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The Aftermath of *Janus v. AFSCME*: An Ongoing Assault on Public Sector Unions

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In June 2018, the Supreme Court issued its opinion in *Janus v. AFSCME*,¹ reversing decades old precedent and holding that agency fee agreements in the public sector violate the First Amendment. Even before the decision came down, the same organizations that mounted the constitutional challenges against agency fees began to file lawsuits seeking return of agency fees paid prior to the decision. Multiple cases are winding their way through the courts in a number of states, with appellate decisions just beginning to issue. Although major drops in union membership and funding post-*Janus* have not occurred thus far,² these repayment cases are a significant drain on union resources.

This Issue Brief will analyze the post-*Janus* cases, beginning with a short description of the history leading up to *Janus*, along with the Supreme Court's decision in *Janus*. The Issue Brief will then examine the organizations that are bringing these cases before moving to an analysis of the cases themselves, including the arguments of the plaintiffs and defendants and the outcomes of those cases that have been decided thus far. This portion of the Issue Brief will concentrate on the Seventh Circuit's decision on remand in *Janus II*, as the first decision from a court of appeals and one that is representative of the arguments presented and decisions reached. The primary focus of the Issue Brief will be on the cases seeking restitution of agency fees collected under state laws pre-*Janus*. Before concluding, however, the Issue Brief will describe some additional cases that union opponents have brought against public sector unions after *Janus*. In conclusion, the Issue Brief will pose some important questions raised by this litigation.

¹ *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018) (hereinafter *Janus I*).

² Rebecca Rainey & Ian Kullgren, *One Year After Janus, Unions are Flush*, POLITICO (May 17, 2019) (describing the impact of organizing, budget cuts, staff reductions, and new legislation in mitigating the impact of the loss of agency fees).

I. *Janus v. AFSCME*

Janus was the culmination of a years long effort to limit the funds available to labor unions by removing their ability to collect fees from employees they are mandated by law to represent. In 1977, in *Abood v. Detroit Board of Education*,³ the Supreme Court upheld the right of unions representing employees working for the government to charge those employees fees, known as agency fees or fair share fees, for the representation that state laws required the unions to undertake. Fair share fees are part of the comprehensive collective bargaining system fashioned by Congress for private sector employees under the National Labor Relations Act and subsequently adopted by many state legislatures for state and local government employees.

Under this system of exclusive representation, unions chosen by a majority of employees represent all of the employees in the collective bargaining unit. They must represent all of the employees in good faith without discrimination based on union membership or any other irrelevant or arbitrary factor, such as race or gender. Employees who choose to become union members pay full dues, which can be used for other union activities. Where authorized by law, the unions can require all of the represented employees – regardless of whether they are union members – to pay a fee for that representation, but the fee can only be used for collective bargaining and contract administration, not for any political activities of the union.⁴ The *Abood* Court recognized that these fair share fees might impact the First Amendment interests of employees, but concluded that the fee requirement was justified by the government’s interest in maintaining stable labor relations and ensuring there were no “free riders” who benefited from the union’s collective bargaining activities without paying for them.

After losing their constitutional claim in *Abood*, organizations opposed to unions broadly continued to attack fair share fees, leading to a series of Supreme Court cases deciding such issues as what activities unions could charge fair share fee payers for and what processes unions must follow if employees objected to the union’s decision about which activities were chargeable.⁵ Other attacks continued as well and in 2012, Justice Alito began to lay the groundwork for the overruling of *Abood*,⁶ culminating in *Janus*. In a 5–4 decision, with a strong dissent by Justice Kagan, the Court held that the government’s interests were insufficient to

³ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). For a detailed history of the law leading up to *Abood*, along with a critique of the *Janus* decision, see Catherine Fisk, *Janus and the Future of Unions*, AM. CONST. SOC’Y (last visited Jan. 21, 2020).

⁴ *Abood*, 431 U.S. at 235–36.

⁵ See, e.g., *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991) (determining whether certain expenses were chargeable to fee payers); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (finding union procedures for employees to challenge chargeable fees insufficient to meet constitutional requirements).

⁶ See, e.g., *Knox v. SEIU*, 567 U.S. 298, 314 (2012) (stating that previous decisions allowing unions to charge agency fees unless an employee opts out “approach, if they do not cross, the limit of what the First Amendment can tolerate”); *Harris v. Quinn*, 573 U.S. 616, 635–38 (2014) (detailing what the Court described as *Abood*’s questionable analysis).

justify the burden on First Amendment interests of dissenting workers forced to pay for their union representation. The decision overruled *Abood*, reaching a different conclusion than the *Abood* majority about the weight of government interests and rejecting as well the analogy to a series of cases decided after *Abood*, which gave government employers broad authority to restrict the speech of their employees.⁷

