

RESPONSE: Undisputed.

6. The IPLRA requires labor organizations deemed the exclusive representative of public employees in a given bargaining unit to be "responsible for representing the interests of all public employees in the unit," 5 ILCS 315/6(d) (SAC/Answer ¶ 19). Moreover, as an exclusive representative, unions such as Local 150, owe a "duty of fair representation" to all employees in every bargaining unit they represent, 5 ILCS 315/10(b)(1)(ii) (SAC/Answer ¶ 20). Failure to honor this duty of fair representation is an unfair labor practice under the IPLRA. 5 ILCS 315/10(b)(1)(i)(ii) (SAC/Answer ¶¶ 20, 22).

RESPONSE: Undisputed.

7. The IPLRA authorized labor unions and the public employers of the employees the unions represented to negotiate clauses which "may include...a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and conditions of employment..." 5 ILCS 315/6(e) (SAC/Answer ¶ 21).

RESPONSE: Undisputed that the statute contains this provision.

8. In *Janus v. AFSCME Council 31*, 585 U.S. ___, 138 S.Ct. 2448 (June 27, 2018), the Supreme Court found that IPLRA provisions 5 ILCS 315/6(e) and (g), requiring employers to deduct fair share fees from non-members who have not consented to such deductions was unconstitutional. 138 S.Ct. at 2459-2460. As the Court explained, the IPLRA provisions which "forced [public employees] to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities...violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." *Id.*

RESPONSE: Defendants object. The statements in this paragraph are not "facts," rather they are legal characterizations. Undisputed that *Janus* declared the collection of fair share fees unconstitutional for public sector employees.

9. In about 1989-1990, Local 150 began organizing public employees outside the City of Chicago (Second Sweeney Cert. ¶ 5). It was the Union's experience that as communities in the Chicago suburbs and elsewhere in Illinois matured, they began to self-perform maintenance of roads, sewer and water systems, and a variety of other tasks which involved the operation of heavy construction equipment (*id.*).

RESPONSE: Undisputed.

10. Since 1989, Local 150 has organized and represented employees in the public works, sewer and water, parks, and other departments in municipalities throughout northern Illinois and northwest Indiana (Second Sweeney Cert. ¶6). Local 150 currently represents approximately 3,300 employees in about 133 bargaining units of public employees employed by municipalities and other units of local government (*id.*).

RESPONSE: Undisputed.

11. Local 150's staff assigned to represent public employees in the Union's Public Sector Department (also known as the Municipal Branch) include three attorneys whose primary responsibilities include litigation before state agencies including the Illinois Labor Relations Board and federal courts; contract negotiations with public employers; and arbitration of contract disputes (Second Sweeney Cert. ¶ 7). It also includes four Business Agents who represent employees in resolving day-to-day disputes, assisting employees in resolving grievances, and responding to employer requests (*id.*). The Public Sector Department also employs at least two clerical employees (*id.*). These staff members report to me as well as two other Officers of the Union working out of the Countryside Union Hall (*id.*).

RESPONSE: Undisputed. "Reports to me" refers to Mr. Sweeney.

12. The total cost of Local 150's Municipal Branch in 2018 was $5,083,445.00 (Second Sweeney Cert. ¶ 8). This includes employees' salaries and benefits; prorated costs of office space, utilities, and other charges; and automobiles used by staff to service the public employee bargaining units (*id.*).

RESPONSE: Undisputed.

13. Throughout the time Local 150 has represented public employees in Illinois, it has negotiated union security clauses into the collective bargaining agreements with public employers (Second Sweeney Cert. ¶ 9, Attachments 1, 2). Those provisions typically read (*id.*):

> **SECTION 18.2 Fair Share**
>
> Any present employee who is not a member of Local Union #150 shall, as a condition of employment, be required to pay a Fair Share (not to exceed the amount of Union dues) of the cost of the collective bargaining process, contract administration in pursuing matters affecting wages, hours, and other conditions of employment, but not to exceed the amount of dues uniformly required by members. All employees hired on or after the effective date of this Agreement and who have not made application for membership shall, on or after the thirtieth (30th) day of their employment, also be required to pay a Fair Share as defined above.

RESPONSE: Undisputed.

14. Since the decision by the Supreme Court last year in *Janus v. AFSCME Council 31*, 585 U.S. ___, 138 S.Ct. 2448 (June 27, 2018), approximately 30 public employees represented by Local 150 have resigned their membership in the Union and/or ceased paying fair share fees formerly required of them under state law which is now determined to be unconstitutional (Second Sweeney Cert. ¶ 10).

RESPONSE: Undisputed.

15. The *Janus* decision eliminating fair share agreements requires union members to pay more than their proportionate share for services in order to subsidize the non-member free-riders who no longer have to contribute to the cost of representation (SAC ¶ 32).

