No. 16-3638

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; and MICHAEL HOFFMAN, in his official capacity as Director of the Illinois Department of Central Management Services,

Defendants-Appellees;

LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Hon. Robert W. Gettleman, U.S. District Judge

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3638

Short Caption: Mark Janus et al. v. American Federation of State, County & Municipal Employees, Council 31, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Federation of State, County and Municipal Employees, Council 31

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bredhoff & Kaiser, P.L.L.C.

Dowd, Block, Bennett, Cervone, Auerbach & Yokich

Cornfield and Feldman LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ John M. West Date: October 26, 2016

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3638

Short Caption: Mark Janus v. American Federation of State, County & Municipal Employees, Council 31

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ Melissa J. Auerbach Date: December 5, 2016

Attorney's Printed Name: Melissa J. Auerbach

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

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N/A

Attorney's Signature: s/ Stephen A. Yokich Date: December 5, 2016

Attorney's Printed Name: Stephen A. Yokich

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

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiffs-Appellants Mark Janus and Brian Trygg is not complete and correct. For example, it fails to alert this Court to the district court's exercise of discretion to allow plaintiffs to intervene and pursue their claims in this case even though the underlying action had been dismissed for lack of subject matter jurisdiction and lack of standing. Defendants-Appellees, American Federation of State, County and Municipal Employees, Council 31 ("AFSCME Council 31"), General Teamsters/Professional & Technical Employees Local Union No. 916 ("Teamsters Local 916"), and Michael Hoffman, and Intervenor-Appellee Lisa Madigan, submit this jurisdictional statement as required by Circuit Rule 28(b).

Illinois Governor Bruce Rauner filed a complaint in district court against numerous labor organizations that are the exclusive representatives of bargaining units of state employees. R1-22. The Governor sought declarations that the parts of the Illinois Public Labor Relations Act ("Act"), 5 ILCS 315/1 *et seq.*, that allow collection of "fair-share fees" from non-union members violated the First Amendment to the United States Constitution and that the Governor did not exceed his powers under the Illinois Constitution when he issued an executive order barring the collection of fair-share fees. R20-21. The court granted Illinois Attorney General Lisa Madigan's motion to intervene as a defendant on behalf of the People of the State of Illinois. R215.

All defendants moved to dismiss under Federal Rule of Civil Procedure 12(b) because the district court lacked subject matter jurisdiction over the complaint, the Governor did not have standing under Article III of the United States Constitution to bring his claims, and the complaint failed to state a claim on which relief could be granted. R76-80, R216-19.

Shortly thereafter, on March 23, 2015, state employees Janus, Trygg, and Marie Quigley filed a motion to intervene as plaintiffs. R656-57. They attached a proposed complaint alleging a

claim under 42 U.S.C. § 1983 that the Act violated their First Amendment rights and seeking a declaration that the Governor's executive order was lawful. R672-84. In addition, on March 26, 2015, the Governor filed an amended complaint purporting to add Janus, Trygg, and Quigley as plaintiffs, R958-90, along with a motion asking the court to confirm the amendment as a matter of right, R1563-70. The court ordered supplemental briefing on the jurisdictional issues raised by the motions to intervene and to amend the complaint. R2223.

On May 19, 2015, the court issued an order granting the motions to dismiss the Governor's complaint and denying his motion to confirm the amendment of that complaint because the court lacked subject matter jurisdiction over the Governor's claims and the Governor did not have Article III standing to challenge the constitutionality of the Act. R2334-42.

In the same order, however, the court granted the motion to intervene filed by Janus, Trygg, and Quigley, ordering that their complaint be treated as the operative pleading. R2342. Acknowledging that generally "[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention" (quoting *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950)) – so that the plaintiffs' intervention could not have created jurisdiction where there otherwise was none – the district court applied a line of authority from other circuits recognizing an exception to that rule in cases "where the intervening party brings separate claims, and the district court has an independent basis to exercise jurisdiction over those claims" (quoting *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007)). R2341. In such circumstances, the court held, "[a] court has discretion to treat pleadings of an intervener as a separate action to adjudicate claims raised by the intervener." *Id.* (quoting *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895 (10th Cir. 1973)). Although the cited decisions recognize this exception, neither this Court nor the Supreme Court has yet adopted it.