II. The Organizations Leading the Attack

The sheer number of Supreme Court cases dealing with the issue of fair share fees is relatively remarkable, particularly given the small amount of money at stake for each employee. The legal representation in these cases, however, is not funded by the employees, but instead provided by organizations dedicated to curbing the power of unions. The National Right to Work Foundation argued *Janus* in the Supreme Court as it has many other cases involving union fees.⁸ The organization is also bringing many of the cases following *Janus*.⁹ The Freedom Foundation, with a goal of “revers[ing] the stranglehold government unions have on our state and local policymaking,” is another organization involved in these cases,¹⁰ along with the Liberty Justice Center, which represents *Janus*.¹¹ The funding for these organizations is often opaque, and indeed, some are dedicated to keeping it so.¹² What we do know, however, indicates funding by conservative and libertarian foundations and wealthy individuals with similar political bents.¹³

⁷ See, e.g., *Connick v. Myers*, 461 U.S. 138, 154 (1983) (finding that even where employee’s speech implicated matter of public concern, she could be terminated for the speech where the employer reasonably believed it would cause disruption in the workplace); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that public employee speech made pursuant to job duties is not protected by the First Amendment from employer discipline).

⁸ Mark Walsh, *A “view” from the courtroom: The dog that didn’t bark*, SCOTUSBLOG (Feb. 26, 2018); NAT’L RIGHT TO WORK LEGAL DEF. FOUND., *About* (last visited Dec. 16, 2019) (describing the organization’s mission “to eliminate coercive union power and compulsory unionism abuses through strategic litigation, public information, and education programs.”)

⁹ FEDERALIST SOC’Y, *The Legal Battle to Enforce Janus v. AFSCME*, (Nov. 9, 2018). Another important figure in these cases is attorney Jonathan F. Mitchell, although it is unclear by whom he is being paid. See Noam Scheiber, *Trump Nominee is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES (July 18, 2018).

¹⁰ FREEDOM FOUND., *About*, (last visited Dec. 30, 2019). According to its website the Freedom Foundation has grown “[f]rom humble beginnings with just two staff members and 341 supporters . . . to include about 50 staff and over 5,000 volunteers and financial supporters.” *Id.*

¹¹ LIBERTY JUSTICE CTR., *Cases*, (last visited Dec. 16, 2019).

¹² See LIBERTY JUSTICE CTR., *Nonprofit groups challenge New Mexico disclosure law for violating free speech, privacy rights*, (last visited Dec. 16, 2019) (describing the organization’s legal representation of nonprofits seeking to overturn a law that requires transparency regarding donors).

¹³ Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018) (describing the “cohesiveness with which conservative philanthropists have taken on unions in recent decades.”) The website Conservative Transparency shows some of the web of conservative and libertarian donors that support these organizations. See conservativetransparency.org.

Following *Janus*, conservative organizations have engaged in a concerted campaign to persuade workers to abandon their unions, reaching out to workers individually to encourage and assist them in ceasing to fund their unions.¹⁴ These efforts too are operated by and funded by many of the same organizations and funders.¹⁵ Indeed, Janus himself is no longer a child support specialist for the state of Illinois, but a senior fellow at the Liberty Justice Center which represented him in his case.¹⁶ There he is continuing his efforts to limit the funding available to unions with a different platform.¹⁷

III. The Cases Seeking Restitution

At the time that *Janus* was decided by the Supreme Court, twenty-two states and the District of Columbia had laws authorizing fair share payments, which had been in effect for many years. Even before the decision came down some lawsuits had been filed seeking repayment of fees paid pursuant to these laws, and many more have been filed subsequently. These lawsuits seek millions of dollars from public sector unions, money collected in compliance with existing laws and already spent on representing employees. Rulings in favor of the employees would have the potential to decimate, if not bankrupt, unions representing government employees.

A. Claims of Retroactivity

The lawsuits argue that *Janus* should be retroactive, thus entitling Janus and all other employees who paid fair share fees prior to the decision to reimbursement. In *Janus II*, the first case¹⁸ to be decided at the appellate level, the plaintiff relied on two Supreme Court cases indicating that once a rule has been “‘ announced and applied to the parties to the controversy, [it] must be given full retroactive effect by all courts adjudicating federal law.”¹⁹ As the Seventh Circuit

¹⁴ Kate Patrick, *One Year After Janus, Conservatives Begin Difficult Campaign to Tackle Union Membership*, INSIDE SOURCES: POLITICS (July 8, 2019) (describing campaign).

¹⁵ See Anya Kamenetz, *Behind The Campaign To Get Teachers To Leave Their Unions*, NPR (July 19, 2018); Robin Urevich, *Mark Janus Wants His Union Dues Back*, AM. PROSPECT (July 11, 2019) (describing the well-funded network of conservative and libertarian organizations engaged in this campaign).

