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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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Janus: Otherwise Known As The Death Of Stare Decisis, But Only As It Relates To Unions

By Amanda R. Clark and Susan M. Matta

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RECENT DEVELOPMENTS

By Student Editorial Board:

Johnny D. Derogene, Patrick J. Foote, Miranda L. Huber, and Matt Soaper

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, the equal employment opportunity laws, and the First Amendment.

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JANUS: OTHERWISE KNOWN AS THE DEATH OF STARE DECISIS, BUT ONLY AS IT RELATES TO UNIONS

By Amanda R. Clark and Susan M. Matta

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I. INTRODUCTION

Forty-one years ago, in *Abood v. Detroit Board of Education*,^[1] the United States Supreme Court upheld the constitutionality of what is commonly referred to as “fair share” or “agency” fees. Fair share fees apply to governmental employees who are in a bargaining unit represented by a union, but choose not to become members of the union. The *Abood* Court weighed employee free speech rights against the government’s managerial interests, and found that the government’s interest in labor peace outweighed any harm caused by requiring employees to pay fair share fees.^[2] Exclusive representation is an essential element of labor peace. Without it, government employers would be faced with conflicting demands from various sources, thereby, impeding the provision of public services.^[3] The Court found that the government had an interest in a financially stable bargaining partner.^[4] However, recognizing that unions engage in political activities, the Court found that employees could not be required to subsidize political causes they opposed.^[5] The Court balanced the conflicting interests by requiring non-members to pay fees associated only with “collective bargaining, contract administration, and grievance adjustment,” and prohibiting unions from charging non-members for their political and ideological activities.^[6]

In response, “[o]ver 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions.”^[7] Illinois is one of those States. The Illinois Public Labor Relations Act (“IPLRA”) is founded upon strong public policy favoring collective bargaining rights for public employees.^[8] In addition to the establishment of the right to organize, bargain collectively through an exclusive representative, and strike,^[9] the IPLRA requires non-members to pay fair share fees to unions that represent them.^[10]

Mark Janus, a non-member of a bargaining unit represented by the American Federation of State, County and Municipal Employees, Council 31, was required to pay a fair share fee of a mere \$44.58 per month, or \$535 per year.^[11] He challenged the imposition of these fair share fees on the basis that they violated his First Amendment rights by compelling him to support the union. In *Janus*, the Court relied upon the dicta from *Knox v. Service*

Employees International Union, Local 1000 and *Harris v. Quinn*, that referred to the *Abood* decision as an “an anomaly.”[12] The Court overturned *Abood* and held the fair share fees unconstitutional.

The *Janus* decision is wrought with contradictions and personal opinions on unions. It is a decision that can only be characterized as legislating from the bench; it is evident from the majority opinion, that this decision was crafted six years ago, and the Court simply waited for the right opportunity to overturn *Abood*. Sadly, this is not the most troubling aspect of the Court’s ruling, as the decision flies in the face of the principles of *stare decisis*, represents a significant step away from promoting democracy in the workplace, and raises more constitutional questions than it resolves. In addition, as will be discussed below, the *Janus* decision undermines our system of jurisprudence, and is completely contrary to the very notion of democracy.

II. **ABOOD FIT SQUARELY WITHIN FIRST AMENDMENT PRINCIPLES**

The Court’s initial rationale for overturning *Abood* stems from the misplaced notion that fair share fees amount to compelling the fee-payer “to subsidize” the speech of other private speakers.[13] Relying on *Friedrichs v. California Teachers Assn.*,[14] *Knox*, and *Harris*, the majority determined that fair share fees failed the exacting scrutiny test.[15] This test requires “a compelled subsidy [to] serve ‘a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’”[16] The majority determined that “the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”[17]

The majority’s rationale suffers from significant flaws. Perhaps, the most glaring flaw is the comparison between unions and groups that lobby on behalf of “senior citizens or veterans or physicians.”[18] Such an analogy ignores the unique nature of the legal relationship between unions and bargaining unit employees. Unlike unions, these other groups are not required to represent any interests held by non-members. Rather, any benefits conferred upon non-members are incidental to the group’s efforts to benefit its members. In addition, these groups are allowed to give members special benefits to make membership more attractive. On the other hand,

unions are required to fairly represent all bargaining unit employees, regardless of membership status, which includes pursuing costly litigation on behalf of non-members. This obligation significantly impedes a union's ability to make membership more attractive. Accordingly, the *Janus* Court's analogy completely misses the mark.

Moreover, the Court's findings are completely contrary to long-standing precedent. "The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech, especially about the terms of employment, in the interest of operating their workplaces effectively."^[19] Indeed, the *Abood* Court acknowledged the importance of labor peace, and the "significant benefits" resulting from exclusive representation and an adequately funded exclusive representative.^[20] The Court has consistently upheld government restrictions on speech related to workplace operations.^[21] Fair share fees are an example of an allowable governmental restriction on employee speech because they advance the government's interest in regulating the workplace. When a union engages in collective bargaining or contract enforcement, the speech involved in those activities is "intimately tied to the workplace and employment relationship" because it "occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer."^[22] Thus, fair share fees have long been considered a permissible restriction on employee speech rights.

Contrary to this approach, the *Janus* majority now finds that compelling speech is a far greater injury than restricting it.^[23] The majority views fair share fees in the same light as compelled speech based on the notion that "compelled subsidization of private speech seriously impinges on First Amendment rights."^[24] Yet, as Justice Kagan notes in her dissent, "the majority's distinction between compelling and restricting speech also lacks force" because the only case cited in support of this argument "is possibly (thankfully) the most exceptional in our First Amendment annals."^[25] Importantly, the majority ignores the unique nature of the relationship between exclusive representation and fair share fees. Although the majority recognizes that the requirement imposed upon unions to serve as an exclusive representative is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts," it rejects the notion that exclusive representation and agency fees are inextricably linked.^[26]

Apparently, sufficient justification for this proposition is evident in how “avidly” unions seek to represent employees in states that do not permit fair share fees.[27] For these reasons, the majority believes that fair share fees impermissibly compel one to not only support, but also subsidize, the speech of another.[28]

The majority view demonstrates a fundamental misunderstanding of the nature of collective bargaining. Public sector unions are comprised solely of governmental employees, and exist for the purpose of representing all bargaining unit employees concerning their terms and conditions of employment. “The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones,” requiring the “expenditure of much time and money.”[29] Simply stated, no other situation is even remotely analogous to the plight now faced by unions – where an entity is compelled by the government to provide expensive and valuable services for free. Notwithstanding the balance struck by *Abood*, which remained workable for over four decades, the Supreme Court now finds that fair share fees cannot survive constitutional scrutiny.

A. *States Continue to Have Compelling Justifications for Imposing Agency Fees*

The *Abood* Court deferred to the State’s interest in maintaining labor peace and preventing free riders as compelling justifications for permitting fair share fees.[30] However, the Janus majority summarily dismisses these justifications in the absence of compelling reasons. As the *Abood* Court recognized, labor peace and exclusive representation are inextricably intertwined.[31] Exclusive representation avoids conflicts associated with inter-union rivalries, multiple demands from multiple unions for the same groups of employees, and confusion stemming from having to enforce multiple collective bargaining agreements that cover the same groups of employees.[32] Unable to argue that labor peace is not a compelling state interest, the majority criticizes the lack of “evidence that the pandemonium [the *Abood* Court] imagined would result if agency fees were not allowed,” claiming that such “fears were unfounded.”[33] But the majority goes further and finds that “[t]he *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true.”[34]

To illustrate its point, the majority cites to the experiences in federal employment and the twenty-eight states that require exclusive representation without agency fees.[35] The majority finds that, because labor peace can be achieved without imposing fair share fees, the two are not “inextricably linked.”[36] The majority also finds that the benefits and privileges associated with its status as the exclusive representative “greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers.”[37] The majority’s anti-union sentiments are perhaps most evident in the gross understatement of the union’s duty of fair representation—that it obligates the union to refrain from acting solely for the benefit of members.[38] Indeed, the duty of fair representation imposes far greater obligations, and costs, upon unions than the majority is willing to admit. Instead of addressing this dilemma, the majority simply ignores it.

Fair share fees are rooted “in the ‘principle of exclusive union representation’—a ‘central element’ in ‘industrial relations’ since the New Deal.”[39] Consequently, the courts “have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public.”[40] Thus, *Abood* does not stand for the proposition that all government employers should permit fair share fees. Rather, it gives proper deference to governmental employers who choose to manage their workforces by permitting fair share fees. Accordingly, the fact that some governmental employers hold different views on how to achieve labor peace is of no consequence, as employers often believe that unions need adequate funding for exclusive representation to work.[41]

The majority also dismisses the free-rider concerns addressed in *Abood*.[42] Relying on *Knox*, the majority finds that “avoiding free riders is not a compelling interest.”[43] Pointing to the fact that unions continue to seek to represent employees in states that do not permit fair share fees, the majority essentially faults unions for their persistence in organizing in those states.[44] After all, under the *Knox* theory, if the benefits derived from exclusive representation are not outweighed by the burden of a prohibition against fair share fees, surely, unions would refrain from organizing in those states.[45] This reasoning demonstrates a fundamental misunderstanding of the nature of fair share fee arrangements. Labor relations and fair share fees are policy matters that are best left to state and local legislatures, not the judiciary, to decide. That unions continue to seek exclusive representative

status in right to work states is not a compelling reason to depart from the traditional deference given to governmental employers when dealing with policy matters and workplace regulation.

Furthermore, it cannot be overlooked that this decision improperly penalizes unions by making union membership significantly less attractive. The majority recognizes that “government may not ‘impose penalties or withhold benefits based on membership in a disfavored group’ where doing so ‘ma[kes] group membership less attractive.’”[46] However, as Justice Kagan points out, “basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent.”[47] Unlike other special interest groups that can make membership more attractive by offering special benefits to members, unions are prohibited from treating members and non-members differently. Thus, requiring unions to represent everyone equally without requiring those who benefit to pay a fee for services rendered operates as a penalty against a disfavored group for the purpose of making group membership less attractive. As Justice Kagan notes, the end result is that “[e]veryone – not just those who oppose the union, but also those who back it – has an economic incentive to withhold dues[48]

The *Abood* Court recognized that the “designation of a union as exclusive representative carries with it great responsibilities” as well as significant costs, and that fair share fees were a reasonable way to fairly distribute these costs among all who benefit therefrom.[49] The majority opinion, however, refuses to acknowledge the costs associated with such duties; and instead focuses on the “many benefits” that come with exclusive representation, and the “special privileges” that are granted to unions.[50] Clearly, the majority purposefully ignores the economic realities of prohibiting fair share fees. As Justice Kagan poignantly states:

[T]he majority again fails to reckon with how economically rational actors behave . . . Without a fair-share agreement, the class of union non-members spirals upward . . . [a]nd when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all.[51]

The likelihood that bargaining unit employees will choose not to become union members is significant. After all, why would anyone pay for something

they can get for free? The risk is that unions will be financially crippled, and unable to afford to operate, rendering these special benefits and privileges utterly meaningless.