Janus, Trygg, and Quigley later filed an amended complaint against AFSCME Council 31, Teamsters Local 916, Madigan, and Tom Tyrrell, the Director of the Illinois Department of Central Management Services at the time, under 42 U.S.C. § 1983, alleging that the portions of the Act allowing for the collection of fair-share fees violated their First Amendment rights. R2349-66. Janus and Trygg, but not Quigley, then filed a second amended complaint, substituting Hoffman for Tyrrell and alleging the same federal statutory claim under section 1983, over which the district court had federal question jurisdiction under 28 U.S.C. § 1331. R2708-24 (A4-20).

All defendants moved to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). R2988-90. On September 13, 2016, the district court dismissed plaintiffs' complaint. R3070-71 (A1-2). That same day, the court entered judgment under Federal Rule of Civil Procedure 58. R3072 (A3). No motions to alter or amend the judgment were filed. On October 11, 2016, plaintiffs filed a notice of appeal (R3073-75) that was timely under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court thus has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether, as the Supreme Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the First Amendment to the United States Constitution permits a public employer to agree with the labor organization that represents its employees that all members of the bargaining unit who choose not to become members of the union will be required in lieu of union dues to pay a fair-share fee to help defray the union's costs of collective bargaining and grievance administration activities that inure to the benefit of union members and nonmembers alike.

2. Whether the claims brought in this case by plaintiff Brian Trygg are barred by the doctrine of claim preclusion because of his previous litigation of a challenge to the fair-share fee in state court.

STATEMENT OF THE CASE

A. The Fair-Share Requirements

The two defendant labor organizations, AFSCME Council 31 and Teamsters Local 916, are certified as the exclusive representatives for bargaining units of certain Illinois public employees. R2710 (A6), ¶¶ 8-9. Under Illinois law, the unions are required to represent the interests of all employees in their bargaining units, whether they are union members or not. 5 ILCS 315/6(d). Both unions have entered into collective bargaining agreements with the Department of Central Management Services ("Department") that govern the terms and conditions of employment for the members of their respective bargaining units. R2710-13 (A6-9), ¶¶ 10-12, 14, 20-22.

Illinois law further authorizes the negotiation of "fair-share" clauses as part of such collective bargaining agreements:

> When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, … but not to exceed the amount of dues uniformly required of members.

5 ILCS 315/6(e). Both defendant unions have, accordingly, negotiated fair-share clauses requiring bargaining-unit members who decline to become dues-paying members of the union to pay a service fee to help defray the union's costs of collective bargaining and contract enforcement that benefit union members and nonmembers alike. R2711-13 (A7-9), ¶¶ 18-22.

Plaintiffs Mark Janus and Brian Trygg are state employees and are part of bargaining units represented, respectively, by AFSCME Council 31 and Teamsters Local 916. R2709 (A5), ¶¶ 6-7. Neither is a member of the union that represents him, and both are, accordingly, required to pay fair-share fees in lieu of union dues. R2709 (A5), ¶¶ 6-7; R2713 (A9), ¶¶ 23-26.[1]

B. Plaintiff Trygg's State Court Proceedings

Before this action was decided in the district court, plaintiff Trygg litigated a claim before the Illinois Labor Relations Board ("Board") and the Illinois Appellate Court, challenging the requirement that he pay a fair-share fee. The parties to that proceeding included Teamsters Local 916 and CMS, both of which are parties to this action. *See Trygg v. Illinois Labor Relations Bd., State Panel*, 9 N.E.3d 1244 (Ill. App. Ct. 2014).[2]

In December 2009, after plaintiff Trygg learned that his position had been certified for inclusion in a bargaining unit covered by a collective bargaining agreement negotiated by Teamsters Local 916, he filed an unfair labor practice charge before the Board against the Department and Teamsters Local 916, claiming that the withholding of fair-share fees violated section 6(g) of the Act, 5 ILCS 315/6(g), which requires any collective bargaining agreement containing a fair-share provision to safeguard the right of nonassociation based upon religious beliefs. In December 2012, the Board's Executive Director dismissed Trygg's charge, and in May 2013 the Board affirmed that dismissal. *See* 9 N.E.3d at 1247-51.