¹⁶ Robin Urevich, *Mark Janus Wants His Union Dues Back*, AM. PROSPECT (July 11, 2019). Rebecca Friedrichs, who brought a similar case before *Janus* that resulted in a deadlock at the Supreme Court due to the death of Justice Scalia, is promoting a book about her case. *Id.*

¹⁷ *Id.*

¹⁸ The Seventh Circuit heard oral argument in *Mooney v. Illinois Education Association*, a case based on the same theory as *Janus*, on the same day as *Janus*. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 942 F.3d 352, 359 (7th Cir. 2019) (hereinafter *Janus II*). *Janus* sought damages while *Mooney* argued that her claim sounded in equity as restitution. *Id.* The Seventh Circuit concluded that there was no significant difference between the two theories and treated them much the same in its opinions. *Id.*

¹⁹ *Janus II*, 942 F.3d at 359 (quoting *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 87 (1993)). The other case relied on is *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995), which cited *Harper* for the proposition that when the Court announces a new rule and applies it to the parties before the Court, the rule must also be applied to pending cases, including those involving events that preceded the decision. *Janus*, 942 F.3d at 359.

noted in *Janus*, the Supreme Court did not expressly hold that the decision should be applied retroactively and some language in the opinion suggest that the Court contemplated prospective application only.²⁰ Nevertheless, the *Janus I* Court remanded the case to the lower courts for further proceedings, including consideration of the remedy.²¹

In considering the retroactivity question, the Seventh Circuit recognized that there are circumstances under which the Supreme Court has found that decisions do not apply retroactively. In earlier cases involving retroactivity, the Court was particularly concerned about the unfairness of applying the decision to the litigants in the case at bar and not to others with pending cases.²² Furthermore, reliance interests and “grave disruption or inequity” warrant prospective application only.²³

1. Good Faith Defense

Ultimately, the Seventh Circuit declined to decide the “knotty” retroactivity question, assumed retroactive application, and turned to the question of remedy.²⁴ The decision, like the other cases that have addressed the issue, turned on the application of the good faith defense. The claims of employees against their unions for return of fees arise under Section 1983 of the U.S. Code,²⁵ which provides a cause of action for individuals deprived of “rights, privileges or immunities secured by the Constitution” through actions taken “under color” of law.²⁶ Section 1983 provides qualified immunity for public employees when the constitutional right they are alleged to have violated is not clearly established.²⁷

²⁰ *Janus*, 942 F.3d at 358.

²¹ *Id.*

²² *Id.* at 360.

²³ *Id.* (quoting *Ryder v. United States*, 515 U.S. 177, 184–85 (1995)).

²⁴ *Id.* In *Danielson v. Inslee*, 945 F.3d 1096, 1099 (9th Cir. 2019), the Ninth Circuit similarly assumed the retroactive application of *Janus I* and moved to consideration of the application of the good faith defense. *Accord*, *Lee v. Ohio Educ. Ass'n*, No. 19-3250, 2020 WL 881265, at *2 (6th Cir. Feb. 24, 2020); In *Hough v. SEIU Local 521*, the court suggested that no decision should be applied retroactively to award monetary relief where the Supreme Court reversed prior authority that deemed the challenged conduct lawful. No. 18-CV-04902-VC, 2019 WL 1785414, at *1 (N.D. Cal. Apr. 16, 2019).

²⁵ Some plaintiffs have added state law claims such as conversion, trespass to chattels, or unjust enrichment to their Section 1983 claims. *See, e.g., Lee*, 2020 WL 881265, at *5; *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008–09 (D. Alaska 2019), *appeal docketed, sub nom. McCollum v. NEA-Alaska*, Case No. 19–35299 (9th Cir.). The elements of a conversion claim may not be satisfied. *See Lee*, 2020 WL 881265, at *5 (finding that the employee had no right to ownership or possession of the fees at the time they were deducted and thus did not meet the requirements for a conversion claim). In addition, the state statutes authorizing the deductions may defeat any common law claims. *See Crockett*, 367 F. Supp. 3d at 1008-09 (finding that state statute authorizing agency fees displaced any common law claims and that the elements of the common law claims were not met in any event).

²⁶ 42 U.S.C. § 1983.

²⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In *Wyatt v. Cole*, however, the Supreme Court decided that the doctrine of qualified immunity does not apply to private actors such as unions.²⁸ Despite denying qualified immunity, the Supreme Court stated that “we do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.”²⁹ In fact, the five justices who concurred and dissented in *Wyatt* indicated strong support for such a defense.³⁰

On remand, the Fifth Circuit in *Wyatt*, recognized the good faith defense to liability, pointing out the language in the Supreme Court’s majority opinion noting the inequity of recognizing a defense for the government when it relied on a statute but not for a private party.³¹ The Fifth Circuit held that “private defendants sued on the basis of *Lugar* [which recognized that private citizens could be sued under § 1983 if they acted under color of law] may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional.”³²

Following *Wyatt*, every other circuit to address the question applied the good faith defense to private actors sued under § 1983.³³ The Second Circuit applied the good faith defense to reject a claim for refund of fair share fees after the Supreme Court held in *Harris v. Quinn*³⁴ that fair share fees for “quasi-government” employees, like caregivers, were unconstitutional.³⁵ The Second Circuit found it reasonable for the union to rely on “validly enacted state law and the controlling weight of Supreme Court precedent.”³⁶ Further, every court that has considered the issue of union fees after *Janus I* has reached the same conclusion.³⁷

²⁸ *Wyatt v. Cole*, 504 U.S. 158, 159 (1992).

²⁹ *Id.* at 168.