The majority opinion represents a significant departure from the Court's long history of valuing democracy in the workplace. For the first time, the rights of individuals are held in higher regard than the rights of the collective majority. To reach this decision, the majority equates fair share fees with requiring individuals to support the union. However, nothing could be further from the truth. Non-members are free to voice whatever opinions they choose, in any forum. No matter what opinions are voiced by those who oppose them, the union's obligations remain the same. Because employees remain free to voice their opposition to the union, fair share fees do not compel anyone to support the union or any positions it advances.

The majority also overlooks that the costs of fair share fees are minimal. The petitioner's annual fair share fees were a mere \$535.^[52] The cost of one arbitration hearing alone often far exceeds \$5,000. Thus, the requirement to pay such minimal fees, especially when compared with the costs associated with the duty of fair representation, hardly infringes on free speech rights. Yet, the majority is of the opinion that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees" because individuals "may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer."^[53]

This argument is entirely misplaced, and completely incompatible with the majority's acknowledgement that exclusive representation comes with great rights and privileges. The rights and privileges gained by unions are used solely for the benefit of bargaining unit employees. The majority's opinion that exclusive representation restricts the rights of individuals is belied by economic realities. In the absence of exclusive representation, where will employees find someone to represent them in costly litigation for an annual fee of \$535? They cannot, which is why democracy in the workplace is so vital. It gives bargaining unit employees a voice they otherwise do not have, and access to litigation they otherwise cannot afford.

In an effort to resolve this dilemma, the majority claims that the burden of exclusive representation imposed upon unions is inconsequential because

“[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether,” citing to a single state law that authorizes unions to charge religious objectors who use the grievance or arbitration procedures for the reasonable costs associated with those procedures.[54] Oddly, though, the majority also cites to Section 6(g) of the IPLRA, which permits those who object to fair share fees for religious reasons to pay the same amount to a non-religious charitable organization.[55] However, the IPLRA is devoid of any requirement that such individuals pay for costs associated with use of grievance proceedings.[56] Nothing in the IPLRA permits unions to charge for costs associated with the use of grievance proceedings. Instead, like many other States, such a requirement can only be accomplished through legislative measures. It is utterly inappropriate for the Court to justify overturning long-standing precedent based on legislation that could be enacted.

Fair share fees result in minimal infringements on free speech rights. Such minimal infringements clearly do not outweigh the burdens imposed upon the government and unions so as to justify such a drastic departure from the Court’s historical treatment of fair share fees.

B. Fair Share Fees are Now the Exception to the Rules Concerning Public Employee Speech

The historical deference given to public employers in managing their workforce and regulating speech is not without limits. Rather, “[t]he government . . . needs to show that legitimate workplace interests lay behind the speech regulation.”[57] Thus, a two-part test arose out of three Supreme Court decisions that form the basis for determining whether a public employee’s speech is protected.[58] First, it must be determined whether the individual spoke as a citizen on a matter of public concern.[59] If the individual spoke as an employee on a workplace matter, there is no constitutional protection, and the public employer is allowed to regulate the speech.[60] However, if the individual spoke as a citizen on a matter of public concern, the second step of the analysis focuses on “whether the relevant government entity had adequate justification for treating the employee differently from any other member of the general public.”[61]

The majority opinion dismisses *Abood’s* balancing protected speech and the government’s interest in regulating its employees’ speech.[62] However, the majority’s analysis is misplaced because it improperly focuses on the nature

of the regulation (*i.e.* compelling support of the union), and whether the speech impacts the government's budget. This is a slippery slope because the category of speech that could impact a government's budget is vast. Taking this argument to its logical conclusion means that even the most trivial workplace concerns are matters of public concern simply because they impact the budget. Carving out a new exception to long-established public employee speech rules will only result in confusion and expose state and local governments to increased litigation.

The majority recognizes that a state's ability to require unions to fairly represent all bargaining unit employees is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts," but "draw[s] 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." [63] Thus, the majority readily accepts limitations on associational freedoms as applied to unions, but rejects limitations on public employee speech rights as applied to individuals who oppose unions. This is especially true where, as here, the limitations on public employee speech are intended to balance the burden imposed by the duty of fair representation. The majority's theory is that fair share fees amount to "compelling" those individuals to support union speech. It ignores *Abood's* limitations on chargeable expenses, and that bargaining unit employees remain free to voice their opinions and opposition to the union, or the positions it advances.

One of the most significant hurdles to overturning *Abood* was the Court's long-standing belief that speech related to collective bargaining was not a matter of public concern. [64] The majority now claims that "[w]hen a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk." [65] Citing the Illinois budget problems, the majority views any demand from a public sector union that impacts the employer's budget as a matter of public concern. [66] Thus, contrary to the Court's historical treatment of collective bargaining, the majority declared that speech related to collective bargaining "is overwhelmingly of substantial public concern." [67]

This raises more constitutional questions than it resolves. Almost every issue raised by a union has the potential to impact the employer's budget. Does

this now mean that all issues raised by a union are matters of “substantial public concern”? If so, that means such speech should be given greater, not less, protection. Yet, it appears from the majority’s opinion that the intent is to carve out an exception for a small minority of individuals who do not want to be union members, while not affording the same status to the collective interests of the bargaining unit. This is completely contrary to this country’s system of collective bargaining, which necessarily “subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.”[68] There is simply no constitutional justification for giving greater protection to those who oppose unions than those who support them.

To fit this new framework, the majority distorts the test by focusing on “whether the public is, or should be, interested in a government employee’s speech.”[69] Importantly, this approach is fundamentally flawed because, arguably, most issues raised by public sector unions impact the governmental employer’s budget. “Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square.”[70] Clearly, speech involving collective bargaining is “intimately tied to the workplace and employment relationship.”[71] Such speech occurs in the workplace, directly concerns the workplace, and is addressed to the employer, thereby satisfying the Court’s well-established standards for determining whether governmental limits on workplace speech pass constitutional muster. “*Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees’ speech on similar workplace matters. . . . *Abood* thus dovetailed with the Court’s usual attitude in First Amendment cases toward the regulation of public employees’ speech.”[72]

As Justice Kagan notes, the balance struck in *Abood* gave great deference to the government’s role as an employer, “[a]nd when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. . . . Except that today the government does lose, in a first for the law.”[73] However, with this decision, the government is not the only loser; we all lose when democracy and free speech rights are threatened. By carving out exceptions that apply only to those who oppose unions, the Court has indeed threatened core democratic principles.

C. *Stare Decisis is Apparently Dead*

After determining that fair share fees violate the First Amendment, the only remaining hurdle the *Janus* Court faced was that of *stare decisis*. *Stare decisis* is an important doctrine because it ensures consistent and predictable outcomes, and preserves the integrity of the judicial process; the importance of which even the majority cannot deny.[74] Although the majority recognizes that the decision to overturn precedent should not be made lightly, the Court justified overturning *Abood* on the basis that it was incorrectly decided.[75] However, even if it were true that *Abood* was wrong, “[r]especting *stare decisis* means sticking to some wrong decisions.” Any departure from settled precedent (so the Court has often stated) demands a “special justification – over and above the belief that the precedent was wrongly decided.”[76]

Stare decisis is central to our system of jurisprudence because it means the Court’s decisions are “founded in the law rather than in the proclivities of individuals.”[77] Clearly, *Janus* was based on the individual anti-union sentiments of the current majority.

The majority opinion faults the *Abood* Court for relying on *Railway Employees’ Dept. vs. Hanson*,[78] and *Machinists vs. Street*,[79] two prior cases involving agency shop arrangements in the private sector. The Court, in *Janus*, finds that the “deferential standard” in those two cases “finds no support in our free speech cases.”[80] The Court plainly ignores the fact that “*Abood* is not just any precedent: It is embedded in the law . . . in a way not many decisions are.”[81] Yet, the majority glosses over *Abood*’s impact, and claims that “*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either ‘chargeable’ . . . or nonchargeable.”[82] The majority completely ignores the fact that, in the forty-one year history of *Abood*, “this Court has had to resolve only a handful of cases raising questions about the distinction” between chargeable and non-chargeable expenses.[83]

In support of its argument that *Abood* is no longer workable, the majority cites to the “daunting and expensive task” faced by fair share fee objectors who “wish to challenge union chargeability determinations.”[84] The Court fails to explain why this is a compelling factor, especially when it ignores the

“daunting and expensive task” imposed upon unions by the duty of fair representation. And, while there may be some gray areas requiring clarification between chargeable and non-chargeable offenses, “everyone knows the difference between politicking and collective bargaining.”[85] Thus, the majority’s attempt to attack the workability of *Abood* is weak, at best.

The majority circles back to the notion that the principles of exclusive representation and fair share fees are mutually exclusive to support its argument that *Abood* is “an outlier among our First Amendment cases.”[86] The “developments” relied upon by the majority since issuance of *Abood* are the “ascendance of public-sector unions [that] has been marked by a parallel increase in public spending.”[87] However, even the majority cannot deny that the increase in public spending cannot be attributed solely to public sector unions.[88] More importantly, concerns over state and local government spending, and the costs of public employee wages and benefits, are policy matters that are best left to those governmental entities, as opposed to the judicial branch. This is especially true where, as here, “Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals.”[89]

Additionally, the majority compares agency fees to the political patronage cases.[90] Simply stated, this argument makes no sense, and is another example of gross overreaching by the majority. No bargaining unit employee, regardless of membership status, is required to support a particular politician, or political activity. Indeed, the entire purpose of fair share fees is to prohibit unions from using non-members’ funds for political purposes and activities. Yet, the majority views this decision as “bring[ing] a measure of greater coherence to our First Amendment law.”[91] Nothing could be further from the truth, as this decision accomplishes the exact opposite.