Trygg filed a petition for judicial review in state appellate court, claiming that Teamsters Local 916 and the Department had violated section 6(g). The appellate court reversed the decision of the Board, specifically finding that the collective bargaining agreement at issue

[1] As will be discussed below, however, plaintiff Trygg obtained relief in a previous proceeding that allows him to pay the equivalent of the fair-share fee to a charity rather than to the union that represents him.

[2] A copy of the appellate court opinion is contained in the record at R3001-12.

violated Trygg's rights under section 6(g), and remanded. *Id.* at 1253-56. On remand, the Board issued an order requiring Teamsters Local 916 to allow Trygg to pay the equivalent of the fair-share fee to a charity of his choice and to remit all fees collected from him to that organization. *See* R.3013-19.

C. Proceedings Below

Governor Rauner initiated this federal action with a Complaint for Declaratory Judgment filed on February 9, 2015 against some 25 labor organizations that represent Illinois public employees. R1-22. On the same day, the Governor issued his Executive Order 15-13, R2277-80, which directed the Department and other state agencies to disregard provisions of state law by ceasing to enforce the fair-share clauses in collective bargaining agreements governing state employees. In his complaint, the Governor asked the district court to approve his action and to hold that fair-share requirements in the public sector were unconstitutional. R2-4, ¶¶ 1-10.

Both the defendant unions and Illinois Attorney General Lisa Madigan, who was granted leave to intervene as a defendant, filed motions to dismiss for lack of subject-matter jurisdiction, lack of standing, and failure to state a claim. R76-98, 216-302. Three individual public employees, including Janus and Trygg, thereupon moved to intervene as plaintiffs. R656-950. Three days later the Governor filed a First Amended Complaint, purporting to add those three putative intervenors as plaintiffs, and moved for an order confirming his ability to do so. R958-1576.

In a Memorandum Opinion and Order of May 19, 2015, the district court (Hon. Robert W. Gettleman) first dismissed the Governor's complaint for lack of jurisdiction, for two distinct reasons. R2334-43. First, the court held that it lacked subject-matter jurisdiction over the Governor's declaratory judgment action, because the federal issue it raised would arise only as a

defense in the anticipated suit by the unions to enforce the fair-share fee provisions of their collective bargaining agreements. R2337-38. Second, the court found that the Governor had no personal stake in the outcome of the case and thus lacked standing to sue. R2338-39.

The court next considered the Governor's attempt to add as plaintiffs the three individual state employees – who, the court observed, would have standing as well as a federal cause of action. R2339. But the court held that it could not grant leave under Rule 21 to add the additional plaintiffs:

> In the instant case, … the court has determined that the original plaintiff, the Governor, lacks standing and the court lacks subject matter jurisdiction over the case. Thus, it has no power to enter an order allowing the addition of the employees as plaintiffs.

R2340.

Finally, the court addressed the motion of these same three employees to intervene. It first noted the "general rule" that "a party cannot intervene if there is no jurisdiction over the original action." R2341 (citing *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950)). As the court further explained, quoting a recent decision of the Second Circuit:

> The logic that underlies this rule is clear enough. Intervention is a procedural means for entering an existing federal action…. Rule 24 does not itself provide a basis for jurisdiction. Accordingly, since intervention contemplates an existing suit and a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a "nonexistent lawsuit."

Id. (quoting *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012)). Citing cases from the Third, Sixth, and Tenth Circuits, however, the court held that an exception to that rule allowed it to exercise jurisdiction over the complaint in intervention, even while dismissing the original complaint, where "the intervener has a separate and independent basis for jurisdiction and … failure to adjudicate the [intervenor's]

claim will result only in unnecessary delay." R2341-42 (quoting *Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir. 1965)). Accordingly, the court held that it would "grant[] leave for the [intervenor] Employees to file their complaint in intervention and treat[] it as the operative pleading, while simultaneously dismissing the Governor's original complaint." R2342.

Shortly thereafter, however, the court stayed all proceedings in light of the Supreme Court's grant of certiorari in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), a case that raised the same issue of the constitutionality of fair-share fees in the public sector. R2694. Following the Supreme Court's affirmance by an equally divided Court in *Friedrichs*, plaintiffs were permitted to file a Second Amended Complaint and the court entertained defendants' motions to dismiss. R2707.