³⁰ *Id.* at 169, 175.

³¹ *Wyatt v. Cole*, 994 F. 2d 1113, 1118 (5th Cir. 1992) (quoting *Wyatt v. Cole*, 504 U.S. at 168).

³² *Id.*

³³ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 942 F.3d at 362 (citing cases from the 2d, 3d, 6th and 9th Circuits).

³⁴ *Harris v. Quinn*, 573 U.S. 616, 639 (2014) (stating that the state was seeking a significant expansion of *Abood* to apply to employees who were state employees only for purposes of collective bargaining and otherwise were private employees).

³⁵ *Jarvis v. Cuomo*, 660 F. App’x 72, 75–76 (2d Cir. 2016) (unpublished).

³⁶ *Id.* at 76.

³⁷ *Janus*, 942 F.3d at 364. See, e.g., *Danielson v. Inslee*, 945 F.3d at 1099; *Lee v. Ohio Educ. Ass’n*, 2020 WL 881265, at *3 (finding that because the union relied on existing legal authority, as a matter of law it was acting in good faith); *Diamond v. Pa. State Educ. Ass’n*, 399 F. Supp. 3d 361, 398 (W.D. Pa. 2019) (finding it “objectively reasonable to rely on a state statute that is valid under controlling Supreme Court precedent”); *Hamidi v. Serv. Employees Int’l Union Local 1000*, No. 2:14-cv-00319WBS KJN, 2019 WL

These decisions are not surprising. It would be quite troubling for a private party to be liable for damages for acting in accordance with a validly enacted statute that the Supreme Court upheld as constitutional. Even those opposed to unions should understand the risks to private parties posed by the unavailability of such a defense. Individuals and organizations relying on laws duly enacted and even approved by the highest court in the land could be bankrupted if the Court changes its mind and reverses prior precedent.

The fee payers in *Janus II* argued that the good faith defense is not mentioned in the text of Section 1983, and in fact is inconsistent with the statute's language which says "shall be liable."³⁸ Many years ago, however, the Supreme Court recognized both absolute and qualified immunities under the Section, which are also nowhere mentioned and equally inconsistent with the quoted language. The Court explained that the immunities recognized were "so firmly rooted in the common law" and "supported by such strong policy reasons" that Congress would have specified if it intended to abrogate them.³⁹ The defense of reliance on valid law was also well-established at common law.⁴⁰ Accordingly, the Seventh Circuit in *Janus II* and all other courts that have considered the issue have rejected the argument that no good faith defense to Section 1983 claims exists.⁴¹

Applying the defense in *Janus II*, the Seventh Circuit found that the state of Illinois complied with existing law when it enacted the statute creating the labor relations system that incorporated exclusive representation and fair share fees.⁴² The union then relied on that statute to collect the authorized fees.⁴³ The court recognized, as *Janus* argued, that some justices had previously signaled in judicial opinions an interest in revisiting *Abood*.⁴⁴ That fact was insufficient to establish bad faith, however, since there was no certainty that the case would be overruled and parties should be able to rely on existing law instead of trying to predict how the

5536324, at *3 (E.D. Cal. Oct. 25, 2019), *appeal docketed*, Case No. 19-17442 (9th Cir.) (holding "a union's compliance with then-existing law indeed suffices to find good faith").

³⁸ These arguments and the responses are discussed in *Janus II*, 942 F.2d at 362.

³⁹ *Id.* (quoting *Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992)).

⁴⁰ *Id.*

⁴¹ *See, e.g., Danielson v. Am. Fed'n of State, Cty., & Mun. Emps.*, 945 F.3d at 1099 (finding authority for the use of the good faith defense by private parties); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1228 (W.D. Wash. 2019), *appeal docketed*, Case No. 19-35290 (9th Cir.) (applying the good faith defense, noting it has been recognized by every court of appeals to consider the question); *Wenzig v. Serv. Emps. Int'l Union Local 668*, No. CV 1:19-1367, 2019 WL 6715741, at *5 (M.D. Pa. Dec. 10, 2019) (noting that nineteen district courts plus the Seventh Circuit had applied the good faith defense in cases involving claims for fee refunds based on *Janus*).

⁴² *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 942 F.3d 352, 366 (7th Cir. 2019).

⁴³ *Id.*

⁴⁴ *Id.*

law might change.⁴⁵ Notably, other courts have applied the good faith defense to parties relying on a statute even in the absence of a decision directly on point upholding the constitutionality of an identical statutory scheme.⁴⁶

On remand, Janus contended that the union could not establish the good faith defense because it acted in bad faith by refusing to escrow the fees pending the outcome of the case.⁴⁷ The Seventh Circuit agreed with AFSCME that the union had no obligation to escrow the fees and, had it done so, might have violated the fiduciary duties owed to the employees it represented.⁴⁸ Janus further contended that the union received an “unjust ‘windfall’” by collecting and retaining the now unconstitutional fees.⁴⁹ The court disagreed, noting that Janus received the benefits of the union’s representation, however unwanted, in exchange for the fees.⁵⁰