Finally, the majority finds reliance an insufficient reason to uphold *Abood*. In support of this finding, the Court notes that “public-sector unions have been on notice for years regarding this Court’s misgivings about *Abood*.”[92] The majority reasons that, “[d]uring this period of time, any public-sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain.”[93] Such an argument is preposterous. It ignores the long history of *Abood*, and reasonable reliance on the principles of *stare decisis*. It also ignores the thousands of collective bargaining relationships developed over

decades between unions and employers; relationships that developed under the framework of fair share fees. Removing fair share fees from the equation will undoubtedly inject substantial discord into those relationships.

The majority also cites to the relatively short duration of public-sector collective bargaining agreements, and claims that “the union was able to protect itself if an agency-fee provision was essential to the overall bargain” because it “could have insisted on a provision giving greater protection.”[94] This argument is nonsensical, and the majority fails to explain what “greater protection” could be negotiated. Apparently, the majority views severability clauses as the answer.[95] Severability clauses commonly appear in collective bargaining agreements, and protect the integrity of said agreements by preserving the remaining portions of an agreement where one portion is deemed invalid. However, such clauses have nothing to do with securing adequate funding, and already appear in most, if not all, collective bargaining agreements.

Moreover, the weakness of the majority viewpoint is underscored by its views on the impact resulting from the loss of fair share fees. Recognizing that the loss of fair share fees will cause “unions to experience unpleasant transition costs in the short term,” the majority is of the opinion that it “may require unions to make adjustments in order to attract and retain members.”[96] Yet, because the duty of fair representation ties the union’s hands, few, if any, adjustments can be made that will enable unions to effectively attract and retain members. Thus, the majority’s inability to articulate how unions can adjust for the loss of fair share fees is understandable because the unions’ hands are tied.

These illogical leaps underscore the majority’s desperation to fit a square peg into a round hole. Indeed, this is most evident in the Court’s opinion concerning “the considerable windfall that unions have received under *Abood* for the past 41 years.”[97] Elaborating further, the majority finds that “[i]t is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.”[98] Such findings make a mockery of our system of jurisprudence. As Justice Kagan notes, *stare decisis* is strengthened by the legislature’s and citizens’ reliance on Supreme Court precedent, and the majority opinion “wreaks havoc on entrenched legislative and contractual

arrangements” that arise in the context of a continuing relationship between employers and unions.[99] More importantly, borrowing a quote from Justice Scalia, Justice Kagan notes that “reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance.”[100]

Thus, notwithstanding the lack of exceptional circumstances or special justifications for departing from *stare decisis*, the Court made clear its willingness to legislate from the bench. As Justice Kagan so eloquently stated:

The majority has overruled *Abood* for no exceptional or special reasons, but because it never liked the decision. It has overruled *Abood* because it wanted to. Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. . . . Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. . . . And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. . . . The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.[101]

This decision is a slippery slope because it has the potential to “expos[e] government entities across the country to increased First Amendment litigation and liability.”[102] Indeed, this decision creates more constitutional questions than it resolves, as union speech now has a new constitutional status. However, the real test is yet to come. The Court will be likely be required to address increased constitutional challenges in this area of public employee speech. Only then will we see whether the Court is willing to extend this new constitutional status to pro-union speech.

Moving forward, unions and state and local governments are faced with an onerous task. The relationships built between public sector unions and state and local governments have developed over the course of more than four decades. The prohibition against fair share fees means that these parties will have to re-write legislation and thousands of collective bargaining agreements, and re-think labor relations in a climate of great uncertainty.

III. LEGISLATIVE AND LEGAL MOVES INVOLVING *JANUS*

Janus is a major destabilizing event in what had been an area of law that was well settled for the past forty years. The legal understanding since *Abood* had been incorporated into twenty-plus public sector collective bargaining statutes across the country. However, the *Janus* decision had been lurking on the horizon since Justice Alito started lining up his legal dominos, and significant preparation had been put in place prior to the decision by unions on one side and the special interest third parties on the other. Since the *Knox* decision and Justice Alito's clearly telegraphed desire to take down public sector collective bargaining, parties on both sides of the issue have been preparing for the day this decision came down. With the appointment of Justice Gorsuch to the Court, the decision issued by the Court on June 27, 2018 felt largely inevitable. Prior to the Court issuing its decision, legislative as well as legal action had already been taken in anticipation of the Court's ruling. The following will examine the legal challenges and legislative changes prompted by *Janus*' predecessor cases and those that have emerged since the decision issued.

A. *Legislative Actions*

Several states passed legislation before the decision was issued, mostly focusing on everything from union access to new employees to proper periods for membership revocation as well as personal information protection. California passed the most bills addressing the possible impacts of *Janus*, but states from the West coast to the East coast acted to address possible fallout from the decision. The following survey of legislation passed in anticipation of *Janus* may suggest ways other states may handle the fallout from the decision.

California was by far the most preemptively active state in passing legislation to deal with the implications of the Court's *Janus* decision, enacting four laws to deal with the impact of the Court's decision. Assembly Bill 119 was signed into law by Governor Jerry Brown on June 27, 2017 and took effect immediately. The legislature, in drafting and passing the legislation stated:

The Legislature finds and declares that the ability of an exclusive representative to communicate with the public employees it represents is necessary to ensure the effectiveness of state labor relations statutes, and the exclusive representative cannot properly discharge its legal obligations

unless it is able to meaningfully communicate through cost-effective and efficient means with the public employees on whose behalf it acts. In most cases, that communication includes an opportunity to discuss the rights and obligations created by the contract and the role of the representative, and to answer questions. That communication is necessary for harmonious public employment relations and is a matter of statewide concern. Therefore, it is the Legislature's intent that recognized exclusive representatives of California's public employees be provided meaningful access to their represented members as described in this chapter unless expressly prohibited by law. [103]

The law adds Sections 3555 to 3559 to the California Government Code to amend the California's labor relations act. [104] The added sections expanded the act's coverage, making it applicable to cities, counties, special districts, trial courts, state civil service agencies, the Los Angeles County Metropolitan Transportation Authority, public schools (K-12), community colleges, California State Universities, Universities of California and school districts.[105]

Assembly Bill 119 also amended the Section 6253.2 and 6254.3 of the California Public Records Act. [106] Under the legislation, employers must give ten days' notice to the union of new hire orientations, and the law applies to in person, online or through other means. The parties must bargain the structure, time and manner of union access to new employee orientation. Compulsory interest arbitration is required if the parties cannot reach an agreement on orientation access, with the parties splitting the cost of such arbitration. The parties may bargain an agreement that varies from the provisions of the law, but in the absence of such an agreement, the requirements of the law prevail. [107]

The other significant provision of Assembly Bill 119 concerns the information that the public employer is required to supply to the exclusive bargaining representative.[108] The law amended the California Public Records Act, Sections 6253.2 and 6254.3 to require a covered public employer to provide the name, job title, department, work location, work, home and personal cell phone numbers, personal email address if on file with the employer and home address of newly hired employees to the exclusive bargaining representative within thirty days of the employee's hire. The law also requires that the employer provide this information for all employees to the exclusive bargaining representative at least every 120 days.[109] The law also exempts personal email addresses from public inspection unless the

personal email address is used by the employee to conduct public business or is necessary to identify an otherwise disclosable communication. [110]

California also passed Senate Bill 846, which was signed by the Governor on September 14, 2018 and became effective immediately. [111] California law had previously provided for the collection of agency fees under the Ralph C. Dills Act and the Meyers-Milias-Brown Act. Senate Bill 846 recognized that those statutory provisions were voided by the *Janus* decision, but addressed the possible liability of public employers and unions for having collected agency fees in the past. [112] Senate Bill 846 prohibits the state Controller, public employers, and employee organization, or any of their employees or agents from being liable under state law for collecting, deducting, receiving or retaining any agency fees collected under California Law. [113] The law grants complete immunity to any state law claims and denies standing to any current or former public employee for any fees properly collected under California law prior to June 27, 2018. [114] The law applies to any currently pending claims at the time of signing, as well as claims filed on or after that date. [115] The California legislature found the law “necessary to provide certainty to public employers and employee organizations that relied on state law, and to avoid disruption of public employee labor relations, after the Supreme Court’s decision in *Janus* . . .” [116]

California Senate Bill 285 prohibits an employer deterring or discouraging employees becoming or remaining members of a union. [117] California law had previously prohibited state funds from being used to reimburse a state contractor for any costs incurred to assist, promote or deter union organizing, and prohibited public employers from receiving money from the state to make any such payments. The new law filled the gap and added the prohibition of using states funds to pay for efforts to encourage members to leave the union after the *Janus* decision. The bill also clarified the definition of public employer in this instance to apply to “counties, cities, districts, the state, schools, transit districts, the University of California, and the California State University, among others.” [118]

While California was the most prolific state in enacting legislation in preparation for the *Janus* decision, it was not the only state to do so. For example, Delaware enacted House Bill 314. [119] Delaware HB 314 took a different approach from California, establishing a clear procedure and time

frame by which public employees may revoke their membership from a public employee union. [120] HB 314 passed the Delaware House on April 19, 2018 on more or less a party line vote. [121] It passed the Senate on May 5, 2018, with three Republicans joining the Democrats to vote yes, and it was signed by the Governor the next day.[122]

HB 314 amended Delaware's Public Employment Relations Act Section 1304 to provide that an employee may choose to continue to pay a fair share fee as may be provided for in a collective bargaining agreement (CBA). [123] If no valid process exists in the CBA, then an employee, by written authorization, may revoke his or her membership under the terms of the original authorization that the employee signed, so long as the authorization contained at least one revocation period. If the original authorization contained no revocation period, then a request can be made to the exclusive bargaining representative.[124]

Delaware HB 314 also established timelines for when revocation may occur and when it becomes effective.[125] According to the language of the enactment, if an original authorization does not specify when a revocation becomes effective, the revocation will only become effective on the employee's anniversary date. [126] The statute provides that if the revocation period is not provided by the original authorization, the revocation period shall be "during the period 15 to 30 days before the employee's anniversary date of employment, effective on the employee's anniversary date." [127]

Maryland also took legislative action to address implications of the *Janus* decision. The Maryland legislature put forth House Bill 811, cross -filed with Senate Bill 819.[128] The bills passed the Senate on March 26, 2018 and the House on the next day. Despite lacking the governor's signature, the bill became law under the provisions of Article II, Section 17 of the Maryland Constitution after the governor failed to return objections to the General Assembly within six days while the General Assembly was in session. [129]

Maryland HB 811/SB 819 requires certain public school employers, namely any county board of education or the Baltimore City Board of School Commissioners, to provide an exclusive bargaining representative with access to newly hired employees, and largely tracks with the California legislation on the same issue.[130] The exclusive bargaining representative must be provided at least ten days' notice of new employee processing when the representative will be allowed access. Like the California law, the

Maryland law requires that the structure, time and manner of the access to the new hires is determined through negotiations between the employer and the exclusive representative.