As amended, plaintiffs' Second Amended Complaint was brought by two of the three original public employee intervenors – plaintiffs Janus and Trygg – against the two unions that represent their bargaining units, as well as against Department Director Hoffman and Attorney General Madigan as intervenor-defendant. R2709-10, ¶¶ 6-13. Plaintiffs sought declaratory and injunctive relief invalidating those provisions of Illinois law and their collective bargaining agreements that require or allow the assessment of fair-share fees, on the ground that fair-share requirements in the public sector are unconstitutional under the First Amendment.

Defendants jointly moved to dismiss, arguing principally that plaintiffs failed to state a claim in light of the controlling authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In addition, defendants argued – as an alternative ground for dismissal as to plaintiff Trygg – that Trygg's claim was barred by the doctrine of claim preclusion. R2988-3047. On September 13, 2016, the court granted the motions to dismiss in a brief Order, relying solely on the continuing vitality of *Abood* as controlling precedent. R3070-71 (A1-2).

SUMMARY OF ARGUMENT

1. The claim advanced by plaintiffs in this case, that a fair-share requirement is unconstitutional in public employment, is controlled by the Supreme Court's decision in *Abood*, which held precisely the opposite. Notwithstanding that some members of the Court have questioned *Abood*, the Court has declined on two recent occasions to overrule it, and that precedent accordingly remains binding on this and other lower courts.

Abood was, moreover, correctly decided and there is no principled basis for overruling it. The general principle established in *Abood*, that the First Amendment permits a governmental employer to require its employees who decline to join a labor organization certified as their exclusive bargaining representative to pay a service fee in lieu of union dues, has been repeatedly affirmed by the Court in the forty years since that decision. As the Court has explained, this principle is justified by the fact that, when the state has imposed on a union the duty to represent all bargaining-unit employees, those employees can be expected to share in the costs of that representation. *Abood* has, moreover, become a foundational precedent for other decisions of the Court concerning government-compelled financial support for private entities, such as integrated bar associations. And the rule of *Abood* is fully consistent with the Court's other First Amendment precedents addressing regulation of public-employee speech by a governmental entity acting in its capacity as employer. Finally, whatever might be thought of the *Abood* rule as a matter of first impression, there is no justification under the doctrine of *stare decisis* for departing from that well-established, foundational precedent.

2. Plaintiff Trygg's claim can and should be disposed of without reaching the constitutional issue because it is barred by claim preclusion. Trygg has already litigated, before the Board and the state appellate court, the issue of whether he can be required to pay fair-share

fees to Teamsters Local 916, and indeed has obtained a final judgment requiring that the equivalent fee instead be paid to a charity of his choice. That Trygg advanced only a statutory claim in that proceeding is immaterial, because his present constitutional claim arises out of the same group of operative facts and could have been litigated in the same proceedings. Under Illinois law, which this Court is required to follow, he is therefore precluded from raising his constitutional claim in this forum.

ARGUMENT

The district court granted defendants' motion to dismiss plaintiffs' Second Amended Complaint for failure to state a claim, holding that plaintiffs' attack on the constitutionality of fair-share fee requirements in public-sector employment was barred by controlling Supreme Court precedent. That holding is clearly correct – as indeed plaintiffs themselves acknowledge – and the judgment below can be affirmed on that basis. In addition, however, the claim advanced by one of the two plaintiffs is barred by claim preclusion. Although the district court did not find it necessary to address this issue, it remains an alternative ground for affirming the judgment as to plaintiff Trygg.

Standard of Review. The judgment of the district court granting defendants' motion to dismiss is reviewed *de novo*. *Peters v. West*, 692 F.3d 629, 632 (7th Cir. 2012).

I. FAIR-SHARE FEES ARE CONSTITUTIONAL IN PUBLIC-SECTOR EMPLOYMENT UNDER CONTROLLING SUPREME COURT CASELAW

Because the issue raised by the complaint is controlled by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), it is dispositive that this precedent remains good law, which is binding on this Court. And, in any case, *Abood* was correctly decided

– both well reasoned and entirely consistent with the Supreme Court's First Amendment jurisprudence generally.