The Seventh Circuit also considered whether in applying the defense of good faith, it was required to find the most analogous state tort as the Supreme Court had done in *Wyatt v. Cole*, and if so, what that was.⁵¹ In analyzing the question of the application of qualified immunity, the *Wyatt* Court stated that although the language of Section 1983 did not reference immunity, the Court had found government officials entitled to immunities so “rooted in common law” and supported by such strong policy rationale that Congress would have specified if it intended to eliminate them.⁵² To determine whether such a common law immunity applied under Section 1983, the Court looked to defenses available at common law under the most analogous tort when Section 1983 was incorporated in the Constitution.⁵³

Fee payers, including Janus, have claimed that the good faith defense under Section 1983 does not apply unless the most analogous common law tort provides a similar defense. They contend that there is no analogous tort, precluding the application of the defense. Alternatively, they argue that the analogous tort must be one that contains a state-of-mind element in order to provide a good faith defense to liability. Janus urged the court to analogize to the tort of conversion, which has no such requirement. The Seventh Circuit rejected the tort conversion

⁴⁵ *Id.* Indeed, had Judge Merrick Garland been confirmed to replace Justice Scalia instead of Justice Gorsuch, *Abood* might still be the law.

⁴⁶ In *Wyatt*, for example, the court characterized the statute on which the defendant relied as in “legal jeopardy” based on another decision of the court and indeed, the statute was later found unconstitutional. *Wyatt v. Cole*, 994 F. 2d 1113, 1121 (5th Cir. 1992). Nevertheless, the court found it objectively reasonable for the defendant to rely on the statute, which had not been overturned at the time. *Id.*

⁴⁷ *Janus*, 942 F.3d at 366.

⁴⁸ *Id.*

⁴⁹ *Id.* at 367.

⁵⁰ *Id.*

⁵¹ The court’s discussion of this argument is at 364–66.

⁵² *Id.* at 163–64.

⁵³ *Id.* at 164.

analogy for two reasons. First, Janus never had a right to control the fair share fee funds because both the law and the collective bargaining agreement gave the state the authority to deduct the fees from Janus's pay and remit them to the union. Second, there is a privilege defense to conversion claims which applies to those acting pursuant to a legal duty to preserve a public interest, and the court concluded that this privilege might well apply to the union collecting fees pursuant to state law.

Instead of conversion, AFSCME argued that abuse of process was the most analogous tort, while the court suggested that tortious interference with contract might also be analogous. Although the court indicated that it agreed with AFSCME that abuse of process was most similar, it ultimately concluded that it need not find the most analogous tort, noting that the *Wyatt* Court had done so for purposes of immunity not for the good faith defense. Other courts considering this question have also rejected the argument that the court must find an analogous tort with a state-of-mind requirement.⁵⁴ In addition, some district courts have found the most analogous tort to be one that has a state-of-mind requirement, such as abuse of process, tortious interference, or defamation, thereby making the good faith defense available.⁵⁵

Some plaintiffs have characterized their claims as equitable actions for restitution, rather than legal claims for damages. Following from that, they argue that the good faith defense does not apply. The Seventh Circuit rejected such an argument in *Mooney v. Illinois Education Association*,⁵⁶ a case consolidated with *Janus II* for argument and decided the same day. The court concluded that the claim was in fact a legal claim for damages because it sought recovery from the union's general assets rather than recovery of a traceable asset of the plaintiff which remained in the possession of the union.⁵⁷ As a result, the court did not have to decide whether the good faith defense applied to equitable claims. The other courts that have considered the issue have reached the same conclusion.⁵⁸

⁵⁴ See, e.g., *Danielson*, 945 F.3d at 1100-1102 (finding no common law tort analogy is required); *Lee*, 2020 WL 881265, at *4 (same); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1191 (D. Or. 2019), *appeal docketed*, Case No. 19-35191 (9th Cir.) (stating the defense doesn't require finding an analogous tort); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1004-05 (D. Alaska 2019), *appeal docketed, sub nom. McCollum v. NEA-Alaska*, Case No. 19-35299 (9th Cir.) (finding no common law analog required).

⁵⁵ See, e.g., *Danielson*, 945 F.3d at 1101-02 (finding that if an analogous tort is required, abuse of process rather than conversion is the correct analogy); *Cook*, 364 F. Supp. 3d at 1191 (finding abuse of process to be an analogous common law tort); *Crockett*, 367 F. Supp. 3d at 1005 (indicating that if a common law analog is required tortious interference and abuse of process are more analogous than conversion, as the core of plaintiffs' claim is dignitary harm).

⁵⁶ *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019).

⁵⁷ *Id.* at 371. *Danielson* similarly found the claim to be one for legal damages rather than a claim for restitution. 945 F.3d at 1102.

⁵⁸ See, e.g., *Danielson*, 945 F.3d at 1103 (concluding that the equities favored denying relief because the union relied on state law and Supreme Court precedent and the union used the fees to provide benefits to

2. Claims for Class Certification

Some of the post-*Janus I* retroactivity cases have sought class certification. If a case proceeds on a class basis, the cost of litigation and the potential cost of a loss of the case to the union is substantially increased. The Seventh Circuit did not deal with this issue in *Janus II*. In *Riffey v. Rauner*,⁵⁹ however, a case that followed *Harris v. Quinn*, the Seventh Circuit affirmed the district court's denial of class certification.