By default a request to bargain access to new hires made between July 1, 2018 and the expiration of the parties' contract reopens the contract only for the purpose of establishing the time, manner and structure of access.[131] However, the parties are free to agree to a separate agreement, such as a side letter or memorandum of understanding, instead of reopening the contract. [132] The parties have 45 days after the first meeting or 60 days after the initial request to negotiate to resolve any dispute over the structure, time and manner of access. [133] After that point, either party may request the Public School Labor Relations Board to declare impasse and trigger the impasse procedures already contained in state statute. [134]

Maryland's legislation provides the standard by which the Public School Labor Relations Board should consider the matter before it.[135] The Public School Labor Relations Board is instructed to consider the ability of the exclusive representative to communicate with the employees it represents, the legal obligations of the exclusive bargaining representative, applicable state, local and federal laws, any stipulations of the parties, the financial condition of the public schools and the interests and welfare of the employees, access provided in comparable public school communities, and "other facts routinely considered in establishing" such access.[136]

Similarly to the California statute, Maryland House Bill 811 requires that the public school employer provide certain information to the exclusive bargaining representative by amending Section 6-407.2 of Maryland's Education statute. [137] Under the amendment, the public school employer must provide the exclusive bargaining representative, within 30 days of the date of hire for a new employee, the new employee's name, position classification, home and work address, home and work telephone number, personal cell phone number, and work email address. This requirement attaches with all new hires, regardless of whether the newly hired employee had been previously employed by the public school employer. There is no requirement to provide personal email addresses. The public school employer must provide the same information for current employees once every 120 days. [138]

Maryland passed an almost identical bill, HB 1017/SB 677, which addressed exclusive bargaining representative access to newly hired state employees, including those of the public colleges and universities, and the right of the exclusive bargaining representatives to information about those employees.[139] The minor differences are that the exclusive representative has the right request information from the Department of Budget and Management once every 120 days.[140] The Department of Budget and Management and the exclusive bargaining representative may negotiate a more frequent basis to provide the information, and the parties may negotiate more detailed information to be provided than what is listed in the statute. The information must also be presented to the exclusive bargaining representative in a “searchable and analyzable electronic format.”[141]

The bill removes a prior prohibition on an exclusive representative, or an authorized third party on its behalf, to use the information it receives for the purpose of maintaining or increasing employee membership in a union.[142] Previously, the exclusive bargaining representative had been prohibited from using information provided by the employer for the purpose of increasing employee membership. The enactment further provides that on the written request of an employee, an exclusive bargaining representative shall “withhold further communication with an employee unless otherwise required by law or written request is revoked by the employee.”[143] While this in some way limits the exclusive bargaining representative’s ability to use the information, the limitation is balanced by the exclusive bargaining representative now being expressly permitted to use the employee information it receives from the employer to maintain or increase employee membership.

Washington, like California and Maryland, codified an exclusive bargain representative’s access to new employees at employee orientation. Senate Bill 6229 passed the Washington State Senate on February 27, 2018, and the Washington State House on February 27, 2018. It was signed into law by the governor on March 23, 2018.[144]

The Bill created several new sections of statute in Washington’s public employees’ collective bargaining statute. The most significant change was an addition to Washington state statute Chapter 41.56.[145] That addition requires the employer to give the union reasonable access to new employees “for the purpose of presenting information about their exclusive bargaining representative.”[146] The legislature defined reasonable access as occurring

within 90 days and for no less than 30 minutes, and must occur during the employee's regular working hours.[147] However, the employer and union may agree to longer or more frequent access than is provided for in the statute.[148] The presentation should occur during the new employee's orientation, unless the employer and union have negotiated another arrangement. However, no employee is required to attend the meeting with the exclusive bargaining representative.[149]. The act applies to community colleges, school district employees, faculty at public four year colleges and universities, employees of the state of Washington, county or municipal corporation, or any political subdivision of the state of Washington, including district courts and superior courts, ferry employees, and symphony musicians.[150]

New Jersey also passed legislation anticipating *Janus* and its potential impact on public sector collective bargaining. The New Jersey Assembly passed, and the governor signed, the "Workplace Democracy Enhancement Act," which became effective on May 18, 2018.[151] Like California, Maryland and Washington, New Jersey codified an exclusive bargaining representative's right of access to newly hired employees.[152] Access to newly hired employees must be provided within 30 calendar days of the date of hire, last for at least 30 minutes but not more than 120 minutes, and be conducted without effect on the employee's pay or leave time.[153] Access is provided at new employee orientation, or if no orientation is conducted, in individual or group meetings.[154]

The act requires access to current bargaining unit members as well. A public employer must provide access to the work place.[155] Access under the statute includes the right to meet with individual employees during the work day to investigate and discuss grievances, as well as workplace-related complaints and other workplace issues.[156] The Act also provides that exclusive bargaining representatives will have access to the workplace to hold meetings during employees' lunch, breaks and before and after shifts to discuss workplace related issues, such as contract negotiations or enforcement, as well as meetings about internal union matters such as governance or other internal business matters. Exclusive bargaining representatives are also permitted to use, subject to possibly paying for maintenance, security and other costs if applicable, government owned or leased buildings to conduct meetings with bargaining unit members, so long

as those meetings to do not interfere with government operations or involve any form of campaigning for any partisan political office.[157]

The Workplace Democracy Enhancement Act requires the public employer, within ten days of hire of a new employee, provide to the exclusive bargaining representative contact information for the employee, including name, job title, date of hire, worksite, home address, work telephone numbers and any home or cell phone numbers on file with the employer, work email address and personal email address if it is on file with the employer.[158] The act mandates that the information be presented in Excel format or a format mutually agreed to by the parties.[159] Exclusive bargaining representatives have the right to use the employer's email system to communicate with bargaining unit members, as well.[160] Employee information such as home addresses, phone numbers, email addresses, dates of birth, and negotiation units and groupings of employees, and the emails or other communications between employee organizations and their members, prospective members, and non-members are not considered government records, and, therefore, are exempt from the state's Open Public Records Act.[161]

The act penalizes public employers for encouraging bargaining unit members to revoke their membership in the exclusive bargaining representative, and for discouraging employees from joining, forming or assisting an employee organization.[162] Engaging in any of the prohibited acts is an unfair labor practice and, upon finding that the violation occurred, the Public Employee Relations Commission is required to order the exclusive bargaining unit representative be made whole for any losses suffered from the public employer's violations, among any other remedial relief.[163].

The Act also restricts the time period that employees can withdraw from membership in the exclusive bargaining representative organization.[164] Employees who wish to revoke their authorizations for dues deductions may do so by written notice to the employer during the ten days following each anniversary date of their employment.[165] The withdrawal becomes effective on the thirtieth day after the employee's anniversary date.[166] Within five days of the receipt of the written request, the public employer must provide notice to the exclusive bargaining representative of the withdrawal of authorization.[167] However, the legislation allows the public employer and exclusive bargaining representative to agree that requests for withdrawal of authorization must go through the exclusive bargaining

representative and establish the effective date of revocation as the July 1st following the date on which the notice was filed.[168]

New York also enacted legislation granting exclusive bargaining representatives access to new employees. New York passed the protections in section RRR of its revenue bill in April of 2018.[169] The legislation provides, much like the previously discussed states, that a public employer must give notice to the exclusive bargaining representative within 30 days of making a new hire and inform the representative of the employee's name, address, job title, employing agency, department and work location. Within 30 days of providing the notice, employer must give the representative a reasonable amount of time during the employee's work time to meet with the employee.[170]

Unlike the other states, New York's legislation exempts all public employee exclusive bargaining representative organizations from being required to provide services and representation to non-member employees.[171] The legislation specifically does not require a union to provide representation to a non-member when he or she is being questioned by the employer, in statutory or administrative proceedings over statutory or administrative rights, in any stage of the grievance, arbitration or other contractual process dealing with assessing discipline so long as the non-member is permitted to proceed without the union and allowed to retain his or her own advocate.[172] The legislation specifically permits the union to restrict providing representation in certain administrative and employer based proceedings to union members only, with no threat of an unfair labor practice charge for not representing members.[173]

Although New York's is the broadest exemption from representation of non-members to be passed in anticipation of *Janus*, it is not unique in the nation. Florida, the first state to pass a right to work statute in 1943 and constitutional amendment in 1968, has had a statutory provision since 1977 which provides that unions may refuse to represent non-members.[174] The provision has gone without direct legal challenge since its passage and is a clear indicator that such statutory provisions should be legally viable.

The New York governor also issued an executive order protecting state workers' information from being given to third parties. Executive Order 183 was signed by the governor on June 27, 2018, the day that the *Janus* decision

issued.[175] The executive order states that workers' home addresses and cell phone numbers are "being used to attack, harass, and intimidate them." [176] It further stated that New York State would not permit its public sector workers' private information to be "abused" "as part of a campaign to harass and intimidate workers for any reason, including engaging in union activities or looking to unionize." [177] The executive order prohibits any state entity, its officers or employees from disclosing the home address, personal telephone numbers, cell phone numbers, and email addresses of a public employee except to a union who represents the employee, a union seeking to represent the employee and if legally compelled to do so. [178]

Traveling to the farthest west state in the Union, Hawaii passed legislation to establish the process by which public employees may revoke their membership in a union. [179] The Hawaii legislation requires that an employee provide written notice to the union to revoke payroll deductions. [180] The written revocation must be delivered to the union within 30 days before the employee's anniversary date. [181] The union then has ten business days to inform the employer of the employee's revocation of deductions. [182]

Rhode Island took a legislative approach similar to New York's in relation to representation requirements for non-member employees. Senate Bill 2158 Substitute A, which applied only to police and fire units in the state, [183] exempts police and fire unions from representing employees in any level of the grievance process, including arbitration, when the employees have elected to not become members of the union or when they revoke their membership status. [184] Non-member employees may proceed through the grievance process at their own cost, but the union must have the opportunity to be present at any hearing. [185] Furthermore, the resolution of the grievance must be consistent with the terms of the collective bargaining agreement. [186] The legislation makes clear that a union has no obligation to incur any expenses in relation to an employee who has not been a member of the union for at least ninety days prior to the events giving rise to the grievance. [187]