A. *Abood v. Detroit Board of Education* Remains Controlling Precedent that Requires Affirmance of the Judgment Below

The issue presented by the plaintiffs' complaint – whether fair-share requirements, such as those to which the plaintiffs are subject, are constitutional in public-sector employment – was decided by the United States Supreme Court forty years ago in *Abood*. The Court previously had upheld the constitutionality of fair-share requirements in the private sector, in cases arising under the Railway Labor Act, *see Railway Employes v. Hanson*, 351 U.S. 225 (1956), and in *Abood* it held that "[t]he same important government interests" it had recognized in its earlier cases equally justified the fair-share principle in the public sector. 431 U.S. at 225. The plaintiffs recognize this point, as they must, acknowledging in both their complaint and in their brief to this Court that "[i]n *Abood*, the Supreme Court held the seizure [sic] of compulsory fees in the public sector to be constitutional ...." R2717 (A13), ¶ 50; *see* Appellants' Br. at 5 (agreeing that "*Abood* remains valid and binding precedent").

Although plaintiffs also argue that "*Abood* was wrongly decided and should be overturned by the Supreme Court," R2721 (A17), ¶ 65, and although they rely heavily on dicta in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), in which "a majority of the Supreme Court questioned *Abood*'s continued validity on several grounds," R2719 (A15), ¶ 56, their concession that *Abood* remains controlling precedent requires affirmance of the judgment below.

That concession, moreover, is clearly correct. Even though the issue was squarely presented in *Harris*, the Court specifically declined "to reach petitioners' argument that *Abood* should be overruled," 134 S. Ct. at 2638 n.19, instead distinguishing that case and refusing to "extend" it to state-compensated home-care providers who were not "full-fledged public

employees." *Id.* at 2638.[3] More recently, in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), the Court again declined an invitation to reconsider the validity of *Abood*, instead affirming by an equally divided Court the lower court's decision upholding public-sector fair-share fees under that precedent.

As this Court has explained, the lower courts are to apply existing Supreme Court precedent "until the Justices themselves overrule it." *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010). That rule follows from repeated admonitions by the Supreme Court that the lower courts are to apply controlling precedent, even when questions have been raised about its continued vitality: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 258 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Because, therefore, *Abood* remains fully intact as controlling precedent, which is binding on this and all other lower courts, the Court must affirm the district court's judgment dismissing plaintiffs' complaint for failure to state a claim.

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[3] Recognizing that "[w]hat justifies the agency fee ... is the fact that the State compels the union to promote and protect the interests of nonmembers," 134 S. Ct. at 2636, the *Harris* Court held that "[t]his argument has little force *in the situation now before us*," *id.* at 2637 (emphasis added), in which the members of the home-care providers' bargaining unit were "quite different from full-fledged public employees." *Id.* at 2638. *Harris* declined to extend *Abood* to that situation precisely because, in the Court's view, the union representing the home-care providers did not have representational obligations comparable to those of unions in traditional public employment settings. *See id.* at 2635-37. Thus, even though the majority opinion could not "resist taking potshots at *Abood*," *id.* at 2645 (Kagan, J., dissenting), it left undisturbed the constitutionality of fair-share requirements for "full-fledged public employees" like those at issue in this case.

B. *Abood* was Soundly Reasoned and Correctly Decided

This Court need go no further. Taken together, *Abood* and the *Rodriguez* line of cases compel the conclusion that the plaintiffs' complaint fails to state a claim.

Although the relief sought by the plaintiffs is thus beyond the authority of this Court to consider, we would be remiss if we left the Court with the impression that there were any principled basis for a court to reconsider and overrule *Abood*, even if it had the authority to do so. Both the complaint and Appellants' brief endeavor to portray *Abood* as an ill-considered and problematic outlier, both with regard to its own subject and with regard to First Amendment law generally, *see* R2717-19 (A13-15), ¶¶ 50-58; Appellants' Br. at 5-14, but that is far from accurate. To the contrary, *Abood* is an eminently sound precedent that has become the basis for a considerable body of law and is fully consistent with general First Amendment principles.