In *Riffey*, plaintiff home healthcare workers challenged an Illinois law that required non-union members to pay a fair share fee. The *Riffey* plaintiffs sought class certification post-*Janus I*, arguing that their proposed class of around 80,000 members was entitled to a refund of \$32 million. The Seventh Circuit in *Riffey* found that the district court decision denying certification was entitled to deference because of the court's broad discretion on the question of whether or not to grant class certification.⁶⁰ The Seventh Circuit noted that the district court concluded that the determination of damages depended on a number of individualized factors, including the employee's support for the union and the actual damages suffered.⁶¹ Evidence of disharmony among the proposed class—some had joined the union when they no longer had the option to pay the fair share fees, while others had disassociated from the union altogether—also supported the district court's decision.⁶² Accordingly, the group was not appropriate for certification because of the lack of common questions of fact adequate to define the class.⁶³ The district court indicated it might consider certifying a “more targeted class,” but the plaintiffs did not make an alternative request for certification.⁶⁴

It is also worth noting that, in addition to seeking refunds of dues, many cases sought injunctive relief against unions that collected some fees post-decision during the time period that it took to implement the change. While these claims have been dismissed on either mootness or standing

all employees); *Lee*, 2020 WL 881265, at *4 (finding the relief sought to be legal not equitable); *Allen v. Santa Clara Corr. Peace Officers Ass'n*, 400 F. Supp. 3d 998, 1003–04 (E.D. Cal. 2019) (finding that the relief sought was legal but even if equitable, the equities weighed against relief because of the union's reliance on Supreme Court precedent and state statutes and the plaintiffs' receipt of benefits in exchange for fees paid); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 875 (C.D. Cal. 2019) (concluding that the relief sought was legal, not equitable, and plaintiffs could not circumvent the good faith defense by labeling a legal claim as equitable).

⁵⁹ *Riffey v. Rauner*, 910 F.3d 314 (7th Cir. 2018), *cert. denied, sub nom. Riffey v. Pritzker*, 139 S. Ct. 2745 (2019).

⁶⁰ 910 F.3d at 318.

⁶¹ *Id.* at 319.

⁶² *Id.*

⁶³ *Id.*; FED. R. CIV. P. 23.

⁶⁴ 910 F.3d at 319.

grounds,⁶⁵ unions were still required to engage in substantial and costly litigation to achieve these results.

IV. Other Post-*Janus I* Litigation

A. Refund of Pre-*Janus I* Union Dues

In addition to lawsuits seeking refunds of fair share fees paid before *Janus I* declared them unconstitutional, some lawsuits seek refunds of all dues paid by members prior to the *Janus I* decision. The theory of these suits is that some individuals joined the union in lieu of paying fair share fees because the difference between the fair share fee and dues was small and dues gave them a vote in union matters, along with other benefits. Several district courts have dismissed these claims, all relying on similar rationales. *Babb v. California Teachers Association*⁶⁶ is representative. The court concluded that the good faith defense applied equally to members and to fee payers.⁶⁷ In addition, the plaintiffs voluntarily chose to join the union in exchange for the benefits provided and thus were not entitled to any refund.⁶⁸ The fact that they would not have made this decision if *Janus I* was the law at the time did not mean that their payments were compelled.⁶⁹

B. Challenges to Dues Deduction Authorizations Signed Pre-*Janus I*

Other cases challenge the authorizations signed by employees which allow employers to deduct union dues from their pay and remit them to the union. Employees filing these claims resigned from the union in the wake of *Janus I* and allege that failure to immediately stop dues deductions violates the First Amendment, although these authorizations typically cover a specified time period and contain a specific method for revocation. There is a threshold question as to whether these cases meet the Section 1983 requirement that the action be taken

⁶⁵ See, e.g., *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 981–82 (N.D. Ohio 2019) (finding request for injunctive relief moot), *aff'd*, No. 19-3250, 2020 WL 881265 (6th Cir. Feb. 24, 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n, AFSCME, Local 11*, 397 F. Supp. 3d 1076, 1084–85 (S.D. Ohio 2019) (finding lack of standing); *Wholean v. CSEA SEIU Local 2001*, No. 3:18-CV-1008 (WWE), 2019 WL 1873021, at *3 (D. Conn. Apr. 26, 2019) (finding request for declaratory and injunctive relief moot).