In contrast to the above-discussed legislative actions, public employee union detractors have proposed legislation in various states that has been drafted by groups such as the American Legislative Exchange Council (ALEC). In Pennsylvania for example, legislation was proposed which would have amended Pennsylvania's public sector bargaining law to define a

nonmember and provide for “independent bargaining,” the direct bargaining between a public employee and public employer without a collective bargaining representative.[188] It would protect against discrimination in terms of benefits and pay against an employee engaged in independent bargaining.[189]. It would also require the public employer, on an annual basis, to notify all public employees in a bargaining unit that “there is no statutory obligation by nonmembers to make any payments” to the union that represents the bargaining unit.[190] The bill would require that employees be informed that they are not required to make any payments to the union unless they affirmatively assent, and that payment is not necessary to maintain employment.[191] The legislation would also permit employees to revoke their membership at any time in writing and would prohibit the union and employer establishing in the collective bargaining agreement any procedure for rescinding membership.[192] The bill, however, did not make it out of the Labor and Industry Committee.[193]

The legislation that did not pass in Pennsylvania is similar to draft legislation that ALEC has provided. According to ALEC, the purposes of its proposed “Public Employee Bargaining Transparency Act,” (“PEBTA”) is to “avoid having public employees misled into forfeiting free speech rights and suffering financial loss.”[194] According to the model legislation, any authorization signed before June 27, 2018 would no longer be valid, and new authorizations must be freely given and shown by clear and convincing evidence.[195] Under the model legislation, employees may revoke their affirmative authorizations at any time, in writing, and such right to revocation can never be waived.[196] Under PEBTA, an employee’s employment or continued employment cannot be conditioned on payment to any charity or third party in the amount equivalent to dues or fees charged by a labor union, dues or fees to the union.[197]

The model legislation goes so far as to include the text of the affirmative waiver required to allow deductions from an employee’s paycheck for dues or fees. The text reads:

I recognize that I have a First Amendment right to associate. My rights provide that I am not compelled to pay a labor organization as a condition of employment, and I do not have to sign this waiver. However, I am hereby waiving my right to free speech and affirmatively consent to allow my

employer to deduct payments to a labor organization until such time as I choose to revoke this authorization.[198]

The above notice would be required to be in bold and all caps in font equal to or larger than any other font on the document, and shall be a standalone document presented to the employee.[199] The model legislation also provides that any person suffering injury, real or threatened, resulting from violation of the statute has the right to filing a civil action for damages and injunctive relief, as well as mandatory cost shifting for a prevailing plaintiff.[200]

B. Legal Challenges

The legislative front is not the only venue in which reactions and pre-emptive actions have been taken regarding *Janus*. The courts have seen lawsuits filed both in anticipation of and reaction to the Court's decision. At least 13 states have pending cases and range from Alaska to Maine. Some of the cases, such as those dealing with opt-out windows and member incentives, may have significant impacts on the legislation discussed above. This section of the paper will look at some of the pending litigation that has been spurred by *Janus*.

Some cases brought are attempting to collect retroactively for fees collected before the *Janus* decision issued. Cases on the subject have been filed in Washington[201] and Minnesota.[202] Generally, in these cases the plaintiffs are seeking injunctive, declaratory and monetary relief. There has been ongoing debate since the *Janus* decision issued as to whether these cases would be successful. Those who say unions can be liable for pre-*Janus* fees fall under a three step analysis. First, they assert that the decision is understood to be a statement by the Supreme Court of the law as it has always been, not a change in the law. Second, unions can be sued as private actors under Section 1983 because they used state power to collect the money. And third, unions do not have qualified immunity that is available to governments in 1983 cases.[203] Those who do not believe that unions can be sued for fees collected before *Janus* respond by arguing that the unions acted in good faith when they collected the fees pre-*Janus* and did not know or could not have known that the state laws under which they operated were unconstitutional.[204] Only one case, *Danielson v. AFSCME Council 28*, [205] has been decided in this post *Janus* world.

In *Danielson*, the plaintiffs filed suit as State of Washington employees who objected to forced union membership and did not want to pay agency fees.[206] The plaintiffs sought a declaratory judgment that the imposition of agency fees violated the First Amendment, injunctive relief prohibiting the collection of such fees, monetary relief for agency fees wrongly collected, and attorney's fees and expenses. [207] The court had previously dismissed the same claims made against Washington State as moot, because the state had voluntarily stopped deducting agency fees after the *Janus* decision, and there was no reasonable expectation that Washington State would begin collecting them again.[208] AFSCME Council 28 filed a motion for judgment on the pleadings or summary judgment on similar grounds. The U.S. District Court for the Western District of Washington quickly dismissed the claims for declaratory and injunctive relief as moot, as there was little likelihood that the state or union would begin collecting agency fees again.[209]

On the issue of monetary relief, the union argued that the defense of good faith applied.[210]. The defendants cited *Wyatt v. Cole*[211] as the basis of their good faith argument. In that case, the appeals court found that a defendant may be held liable for a violation of Section 1983 only if it failed to act in good faith in applying the unconstitutional state procedure.[212] Failing to act in good faith, as defined by the *Wyatt* Court depended on whether the defendant knew or should have known that the statute the action was based on was unconstitutional.[213]

In the *Daniels* case, the defendant argued that no monetary damages should be awarded because it was acting under good faith when it collected fair share fees according to the state laws in effect at the time, which were presumptively valid until the *Janus* decision.[214] Plaintiffs argued that the good faith defense should not apply because the most closely related common law tort, conversion, would not have conferred a similar immunity at the time that Section 1983 was enacted.[215] The plaintiffs further argued that even if the good faith immunity did apply, the defendant had made no showing of a subjective state of mind.[216]

The court rejected the plaintiffs' argument that the good faith immunity does not apply as the Supreme Court has not foreclosed the defense and several circuit courts have relied upon it.[217] While the court acknowledged that the exact contours of the defense have never been clearly defined the defense

is based upon equity and fairness, and the court adapted the Fifth Circuit's test from *Wyatt* as the standard to apply.[218] The court stated that the defense was clearly applicable in this case as the defendant could not have known, until the *Janus* decision was issued, that collecting agency fees was unconstitutional.[219] After *Janus* was issued, the defendant immediately ceased collecting agency fees in compliance with the Court's ruling and abandonment of fifty-year legal precedent.[220]

The court also rejected the plaintiffs' argument that the court must analogize plaintiffs' claim to a state common law claim, in this case conversion.[221] The court found that the plaintiffs' argument lacked precedent in the Ninth Circuit.[222] Even if the court were required to compare an analogous common law, the court found that the plaintiffs were incorrect in arguing that conversion was analogous.[223] The court agreed with the defendant's astute observation that the plaintiffs' alleged harm was not the defendant's receipt of the moneys, but the "dignitary harm resulting from being compelled to support speech with which they disagreed." [224] Therefore defamation or tortious interference with contract would be more appropriate comparators.[225]

The court also rejected the plaintiffs' argument that the defendant had the burden to show its state of mind and that plaintiffs should be entitled to discovery on that issue.[226] The court found that while the good faith defense usually requires showing a subjective state of mind, application of that requirement in this case would lead to "a perverse outcome." [227] In this case, the court stated the outcome would turn on the subjective belief of an employee of the union and "[a]ny subjective belief [the union] could have had that the precedent was wrongly decided and should be overturned would have amounted to telepathy." [228] Even though overruling *Abood* had been hinted at in the Supreme Court's earlier decisions, the defendant should not be expected to have *known* that *Abood* was unconstitutional.[229] Expecting the defendant to have predicted the outcome of *Janus* "undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. This is not a practical, sustainable or desirable model." [230] The court held that the good faith defense applied as a matter of law and shielded the defendant from liability for collecting pre-*Janus* agency fees and dismissed the case.[231]

While this is the first case of its kind to be decided post *Janus* it is far from the only case. A California case, *Wilford v. NEA*, was filed in July as a class

action with seven California teachers currently named as plaintiffs, at least four of whom were also plaintiffs in the *Friedrichs* case.[232] The complaint was filed to preserve the class members' ability "to seek retrospective relief against the defendants as far back as the applicable statute of limitations will allow." [233] The complaint alleges violations of Section 1983, conversion, and restitution of money had and received.[234] The suit is seeking class certification, declaratory and injunctive relief, as well as reimbursement of all service or agency fees along with pre-judgment and post-judgment interest, damages and attorney fees under Section 1983.[235] Currently, this case is still in scheduling conference.

As of 2018, there were more than 25 pending lawsuits regarding retroactive application of *Janus* and collection of past fees. One such case, *Hoekman v. Education Minnesota*, seeks to recover past collected dues for members and non-members alike, forming a sort of hybrid of the legal issues discussed above.[236] Needless to say, this will be a hot bed of litigation for a while after *Janus*, as Justice Alito seemed to go out of his way to encourage claims for retroactive relief because the Court's overruling of *Abood* was foreseeable.[237] Should the lower courts continue to rule as the Eastern District of Washington did in *Daniels*, it is inconceivable that the cases will not be taken up on appeal considering Justice Alito's language.

The issue of class action status for non-members seeking to apply *Janus* retroactively has already been before the Supreme Court. After the Supreme Court's *Harris v. Quinn*[238] holding that involuntary deduction of fair share fees for home health care assistants violated the First Amendment, *Riffey v. Rauner*[239] was filed on behalf of a class of home health care assistants. The *Riffey* plaintiffs sought to certify a class of all non-union member home health care assistants.[240]. The district court had denied class certification, finding the class to be overly broad, the named plaintiffs could not adequately represent the class, and individual questions regarding damages predominated over common ones.[241] The Seventh Circuit affirmed.

The Seventh Circuit found that the proposed class contained a significant number of people whose First Amendment rights had not been violated, as 65 percent of the assistants had gone on to join the union.[242] It also agreed with the district court's finding that there were serious intra-class conflicts

and that the named plaintiffs could not fairly and adequately represent all prospective members.[243] The court agreed with the district court's finding that the common questions did not predominate over questions affecting individual members in terms of determining who was owed what damages in the case.[244]

The Supreme Court granted the plaintiffs' petition for writ of certiorari and vacated and remanded the issue in light of its *Janus* decision.[245] On December 6, 2018, the Seventh Circuit again found that class certification was not appropriate.[246] The court stated that *Janus* had no impact on its decision because the status of the individuals in *Riffey* had already been decided in *Harris*, in terms of their First Amendment rights in relation to paying a fair share fee.[247] Therefore, "*Janus* simply did not affect whatever remaining class claims the putative class members in" *Riffey* might have.[248] It is inevitable that more class certification issues regarding *Janus* will come up, but *Riffey* may provide a good insight into how those arguments will play out.