RESPONSE: Disputed as to the legal conclusion "free-riders" and that union members "pay more than their proportionate share." These arguments have been litigated in *Janus* and cannot be re-litigated in this case and are improper in a LR 56 statement.

16. The staff needed to negotiate and administer collective bargaining agreements in Local 150's public sector bargaining units for all employees it represents is unchanged after the *Janus* decision (Second Sweeney Cert. ¶¶ 7, 11).

RESPONSE: Undisputed. However, the cited references do not explicitly say "the staff remains unchanged."

17. Full dues and fees paid by public sector members to Local 150 averaged $1,680.00 for the year of 2018. The dues or fair share fees lost to Local 150 easily exceed $50,000.00 per year. Nevertheless, despite this loss of revenue, Local 150's staff remains unchanged and its costs have incrementally increased (Second Sweeney Cert. ¶ 11).

RESPONSE: Undisputed. However, the cited references do not explicitly say "the staff remains unchanged."

18. Processing individual employee grievances up to and including arbitration of such disputes (as is required under state law), however, is another matter (Second Sweeney Cert. ¶ 14). Arbitration cases are expensive, time-consuming endeavors (*id.*). For example, Local 150 has currently scheduled five arbitration cases against the Algonquin Road District challenging the termination of five employees (*id.*). The Arbitrators in these cases all charge per diem fees of between $1,000.00 and $1,600.00 per day (on average $1,400.00 per day) (*id.*). In Sweeney's experience, it is rare for an arbitration case to entail less than two or three days total (*id.*). Local 150 always files a brief in a termination case, for which the Union pays for a court reporter's transcript (*id.*). Those costs typically exceed $1,000.00 for a one-day hearing (*id.*). Hence, the out-of-pocket costs of a single arbitration case can easily exceed $5,000.00 not including staff time (*id.*).

RESPONSE: Undisputed that the union is required to process grievances in appropriate cases, but is not required to do so in every case where a bargaining unit member makes this request. Disputed as to the characterizations that arbitrations are always "expensive" and "time consuming." Undisputed as to the remaining statements in this paragraph.

19. Resignation letters, received by President-Business Manager James M. Sweeney's office from public employees represented by Local 150, include, in part, the request that the Union "immediately cease deducting all dues, fees, and political contributions from my wages, as is my constitutional right in light of the U.S. Supreme Court's ruling in *Janus v. AFSCME*." (Second Sweeney Cert. ¶ 12, Attachments 3, 4). These letters also include the demand that despite their refusal to pay "all dues, fees, and political contributions," "the union must continue to represent me fairly and without discrimination in dealings with my employer and cannot, under any circumstances, deny me any wages, benefits, or protections provided under the collective bargaining agreement with my employer." (*id.*).

RESPONSE: Undisputed.

20. Local 150's Membership and Sweeney object to being forced to represent non-members in processing individual grievances and arbitrating disputes for such individuals who pay nothing for those services (Second Sweeney Cert. ¶ 15). Sweeney objects to paying his dues money and spending Local 150's members' dues money on non-members (*id.*). After *Janus*, we should not be compelled to speak for them or associate with them (*id.*).

RESPONSE: Undisputed that the union objects to representing non-members in the aftermath of *Janus*. Defendants dispute that the statements in this paragraph, which are more akin to the statement of an objection or the assertion of an argument, are "facts" appropriate for a LR 56 statement.

21. Refusing to process grievances for non-members is not discrimination against them because the Union treats them the same as dues-paying members (Second Sweeney Cert. ¶ 16). If non-members want to take a case to arbitration, they can do so on their own as is their right under state law (*id.*). And they can pay the costs of such arbitrations and/or the cost of the Union's representation of them pro rata (*id.*). Or they can join the Union and gain the advantage of the economies of scale all union members enjoy (*id.*). They just cannot get these services for free.

RESPONSE: Defendants dispute the first sentence because it is an argument, not the assertion of a "fact." Undisputed that under Illinois law, "nothing prevents an employee from presenting a grievance to the employer" without representation by the union, 5 ILCS 315/6(b); however the union has a right to be present at any conference with the employee

and employer and any settlement with the employer cannot be inconsistent with the terms of the collective bargaining agreement. *Id.* Defendants dispute the last statement that non-union employees "cannot get these services for free" as the assertion of an argument, not a statement of fact.

22. Local 150 fully intends to honor its obligations as the exclusive representative of the employees it represents in contracts which apply equally to everyone (Second Sweeney Cert. ¶ 13). Local 150 has represented non-members in arbitration proceedings in the past and will continue to do so as is required by law (Second Sweeney Cert. ¶ 17).

RESPONSE: Undisputed the union intends to honor its obligations as exclusive representative and continue to represent non-members in arbitration proceedings as required by law.

Respectfully submitted,

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