⁶⁶ *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019). *Accord Aliser v. SEIU California*, No. 3:19-cv-00426m, at *2 (N.D. Cal. Dec. 10, 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1007–09 (D. Alaska 2019), *appeal docketed, sub nom. McCollum v. NEA-Alaska*, Case No. 19-35299 (9th Cir.); *Hernandez v. Am. Fed. of State, Cty., & Mun. Emps. California*, 2019 WL 7038389 (E.D. Cal. Dec. 20, 2019); *Seager v. United Teachers of L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *appeal docketed*, No. 19-55977 (9th Cir. 2019); *Smith v. Teamsters Local 2010*, No. CV 19-00771-PA (FFMx), 2019 WL 6647935, at *9 (C.D. Cal. Dec. 3, 2019). Other courts have dismissed on different grounds. See, e.g., *LaSpina v. SEIU Pa. State Council*, No. CV 3:18-2018, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019) (dismissing based on lack of standing, speculative injury, and absence of a live case or controversy).

⁶⁷ *Babb*, 378 F. Supp. 3d at 876.

⁶⁸ *Id.* at 877.

⁶⁹ *Id.*

under color of state law. The action taken by the government here is a ministerial function authorized by the employee's agreement with a private party, the union. While a private party can engage in state action under certain circumstances, several district courts have found that these claims do not meet the test.⁷⁰ Not all courts have agreed, however.⁷¹ Even if the state action requirement is met, courts have found that by voluntarily signing the dues deduction authorization, plaintiffs waived any First Amendment rights.⁷² Thus, the union can continue to collect dues until the authorization expires or is revoked in accordance with its contractual requirements. That the plaintiffs signed their authorizations pre-*Janus I* does not change this conclusion, because they chose to be union members rather than fee payers like *Janus*.⁷³

A similar, but not factually identical, issue arises when the dues revocation is limited by a provision negotiated in a collective bargaining agreement that is authorized by state law. The court in *Cooley v. California Statewide Law Enforcement Association* found such a provision valid and enforceable post-*Janus I*, based on the same rationale as the cases considering a signed dues deduction authorization – the employee's voluntary choice to become a union member.⁷⁴

C. Challenges to Exclusive Representation

As noted previously, fair share fees were part of the comprehensive system of collective bargaining adopted in the United States, which uses a model of exclusive representation. Now that one pillar of that system has been removed in the public sector, the organizations that succeeded in its removal are mounting challenges to exclusive representation. Exclusive representation is similar to our political system - the minority is represented by representatives chosen by the majority, in this case a union. Rather than seek an election to remove the existing union representative, those minority members who are unhappy with their representation have decided to challenge the entire system.⁷⁵

⁷⁰ See *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1015 (W.D. Wash. 2019); *Hendrickson v. AFSCME Council 18*, No. CIV 18-1119 RB/LF, 2020 WL 365041, at *6-*8 (D.N.M. Jan. 22, 2020); *Smith*, 2019 WL 6647935 at *4-*8.

⁷¹ See *Hernandez*, 2019 WL 7038389 at *2-*6 (finding that the requirements for state action were met).

⁷² See, e.g., *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019); *Anderson v. Serv. Emps. Int'l Union Local 503*, 400 F. Supp. 3d 1113, 1116 (D. Or. 2019); *Hernandez*, 2019 WL 7038389 at *6-*7; *Smith*, 2019 WL 6647935 at *8-*9.

⁷³ See, e.g., *Anderson*, 400 F. Supp. 3d at 1117; *Hernandez*, 2019 WL 7038389 at *7; *Smith*, 2019 WL 6647935 at *9.

⁷⁴ *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1080 (E.D. Cal. 2019), *appeal docketed*, No. 19-16498 (9th Cir.).

⁷⁵ In a twist on these cases, one union has challenged the state collective bargaining law requiring it to represent non-members, arguing that after *Janus I*, compelling the union to speak on behalf of nonmembers violates the First Amendment rights of the union and its members. The district court granted summary judgment for the defendant, noting the Seventh Circuit's 2017 ruling upholding the system of exclusive representation as against a constitutional challenge in *Hill v. Service Employees Int'l*

Thus far, like the plaintiffs in other post-*Janus I* cases, they have been unsuccessful. The Supreme Court in *Janus I* stated in dicta that “[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itsself a significant impingement on associational freedoms that would not be tolerated in other contexts.”⁷⁶ Seizing on this language, plaintiffs have argued that exclusive representation violates their right to freedom of association by forcing them to be represented by a union they do not desire.

The Supreme Court rejected a First Amendment challenge to exclusive representation in 1984 in *Minnesota State Board for Community Colleges v. Knight*.⁷⁷ In *Knight*, the union was not only the exclusive representative for purposes of collective bargaining, but also for a meet and confer process that covered matters outside the scope of mandatory collective bargaining. The employees, however, remained free to speak outside these processes and to choose to associate or not with the union, the Court found. The Court also noted in support of its decision that the government was not constitutionally compelled to listen to the speech of any of its employees, whether represented by the union or not.⁷⁸ Only the statute compelled the employer to listen to the union. Efforts to distinguish *Knight* or to argue that *Janus I* overruled, or at least undermined, *Knight* have not succeeded,⁷⁹ and the Supreme Court has denied certiorari since *Janus I* was decided in several related cases.⁸⁰

Union, 850 F.3d 861, 864 (7th Cir. 2017). *Sweeney v. Raoul*, No. 18–CV–1362, 2019 WL 5892981 (N.D. Ill. Nov. 12, 2019), *appeal docketed*, No. 19–3413 (7th Cir.).