Another issue in pending litigation is whether union members are bound by the dues deduction contracts they signed before *Janus*. Ruling on cases in this area will have a large impact on much of the legislation that had been passed by states prior to *Janus* discussed above. One decision has been issued on the topic, *Smith v. Superior Court, County of Contra Costa*. [249] The court denied the plaintiff's motion to enjoin defendants from continuing to deduct membership dues from his paycheck.[250]

In *Smith*, the plaintiff, represented by the National Right to Work Legal Defense Foundation, sought a preliminary injunction against his employer, the Superior Court of Contra Costa County and his union, AFSCME Local 2700.[251] Smith became a voluntary member of AFSCME Local 2700 on January 4, 2016, and signed a year-long contract with Local 2700 to pay dues. [252] The agreement to pay was not revocable except at the end of that first year or when the memorandum of understanding between the employer and the union expired.[253] Smith specifically consented to continue his dues deduction through the expiration of the memorandum of understanding, even if he resigned from the union.[254] The court found that Smith could not use the First Amendment to abandon his contractual duties.[255] The court quoted *Cohen v. Cowles Media Co.*, for the rule that "the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law." [256]

The court also found that *Janus* did not give the plaintiff the ability to get out of his contract with his union.[257] The court stated that the *Janus* decision applied to non-members who had opted out of union membership, and therefore could not be compelled to pay agency fees. It reasoned:

Smith wants *Janus* to stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on contractual obligation to pay dues. Far from acknowledging that proposition, *Janus* actually acknowledges in its concluding paragraph that employees can waive their First Amendment rights by affirmatively consenting to pay union dues.[258]

The plaintiff argued that he could not have “knowingly” consented to pay dues before *Janus* because he could not have known or understood the rights the case would inform him that he had.[259] The court rejected this argument because the plaintiff’s right to opt out of the union had been clarified in *Abood*, and he affirmatively waived that right by agreeing to be a dues paying member of his union.[260]

The court also held that the plaintiff could not show irreparable harm required for a preliminary injunction because the defendant union had placed all of Smith’s dues collected after he resigned into an escrow account.[261] Because the money was sitting in escrow, not only would it be available to Smith should he prevail, but it also could not be used to subsidize anything that could be considered compelled speech, which was the First Amendment right at the heart of *Janus*.[262] The court further noted that the plaintiff had failed to show that the opt-out form did not provide a way for him to stop his dues deductions. While the plaintiff called the authorization card “coercive” and “self-serving” the court was having none of it. It found that the authorization card was “a discretionary offer by Local 2700 to amend the terms of the dues-deduction agreement before the contract requires the Union to do so.”[263] The court dismissed the motion to enjoin the union.[264]

A similar case has been filed in Pennsylvania involving a bus driver who was a union member and chose to resign his membership after *Janus*.[265] The plaintiff in *Mayer v. Wallingford – Swarthmore School District*, like the plaintiff in *Smith*, is represented by the National Right to Work Legal Defense Foundation. The claim in *Mayer* is similar to that in *Smith*, although the rejection of the plaintiff’s attempt to withdraw from the union was based

on a statutory requirement that withdrawal from the union happen in the fifteen days before a collective bargaining agreement expires, which was included in the employer and union's collective bargaining agreement. Both defendants in the case have motions to dismiss the first amended complaint pending as of this writing.

On November 13, 2018, the New Mexico Public Employee Labor Relations Board, in *AFSCME Local 3277 v. City of Rio Rancho*, delivered its opinion regarding the employer's withholding of union members' dues deductions after *Janus*.^[266]

The union filed for injunctive relief with the state labor board when the city refused to collect and distribute the dues of union members after the *Janus* decision.^[267] Injunctive relief was granted by the general counsel and the city appealed to the Board.^[268] On appeal, the union further argued that as member dues are required by statute to be deducted from a union member's paycheck until the member revokes according to the procedure in the collective bargaining agreement, the city was also in violation of the parties' CBA.^[269] The city argued that the proper interpretation of *Janus* applied to current union members as well as non-members, and therefore a clear and affirmative consent for deductions is required so it was unclear if the original dues deduction consents were valid.^[270] After oral arguments were held, the board found that the city's withholding of dues deductions from current union members may exceed what is required under the *Janus* decision. Based on that finding, the board found the general counsel's preliminary injunction to be justified.^[271]

An important developing area concerns challenges to exclusive representation. In July, the Buckeye Institute, a conservative advocacy group in Ohio with links to the National Right To Work Legal Foundation, brought a suit in Minnesota on behalf of Kathleen Uradnik against the Inter Faculty organization, St. Cloud State University and the Board of Trustees of the Minnesota State Colleges and Universities.^[272] The complaint sought a preliminary injunction, alleging that the Inter Faculty Organization violates Plaintiff's First Amendment rights when it speaks on her behalf.^[273] Plaintiff is not a member of the union.^[274] The district court, on September 27, 2018, denied the plaintiff's motion, stating that Supreme Court and Eight Circuit precedent have already rejected her arguments, and that even if exclusive representation rose to a First Amendment violation, the state statute would survive strict scrutiny.^[275]

While the plaintiff in *Uradnik* relied heavily on *Janus*, the district court rejected this argument.[276] The court stated that the Supreme Court’s decision addressed mandatory fees paid by non-union members, not exclusive representation, and that the Supreme Court in its opinion noted that it was “not disputed that the State may require that a union serve as exclusive bargaining agent for its employees.”[277] The district court also noted that the Eighth Circuit had also distinguished Minnesota’s public sector bargaining law from that in Illinois, and stated that the *Janus* ruling did not invalidate the Minnesota statute.[278]

The day after the district court’s decision, plaintiff appealed to the Eighth Circuit. On December 3, 2018, the Eighth Circuit affirmed the lower court’s ruling, finding that the plaintiff could not show a likelihood of success on the merits.[279] The next day, December 4, 2018, *Uradnik* filed a petition for certiorari in the Supreme Court.[280] A Supreme Court decision in this case could reshape the public sector labor law landscape in ways that the *Janus* decision only hinted at. Should cert be granted in this case, it will be the case to watch.

IV. CONCLUSION

What can be seen from the decisions that have come out thus far is that courts and the one labor board that have looked at the issue, are narrowly construing the holding in *Janus* to apply to fair share fee payers only. While the sample size is small, thus far courts and administrative agencies are unwilling to read *Janus* as applying to current union members, or see *Janus*’ holding as in any way changing the rights that were available to the individual when he or she willing became a union member.

While the decision may be known in the *Janus* case, its impact is far from clear. While many states passed preemptive legislation, how effective that legislation will be depends greatly on how the cases currently pending in courts across the country are decided. At this point, public sector labor can look forward to several years of legal uncertainty and busy legislatures, if the lead up to and immediate aftermath of *Janus* are any indication.

1. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

2. *Id.* at 220-22.
3. *Id.* at 220-21.
4. *Id.* at 222.
5. *Id.* at 232-35.
6. *Id.* at 225-26; 234-35.
7. *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2499 (2018) (Kagan, J. dissenting).
8. 5 ILCS 315/2.
9. Public safety employees (*i.e.* police officers, firefighters, and paramedics employed by fire departments and fire districts) do not have the right to strike; instead, they have the right to resolve negotiation disputes through compulsory interest arbitration proceedings. 5 ILCS 315/2, 14, 17.
10. 5 ILCS 315/6, 7, 17.
11. *Janus*, 138 S. Ct. at 2461.
12. *Id.* at 2478-86 (*quoting Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 311 (2012); *Harris v. Quinn*, 134 S. Ct. 2618, 2627 (2014)).
13. *Id.* at 2464.
14. 136 S. Ct. 1083 (2016).
15. *Janus*, 138 S. Ct. at 2464-65.
16. *Id.* at 2465 (*citing Knox*, 567 U.S. at 310).
17. *Id.* at 2467.
18. *Id.* at 2466.
19. *Id.* at 2487 (Kagan, J., dissenting).
20. *Abood*, 431 U.S. at 219-21.
21. *Janus*, 138 S. Ct. at 2492 (Kagan, J., dissenting).
22. *Id.* at 2493 (Kagan, J., dissenting).
23. *Id.* at 2463-64.
24. *Id.* at 2464.
25. *Id.* at 2494 (Kagan, J., dissenting).
26. *Id.* at 2465; 2478.

27. *Id.* at 2467.
28. *Id.*
29. *Abood*, 431 U.S. at 221.
30. *Abood*, 431 U.S. at 224.
31. *See id.*
32. *Id.* at 220-21.
33. *Janus*, 138 S. Ct. at 2465.
34. *Id.* (quoting *Harris*, 134 S. Ct. at 2640).
35. *Id.* at 2466.
36. *Id.* at 2467.
37. *Id.*
38. *Id.*
39. *Id.* at 2488 (Kagan, J., dissenting), (citing *Abood*, 421 U.S. at 220).
40. *Id.* at 2491 (Kagan, J., dissenting).
41. *See id.* at 2488 (Kagan, J., dissenting).
42. *Id.* at 2466.
43. *Id.*
44. *Id.* at 2467.
45. *Id.*
46. *Id.* at 2468, (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006)).
47. *Id.* at 2490 (Kagan, J., dissenting).
48. *Id.*
49. *Abood*, 421 U.S. at 221.
50. *Janus*, 138 S. Ct. at 2467.
51. *Id.* at 2491 (Kagan, J., dissenting).
52. *Id.* at 2461.

53. *Id.* at 2460.
54. *Id.* at 2468-69, n.6.
55. *Id.*
56. 5 ILCS 315/6(g).
57. *Id.* at 2492 (Kagan, J., dissenting).
58. *Id.*; see also *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968).
59. *Garcetti*, 547 U.S. at 418.
60. *Id.*
61. *Id.*
62. *Janus*, 138 S.Ct. at 2472.
63. *Id.* at 2477-78.
64. *Abood*, 431 U.S. at 263, n.16 (Powell, J., concurring).
65. *Janus*, 138 S.Ct. at 2473.
66. *Id.* at 2473; 2475.
67. *Id.* at 2477.
68. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).
69. *Janus*, 138 S. Ct. at 2495 (Kagan, J., dissenting).
70. *Id.*
71. *Id.* at 2493 (Kagan, J., dissenting).
72. *Id.*
73. *Id.*
74. *Id.* at 2478.
75. *Id.* at 2480.
76. *Id.* at 2497 (Kagan, J., dissenting) (quoting *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015)).
77. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).
78. 351 U.S. 225 (1956).

