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

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

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants, by their attorney, Kwame Raoul, Attorney General of Illinois, submit the following memorandum in opposition to Plaintiffs' motion for summary judgment.

INTRODUCTION

Plaintiffs, the Local 150 of the International Union of Operating Engineers, AFL-CIO, and its business manager (the "Union" or "Local 150") allege that Illinois labor laws that require the Union to provide fair representation to all members of the Union's bargaining unit, including those who opt out of paying "fair share fees," violate the Union's First Amendment rights of free association.

The parties have filed cross-motions for summary judgment, with each seeking summary judgment as a matter of law. Defendants seek summary judgment on the basic proposition that while *Janus* ruled that non-union members could not be compelled to pay "fair share fees," *Janus* did not, either expressly or by necessary implication, call into question two other long-established, inter-related concepts essential to labor relations: a union's right to be the exclusive representative for the bargaining unit, and that union's concomitant duty to provide fair representation to all members in the bargaining unit, including those employees choosing not to

belong to the union or pay fair share fees. Just as the Union's right to exclusive representation remains unchanged after *Janus* (as numerous cases have held), so too does its duty of fair representation. The Court should reject the arguments made by the Union here.

ARGUMENT

Plaintiffs' legal argument in support of their motion for summary judgment can be summarized succinctly: *Janus* compels it. Under plaintiffs' view, this Court does not need to look at other cases, the nature of the labor law structure as a whole, or even closely read the language of the *Janus* opinion itself, to reach this conclusion. According to plaintiffs, the result in *Janus* means that unions no longer have a duty of fair representation.

Plaintiffs note that in *Janus*, "[t]he Court held that the First Amendment prohibits states from compelling nonmembers to associate with unions by paying fair share fees." Pl. Memorandum (Doc. 71) at 10. From that limited holding, plaintiffs reason that, if non-union members cannot be compelled to pay fair share fees, then "*it necessarily follows* that unions and union members have the right under the First Amendment to refuse to associate with free-riding nonmembers." *Id*. (emphasis added). Plaintiffs thus ask the Court to declare unconstitutional the provision of Illinois law, 5 ILCS 10(b)(1)(ii), that requires the Union to represent all members of the bargaining unit fairly and without discrimination.

No fair reading of *Janus* could lead to that conclusion. Although plaintiffs say their First Amendment claim against their duty of fair representation "necessarily follows" from the Court's invalidation of fair share fees in *Janus*, the Court in *Janus* said precisely the opposite: "Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation." *Janus v. American Federation of State, County, and Municipal Employees*, 138 S.Ct. 2448, 2469 (2018). Exclusive representation and the duty of fair

representation are concepts unchanged by the *Janus* decision, as the *Janus* opinion itself states: "*States can keep their labor-relations systems exactly as they are*—only they cannot force nonmembers to subsidize public-sector unions. In this way these States can follow the model of the federal government and 28 other States." *Id.* at 2485 n.27 (emphasis added). Even without fair share fees, unions continue "avidly" to seek to win the right to be the exclusive representative of all employees. *Id.* at 2467.

Thus, although *Janus* struck down the requirement of fair share fees as a form of compelled speech in violation of the First Amendment, it left intact two foundational principles of labor law—the union's right of exclusive representation, and the union's duty of fair representation. The Court recognized that a principle of "no discrimination" remained in place—that is, a duty of fair representation, stating that "it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers." *Id.* at 2468. Plaintiffs' argument that *Janus* ends the duty of fair representation is defeated by *Janus* itself.

Plaintiffs do not address the growing number of cases, cited in our opening brief, that have rejected the argument that a union's right to be the exclusive representative has been undermined by *Janus.* Doc. 70 at 9–13. That right remains unchanged, based on the authority of *Minnesota State Bd. for Cmty. Colleges v. Knight,* 465 U.S. 271 (1984). *See also O'Callaghan v. Regents of the University of California,* 2019 WL 2635585 at *4 (C.D. Cal. 2019). If *Janus* necessarily meant the end of the duty of fair representation, it would have also meant the end of exclusive representation. No court has held that in the aftermath of *Janus.*[1]

[1] We also note that the U.S. Supreme Court has denied certiorari in two of the Court of Appeals decisions defendants relied on in their opening brief, both upholding the concept of exclusive representation after *Janus*. *Bierman v.* Dayton, 900 F.3d 570 (8th Cir. 2018), cert den. *sub. nom. Dayton v. Walz,* 139 S.Ct. 2043 (2019); *Uradnik v. Inter Faculty Organization,* Doc. 18-3806 (8th Cir.), cert den. 139 S.Ct. 1618 (2019).

In their submission, plaintiffs focus on the handling of grievances for nonunion members as a particular source of injury. Doc. 71 at 4. The Union alleges that it has lost income after *Janus* because some individuals ("approximately 30" out of "over 3,000" covered by the Illinois Public Labor Relations Act) have resigned their union membership or ceased paying fair share fees. *Id*. at 3, 5. The Union also asserts that the expense associated with pursuing a grievance is a constitutional violation if the nonunion member is not paying a fee. *Id*.

But these arguments were raised and disposed of in *Janus.* As the Court noted in *Janus*, unions are not required to file a grievance every time an employee may request. 138 S.Ct. at 2468. The union retains some discretion to decline, assuming of course, it is acting in good faith. *Id.* Unions may have a representative at a grievance proceeding even if the employee declines union representation. *Id*. The outcome of a grievance might have a precedential effect on how a collective bargaining agreement is interpreted, and this of course can have an impact on all members of the bargaining unit, so when the union handles a grievance for a nonunion member it is also acting for the benefit of its membership. *Id.*

In *Janus*, the Court noted these factors in support of its conclusion that having to process a grievance did not infringe the union's rights. It is part of the territory that comes with the considerable advantages of being the exclusive representative. *Id.* at 2467. Forcing non-union members to pay the fair share fee is what the Court found to be the constitutional problem. The Court confirmed that the union's privileges (as exclusive representative) and obligations (its duty of fair representation) remain intact. The Court reached this conclusion with full awareness of the fact that its ruling "might cause unions to experience unpleasant transition costs in the short term." *Id.* at 2485. The Union's relatively small loss constituting less than 1% of its membership does not change the underlying constitutional analysis.

That the nonunion employee was successful in his constitutional claim in *Janus* does not at all strengthen the Union's claim here, which attempts to turn the reasoning of *Janus* against nonunion employees who opt not to pay fair share fees. Unions are not employees. Unions are not compelled to pay fair share fees. On the other hand, employees do not have the right to exclusively represent anybody, and have no cognate legal duty to represent the employees in the bargaining unit fairly and without discrimination. Those rights and responsibilities belong to the union, as they did before *Janus* and after. *Janus,* 138 S. Ct. at 2468, *citing Steele v. Louisville Nashville R. Co.*, 323 U.S. 192 (1944). *Steele* would not have been cited with approval if the Court really meant it to be undermined or overruled. It does not "necessarily follow" that that the employee's victory in *Janus* must lead to a union victory here. To the contrary, the Union's First Amendment claim fails as a matter of law.

CONCLUSION

For each of these reasons, and as discussed in our opening memorandum, plaintiffs' motion for summary judgment should be denied, and defendants' motion for summary judgment should be granted.

Respectfully submitted,

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