⁷⁶ *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

⁷⁷ *Minn. State Bd. for Cmty. Colls. v. Minn. Cmty. Coll. Faculty Ass’n*, 465 U.S. 271 (1984) (rejecting the challenge regarding the right of the exclusive representative to meet and confer over matters not subject to bargaining); *Knight v. Minn. Cmty. Coll. Faculty Ass’n*, 460 U.S. 1048 (1983) (rejecting the challenge as to representation for collective bargaining). In addition to the First Amendment argument, several cases have alleged that exclusive representation violates antitrust law. This theory, too, has been unavailing. *Babb v. Cal. Teachers Ass’n*, 378 F. Supp. 3d 857, 886–87 (C.D. Cal. 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1009–11 (D. Alaska 2019), *appeal docketed, sub nom. McCollum v. NEA-Alaska*, Case No. 19–35299 (9th Cir.).

⁷⁸ *Minn. State Bd. for Cmty. Colls.*, 465 U.S. at 285 (citing *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464–466 (1979)).

⁷⁹ See *Grossman v. Haw. Gov’t Emps. Ass’n/AFSCME Local 152*, 382 F. Supp. 3d 1088, 1091 (D. Haw. 2019); *Reisman v. Associated Faculties of Univ. of Me.*, 356 F. Supp. 3d 173 (D. Me. 2018), *aff’d*, 939 F.3d 409 (1st Cir. 2019); *Sweet v. Cal. Ass’n of Psychiatric Technicians*, No. 2:19–CV–00349–JAM–AC, 2019 WL 4054105, at *2–*4 (E.D. Cal. Aug. 28, 2019); *Thompson v. Marietta Educ. Ass’n*, No. 2:18–CV–628, 2019 WL 6336825, at *7 (S.D. Ohio Nov. 26, 2019) (stating that every court to consider the issue has found the claims foreclosed by *Knight*), *appeal docketed*, No. 19–4217 (6th Cir. 2019); *Uradnik v. Inter Faculty Org.*, No. 18-1895 (PAM/LIB), 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff’d*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, April 21, 2019. See also *Hendrickson*, 2020 WL 365041, at *9 (finding that “while the ultimate issue the *Knight* Court considered does not squarely align with the issue presented here, the Court finds that language in the decision is directly on point and dispositive of this claim”).

⁸⁰ See *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018) (raising a constitutional challenge to exclusive representation for home care workers following *Harris v. Quinn*, 134 S. Ct. 2618 (2014)), *cert. denied sub*

V. The Future

While unions have consistently prevailed in the post-*Janus I* cases thus far, litigation of these issues is far from over. There are additional appeals pending in the Third, Sixth and Ninth Circuits, with potentially more to come. The organizations that fund this litigation will not stop. Even if unions prevail in every case, the cost of litigation is an enormous drain on union resources which would otherwise go to advance the cause of working Americans through collective bargaining, contract administration, support for favorable legislation and administrative rules, and opposition to unfavorable legislation and administrative rules. As pointed out by Linda Greenhouse of Yale Law School:

It's no secret that public employee unions skew Democratic. Teachers unions, in particular, give Democrats a lot of money, some \$60 million alone during the 2016 election. It's also no secret that as private sector unions shrink into near invisibility — 6.5 percent of the private sector work force was unionized in 2017 — unions still cover 34.4 percent of public sector workers, and public sector unions represent the future of organized labor. Take them down, and you remove a money engine for the Democrats and cast a big shadow over the future of organized labor itself.⁸¹

This litigation will not stop until unions are so weak that they pose no threat to the power of the wealthy individuals and corporate interests that oppose them.

These cases raise difficult questions regarding the Constitution, the use of power, and the courts. Courts and the rule of law are essential to democracy. Yet at what point, if any, does the use of the courts by powerful actors have the potential to threaten democracy?⁸² Are the employee plaintiffs in these cases acting out of moral conviction and righteous motives or are they being used by powerful interests to defeat the efforts of working people to join together collectively to combat the power of wealthy individuals and corporate actors? Is this litigation simply another effort by the powerful to divide and conquer the people or a vindication of constitutional rights on behalf of workers who cannot afford to litigate without support? Will unions survive and if so, in what form and with what resources? What other means exist to combat the concentration of power and rising inequality in the United States? At present,

nom. Bierman v. Walz, 139 S. Ct. 2043 (2019); Mentele v. Inslee, 916 F.3d 783 (9th Cir.) (same), *cert. denied sub nom.* Miller v. Inslee, 140 S. Ct. 114 (2019); Uradnik v. Inter Faculty Org., No. CV 18-1895 (PAM/LIB), 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, April 21, 2019.

⁸¹ Linda Greenhouse, *A Question of Legitimacy Looms for the Supreme Court*, N.Y. TIMES (June 21, 2018).

⁸² Some might argue that unions themselves are powerful interests that are at odds with the true interests of workers.

despite the almost unanimous responses of the courts to the post-*Janus I* litigation, there are more questions than answers.

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