79. 367 U.S. 740 (1961).
80. *Janus*, 138 S. Ct. at 2479-80.
81. *Id.* at 2497 (Kagan, J., dissenting).
82. *Id.* at 2480, (quoting *Harris*, 134 S.Ct. at 2633).
83. *Id.* at 2498 (Kagan, J., dissenting).
84. *Id.* at 2482.
85. *Id.* at 2498 (Kagan, J., dissenting).
86. *Id.* at 2482.
87. *Id.* at 2483.
88. *Id.*
89. *Id.* at 2498 (Kagan, J., dissenting).
90. *Id.* at 2484.
91. *Id.*
92. *Id.*
93. *Id.* at 2485.
94. *Id.*
95. *Id.*
96. *Id.* at 2485-86.
97. *Id.* at 2486.
98. *Id.*
99. *Id.* at 2499-2501 (Kagan, J., dissenting).
100. *Id.* at 2501 (Kagan, J., dissenting), (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (emphasis in original)).
101. *Id.* at 2501-02 (Kagan, J., dissenting).
102. *Id.* at 2496 (Kagan, J., dissenting).
103. Assemb. B. 119, 2017-2018 Reg. Sess., 2017 Cal. Stat. 21 § 2 (2017).
104. *Id.* at § 2.

105. *Id.*
106. *Id.* at §§ 3-5.
107. *Id.* at § 2.
108. *Id.*
109. *Id.*
110. *Id.* at § 3.
111. S.B. 846, 2017-2018 Reg. Sess., 2017 Cal. Stat. 405 (2017).
112. *Id.* at § 1.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. S.B. 285, 2017-2018 Reg. Sess., 2017 Cal. Stat. 567 (2017).
118. *Id.*
119. H.B. 314, 149th Assemb., Reg. Sess. (Del. 2018) (codified at DEL. CODE ANN. 19 § 1304 (2018)).
120. *Id.* at § 1(2).
121. DELAWARE GEN. ASSEMB., HOUSE BILL 314 (2018), *available at* <https://legis.delaware.gov/BillDetail?LegislationId=26316>.
122. *Id.*
123. H.B. 314 § 1(2), 149th Assemb., Reg. Sess. (De. 2018).
124. *Id.* at § 1(2)(a)(2).
125. *Id.* at § 1(2).
126. *Id.* at § 1(2)(a)(3).
127. *Id.* at § 1(2)(b).
128. H.B. 811, 438th Gen. Assemb., Reg. Sess. (Md. 2018).
129. MD. CONST. Art II, § 17, *available at* <http://mgaleg.maryland.gov/pubs-current/current-constitution-maryland-us.pdf> (last accessed December 3, 2018).
130. H.B. 811 § 1(A)(1)(I), 438th Gen. Assemb., Reg. Sess. (Md. 2018).

131. *Id.* at §1(A)(3)(I).
132. *Id.* at §1(A)(3)(II).
133. *Id.* at §1(A)(2)(II).
134. *Id.*
135. *Id.*
136. *Id.* at §1(A)(2)(III).
137. *Id.* at §1(A).
138. *Id.* at §1(B)(1)(I).
139. H. B. 1017, 438th Gen. Assemb., Reg. Sess. (Md. 2018).
140. *Id.*, amending ANN. CODE. MD. § 2-308(B).
141. *Id.* at § 2-308(C).
142. *Id.* at § 2-308(F)(3).
143. *Id.* at at 2-308(F)(4).
144. SB 6229, 65th Legislature (Wash. 2018).
145. *Id.* at §1.
146. *Id.* at §1(1)(a).
147. *Id.* at §1(1)(c)(i)-(iii).
148. *Id.* at §1(2).
149. *Id.* at §1(1)(a)-(b).
150. SB 6229, 2018 Sess., Reg. Sess. (Wash. 2018).
151. AB 3686, 218th Sess. (N.J. 2018).
152. *See Id.*
153. *Id.* at § (3)(b)(3).
154. *Id.*
155. *Id.* at § (3)(g).
156. *Id.* at § (3)(b)(1).

157. *Id.* at § (3)(f).

158. *Id.* at § (3)(c).

159. *Id.*

160. *Id.*

161. *Id.* at § (3)(d).

162. *Id.* at § (4)(b).

163. *Id.* at § (4)(c).

164. *Id.* at § (6)(1).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. AB No. A09509, Section RRR, 2018 Leg., Reg. Sess. (N.Y. 2018).

170. *Id.* at § RRR (4)(a)-(b).

171. *Id.*

172. *See Id.*

173. *See Id.*

174. *See* FLA. STAT. § 447.401 (2018).

175. N.Y. Exec. Ord. 183 (June 27, 2018).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See* S.B. 1725 H.D. 2, 29th Leg. Reg. Sess. (Hi. 2018).

180. *Id.* at § (c).

181. *Id.*

182. *Id.*

183. S.B. 2185, 2018 Leg., Reg. Sess. (R.I., 2018).

184. *Id.* at § (a).
185. *Id.* at § (b).
186. *Id.*
187. *See Id.* at § (a).
188. SB 1278, 2018 Sess., Reg. Sess. (Pa. 2018).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *See* Pa. Gen. Assemb., Regular Sess. 2017-2018, S.B. 1278, History, <https://www.legis.state.pa.us/cfdocs/billInfo/BillInfo.cfm?syar=2017&sind=0&body=S&type=B&bn=1278> (last accessed, Feb, 10, 2019).
194. Am. Legis. Exchange Council, Public Employee Bargaining Transparency Act, <https://www.alec.org/model-policy/public-employee-bargaining-transparency-act/> (last accessed Feb, 10, 2019).
195. PEBTA, § 4(D).
196. *Id.* at § 4(E).
197. *Id.* at § 5(A)(4).
198. *Id.* at § 6(A).
199. *Id.* at § 6(B).
200. *Id.* at § 7.
201. *Danielson v. AFSCME*, 340 F. Supp. 3d 1083 (W.D. Wash, 2018).
202. *Hoekman v. Education Minnesota*, No. 0:18-cv-01686 (D. Minn. Complaint filed June 18, 2018).
203. *See* Will Baude, *Can Unions Be Sued for Janus Claims?*, THE VOLOKH CONSPIRACY, <https://reason.com/volokh/2018/07/19/can-unions-be-sued-for-janus-claims>.
204. *See* Aaron Tang, *Inside the Doomed Union Refund Lawsuits, Part II*, TAKE CARE <https://takecareblog.com/blog/inside-the-doomed-union-refund-lawsuits-part-ii>.
205. *Danielson*, 340 F.Supp.3d 1083.
206. *Id.* at 1083.
207. *Id.* at 1084.

208. *Id.*

209. *Id.*

210. *Id.*

211. 944 F.2d 1113, 1118 (5th Cir. 1993).

212. *Id.* at 1118.

213. *Id.* at 1118.

214. *Danielson*, 340 F.Supp.3d at 1084.

215. *Id.* at 1085.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1086.

222. *Id.* (citing *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008)).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* (quoting *Winner v. Rauner*, 2016 WL 7374258, at *5 (N.D.Ill. 2016)).

229. *Id.*

230. *Id.*

231. *Id.* at 1087.

232. Complaint, *Wilford v. NEA*, No. 8:18-cv-01169 (C.D.. Cal. 2018).

233. *Id.* at para. 49.

234. *Id.* at paras 60-76.

235. *Id.* at paras 21-2.
236. Case 0:18-cv-01686-SRN-SER (D. Minn. 2018).
237. *See Janus*, 138 S. Ct. at 2484-85.
238. 134 S. Ct 2618 (2014).
239. 873 F.3d 558 (7th Cir. 2017).
240. *Id.* at 561.
241. *Id.*
242. *Id.* at 563.
243. *Id.* at 565.
244. *Id.*
245. *Riffey v. Rauner*, 138 S.Ct. 2708 (Mem) (2018).
246. *Riffey v. Rauner*, 910 F.3d 314 (7th Cir. 2018).
247. *Id.* at 319.
248. *Id.* at 318.
249. No. 18-cv-05472- VC (N.D. Cal. Nov. 11, 2018).
250. *Id.* at *1.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at *2.
256. *Id.* at *1 quoting *Cohen*, 501 U.S. 663, 672 (1991).
257. *Id.* at *1.
258. *Id.*
259. *Id.*
260. *Id.*

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261. *Id.* at *2.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Mayer v. Wallingford-Swarthmore School District*, No. 2:18-cv-04146 (E.D. Penn. 2018).

266. 15 PELRB 2018, PELRB Case No. 1123-18, 2018 WL 6047494 (N.M. PELRB Nov. 13, 2018).

267. 2018 WL 6047494 at *1.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at *2.

272. *Uradnik v. Inter Faculty Organization, et al.*, 2018 WL 4654751, (D. Minn. Sept. 27, 2018).

273. *Id.* at *1.

274. *Id.*

275. *Id.* at *4.

276. *Id.* at *2.

277. *Id.* (quoting *Janus*, 138 S. Ct. 2448 at 2478).

278. *Id.*, (citing *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018)).

279. *Uradnik v. Inter Faculty Organization*, , No. 18-3086 (8th Cir. Dec. 3, 2018).

280. Petition for Cert. *available at*: <http://src.bna.com/DIk>.

RECENT DEVELOPMENTS

By Student Editorial Board:

Johnny D. Derogene, Patrick J. Foote, Miranda L. Huber, and Matt Soaper

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, the equal employment opportunity laws, and the First Amendment.

I. IELRA DEVELOPMENTS

A. *Managerial Employees*

In *Chicago Board of Education and Chicago Teachers Union*, 35 PERI ¶ 109 (IELRB 2018), the IELRB affirmed the administrative law judge's recommended decision that College and Career Specialists in the Chicago Public Schools are not managerial employees. The union filed a majority interest petition to classify College and Career Specialist as an "educational employee" under the current collective bargaining agreement. The Chicago Board of Education claimed that these employees fall under the managerial exclusion, but the ALJ dismissed this defense.

College and Career Specialists are part of the Office of College and Career Success in the Chicago Public Schools. The employees in this position are tasked with "improving college enrollment and persistence, and then move students into the workforce." The ALJ found that this position's primary function was strategic planning. The specialists work with management to submit recommendations to senior leadership on the school's post-secondary goals. There was nothing in the record showing that employees in this position would ever create procedures without first speaking with management. This position did not act as the leader for each school's post-secondary team; rather, the position acted as a team member to facilitate discussion. Further, they made no budgetary decisions.

The IELRB began its analysis with the definition of a managerial employee under Section 2(o) of the IELRA: “An individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.” The IELRB stated that the College and Career Specialists did not perform executive or management functions because they: did not run the department, agency, or program; did not make recommendations independently; did not create goals for improving student post-secondary enrollment; and were merely advisory. Further, the position's role with side organizations was merely to provide information to the post-secondary team rather than lead that function. Finally, they lacked the power to control their budget. The IELRB further explained that even if the specialists did possess executive or management functions in their job, it was not their dominant function. Therefore, the position was entitled to representation under the IELRA

II. IPLRA DEVELOPMENTS

A. Retaliation

In *Bowers and City of Chicago (Finance Department)*, No. L-CA-18-060 (ILRB Local Panel 2019), the ILRB Local Panel held that the charging party's evidence failed to support her claim that the City discharged her in retaliation for filing a previous unfair labor practice charge against the City, and for serving as a witness for the Union in a grievance.

On September 22, 2016, Lachelle Bowers filed an unfair labor practice charge against the City alleging that the City had discriminated and taken frivolous disciplinary action against her. The record from this first charge demonstrated that Bowers had an extensive disciplinary history including insubordination, disrespectful and unprofessional behavior towards coworkers and supervisors, written and oral reprimands, and numerous suspensions. This charge was dismissed; however, it led to her second charge against the City.

On May 21, 2018, Bowers filed an unfair labor practice charge against the City alleging that the City violated Sections 10(a)(1) and (2) of the IPLRA when it discharged her in retaliation for filing her first unfair labor practice charge city in 2016, and for serving as a witness for the Union in a grievance. The Executive Director dismissed this charge on the ground that Bowers

failed to provide adequate evidence to raise any issue of fact or law that would warrant a hearing. Bowers appealed.

The Local Panel found Bowers' appeal meritless. The ILRB held that the Executive Director correctly decided that Bowers' evidence failed to indicate a nexus between her protected activity and her discharge. The ILRB agreed with the Executive Director that timing alone was not enough to establish the requisite causal connection that the City discharged Bowers in retaliation for having previously filed an unfair labor practice charge against the city, and for serving as a witness for the Union in a grievance.

Lastly, Bowers argued that "numerous material errors" led the Executive Director to erroneously dismiss her case. The ILRB held that Bowers failed to identify any such material errors or flaws in the Executive Director's analyses, findings of fact, or conclusions. Accordingly, the ILRB affirmed the Executive Director's dismissal of Bowers' unfair labor practice charge against the City.

III. EEO DEVELOPMENTS

B. Age Discrimination

In *Mount Lemmon Fire District v. Guido*, 139 S. Ct. 22 (2018), the United States Supreme Court held that states and their political subdivisions are "employers" covered by the Age Discrimination in Employment Act regardless of whether they have at least 20 employees. In reaching this decision, the Court interpreted "also means" in the ADEA's definition of employer as additive rather than merely clarifying the meaning of employer.

Mount Lemmon Fire District, a political subdivision in Arizona, laid off its two oldest full-time firefighters because of a budget shortfall. The laid off firefighters sued the Fire District alleging that their terminations violated the ADEA. Staffed with fewer than 20 employees, the District moved to dismiss the firefighters' suit on the ground that the District was too small to qualify as an employer within the Act's definition of employer.

The ADEA defines "employer" to mean "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . The term also means (1) any agent of such a person, and (2)

a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State,”

The issue presented was whether a state entity must employ 20 or more employees in order for it to be an employer under the ADEA? This statutory interpretation issue originates from Congress’ amendment to the ADEA well over four decades ago in 1974. Prior to the 1974 amendment, state or local government entities were not employers under the ADEA. However, in 1974, Congress amended the ADEA to extend its protection to state and local government employees by specifying that the term employer “also means” a state or political subdivision of a state. However, the Act is silent on whether a state or political subdivision of a State is also required to meet the 20 or more employees’ threshold.

The District argued that when Congress added “also means” to the ADEA, the legislators intended to merely clarify that states and their political subdivisions were qualified to be employers, provided that they had 20 or more employees. On the other hand, the firefighters argued that when Congress added “also means” to the ADEA, the legislators intended to add new categories of employers to the definition, such that states and political subdivisions qualified as employers regardless of whether they employ 20 or more employees.

The Supreme Court affirmed a decision of the Ninth Circuit that states and political subdivisions are employers within the meaning of the ADEA’s definitional provision regardless of whether they employ 20 or more employees. The Court held that the ordinary meaning of “also means” is additive rather than clarifying. The Court reasoned that the words “also means” occur dozens of times throughout the United States Code and they typically carry an additive meaning. The Court found that, similar to Congress’ amendment to the Fair Labor Standards Act (“FLSA”) in 1974 that extended the FLSA’s definition of employer to all government entities regardless of their size, the ADEA warrants a similar interpretation especially because many aspects of the ADEA are based on the FLSA. Accordingly, the Court held that the ADEA carries no numerical threshold with regard to its application to states and political subdivisions.

IV. FIRST AMENDMENT DEVELOPMENTS

A. *Exclusive Representation*

In *Uradnik v. Inter Faculty Organization*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *pet. cert. filed* No. 18-719 (Dec. 4, 2018), the United States District Court for the District of Minnesota denied plaintiff's motion for a preliminary injunction seeking to enjoin the Board of Trustees of the Minnesota State Colleges and Universities, St. Cloud State University, and the Inter Faculty Organization ("IFO") from "regarding the IFO as her representative and allowing it to speak on her behalf."

The plaintiff was a tenured professor of political science who had worked at St. Cloud State University for 19 years. The IFO was elected and certified in 1975 as the exclusive representative for the faculty at Minnesota's seven public universities. According to Minnesota's Public Employment Labor Relations Act (PELRA), election of an exclusive representative obligates the public employer to meet and negotiate about "issues surrounding the terms and conditions of employment." PELRA also "grants public employees," through their exclusive representatives, "the right to 'meet and confer' with their employers on matters outside the scope of mandatory negotiations."

The plaintiff, who has never been a member of the IFO and disagrees with the IFO on many issues, argued that the exclusive representation provisions of the PELRA compelled her speech in violation of her First Amendment rights to freedom of speech and freedom of association. The court, however, denied the preliminary injunction because plaintiff did not establish a likelihood that she would prevail on the merits of her claim. In analyzing the likelihood of success, the court cited *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), where, the plaintiffs argued that exclusive representation under the PELRA violated their First Amendment rights by requiring the exclusive representative to speak on behalf of all employees in "meet and confer sessions." The Supreme Court held that the PELRA did not restrain the the claimants' freedom to speak on any education-related issue or to associate or not associate with whom they pleased, including the exclusive representative." Uradnik argued that PELRA compelled her to speak through the IFO, an argument she maintained was not before the Court in *Knight*. However, the court rejected this argument,

reasoning that “[t]he Court in *Knight* broadly rejected the appellee’s First Amendment . . . arguments, indicating that the decision applies regardless of the type of speech at issue.” Furthermore, in *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), a case attacking exclusive representation of home health care aids, the “appellants made multiple compelled-speech arguments in their briefing.” That court held that “[t]here is no meaningful distinction between this case (*Bierman*) and *Knight*.”

The plaintiff relied upon *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The court rejected this argument, because in *Janus* it “[was not disputed that the State may require that a union serve as exclusive bargaining agent for its employees.” Furthermore, the “main distinction” between *Janus* and the plaintiff’s claim was that *Janus* concerned non-members being made to subsidize the union through fees. Uradnik “[wa]s not required to pay fees, attend meetings, endorse the union, or take any other direct actions against her will.” The court also cited *Bierman* as holding that “recent holdings in *Janus* . . . do not supersede *Knight*.”

The court further held that “[e]ven if *Knight* and *Bierman* did not preclude the plaintiff’s compelled speech argument,” the PELRA would pass the relevant level of constitutional scrutiny for compelled speech: exacting scrutiny. To survive an exacting scrutiny analysis, a statute must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” The court held that the PELRA serves the interest of providing Minnesota public employees with “representation and greater bargaining power” and “promotes the compelling state interest of labor peace.” The court further held that these interests could not be accomplished through significantly less restrictive means. Without exclusive representation, “the Union’s power and persuasion would be significantly eroded and the state interest in labor peace would be undermined.”

On December 3, 2018, the United States Court of Appeals for the Eighth Circuit affirmed the district court’s decision. Uradnik filed a petition for a writ of certiorari with the United States Supreme Court the following day.

B. Fair Share Fees

In *Riffey v. Rauner*, 910 F. 3d 314 (7th Cir. 2018), the Court of Appeals for the Seventh Circuit denied class action status to a claim for restitution of fair

share fees paid by home health care assistants that had been held unconstitutional in *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014). Following the Supreme Court's decision, on remand to the district court, the plaintiffs amended their complaint to substitute new named plaintiffs and to substitute Governor Bruce Rauner for Pat Quinn. They sought to certify a class that included all non-union assistants who had fair-share fees collected from them from April 2008 until the date on which *Harris* was decided. The district court denied the motion to certify the class because the class was too broad, the named plaintiffs did not adequately represent the class, and the class appeared unmanageable. Because *Harris* had resolved the class-wide question about fair-share fees, only individual issues concerning relief remained. The Seventh Court affirmed, and the assistants went back to the Supreme Court. The Court held *Riffey* in abeyance while it decided *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). The Court remanded *Riffey* to the Seventh Circuit for reconsideration in light of *Janus*.

The Seventh Circuit noted that *Janus* and *Harris* differed at the outset because the plaintiff in *Janus* was a state employee, while the *Harris* plaintiff was not. This meant that the *Janus* Court had to confront its prior decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The Seventh Circuit reasoned that *Janus* had no impact on the remaining claims in *Riffey*; the Supreme Court had already dealt with the fair-share fee issue when it decided *Harris*. The court reiterated its reasoning from its holding in 2017, the first time it affirmed the denial of class certification, “[T]he question whether damages are owed for many, if not most, of the proposed class members can be resolved only after a highly individualized inquiry.” The appellate court noted that each putative class member would have to discuss his or her individual support or opposition to the union and any injuries opponents experienced. In turn, the union could assert defenses against each member. Further, even without the class certification, individuals still could pursue any funds to which they were entitled. In light of the above, the Seventh Circuit again affirmed the district court's decision to deny class certification to the plaintiffs.