1. *Abood* holds that a state may permit a public-sector exclusive bargaining representative to charge nonmembers a mandatory fair-share fee "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. That holding rests on two basic propositions. First, "[t]he principle of exclusive union representation," which is "a central element in the congressional structuring of industrial relations," *id.* at 220, is one that a state may properly "cho[ose] to establish for local government units." *Id*. at 223. Second, when a state makes that choice, "[t]he designation of a union as exclusive representative carries with it great responsibilities." *Id.* at 221. "[N]egotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult [tasks]. They often entail expenditure of much time and money." *Id.* "Moreover, in carrying out these duties, the

union is obliged 'fairly and equitably to represent all employees ... , union and nonunion,' within the relevant unit." *Id.* (quoting *Machinists v. Street*, 367 U.S. 740, 761 (1961)).

It follows from the foregoing, the Court concluded, that it is consistent with the First Amendment to require all represented employees to pay a share of the union's expenses as their exclusive collective bargaining representative in order "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[] the incentive that employees might otherwise have to become 'free riders' – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. At the same time, the Court made clear that nonmember feepayers cannot be required, over their objection, to provide financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.

Subsequently, in a line of cases from *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), through *Locke v. Karass*, 555 U.S. 207 (2009), the Court repeatedly, and unanimously, reaffirmed the "general First Amendment principle" established in *Abood* – that "[t]he First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment." *Locke*, 555 U.S. at 213. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court fashioned prophylactic rules to "protect[] the basic distinction drawn in *Abood*" between "collective-bargaining activities," as to which all employees may be required to pay their share of the costs, and "ideological activity," which objecting nonmembers cannot be required to support. *Id.* at 302 (quoting *Abood*, 431 U.S. at 237). And in *Lehnert v. Ferris*

Faculty Ass'n, 500 U.S. 507 (1991), where the Court was called upon to consider in greater detail the principles that determine whether objecting nonmembers may constitutionally be required to provide financial support for union activities, all members of the Court agreed that employees may properly be required to pay their share of the expenses of the exclusive representative's collective bargaining activities. *See id.* at 519, 522-23, 526 (opinion of the Court); *id*. at 541-42, 550 (opinion of Marshall, J.); *id.* at 550, 552-53, 556 (opinion of Scalia, J.); *id.* at 563 (opinion of Kennedy, J.).

In particular, although Justice Scalia disagreed with the *Lehnert* majority's test for determining chargeability, he agreed that *Abood* had properly identified "the state interest in compelling dues," *id.* at 552 (opinion of Scalia, J.), and he explained what "justifies th[e] constitutional rule" established in *Abood*: "Where the state imposes upon the union a duty to deliver services it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Id.* at 556. That was true in the case before the Court:

> In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

Id. (emphasis in original). Thus, "[t]he 'compelling state interest' that justifies this constitutional rule" rests in large part on the fact that these "are free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Id.* (emphasis in original).[4]

[4] As has frequently been observed, a union's role as exclusive representative, required by law to represent all members of the bargaining unit, presents a classic "public good" dilemma, in which even those bargaining unit members who affirmatively support union representation will

2. Beyond the specific context of union representation, *Abood* has become a foundational precedent for First Amendment cases addressing issues of compulsory financial support for private entities, ranging from integrated bar associations to agricultural market stabilization programs. Thus, in *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001), the Court recognized *Abood* as the leading case setting out "the First Amendment principles" for "cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." Such cases, the Court explained, were to be decided by "proper application of the rule in *Abood*." *Id*. at 413-14. And the Court noted in *Board of Regents v. Southworth*, 529 U.S. 217, 231 (2000), that "[t]he principles outlined in *Abood* provided the foundation for our later decision in *Keller* [*v. State Bar of Cal.*, 496 U.S. 1 (1990)]," upholding mandatory bar dues.

3. In holding that a state can permissibly adopt for its own workforce the same fair-share system that the Court previously had approved for private-sector employers in *Hanson*, *Abood* is, moreover, entirely consistent with the fundamentals of the Court's First Amendment jurisprudence – in particular, the well-established framework the Court applies in assessing whether conditions of public employment violate First Amendment rights. In that context, the Court has consistently held that "the government as employer ... has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.); *see generally Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973). As the Court put it in *Engquist v. Oregon Department of*

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have rational economic incentives to avoid paying for that representation. *See, e.g.*, Mancur Olson, Jr., THE LOGIC OF COLLECTIVE ACTION 11, 14-16, 67, 75-76, 85-87 (1965); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133, 137-38 (1996) (noting that, in such systems, "each [individual] actor finds it rational to cheat").

Agriculture, 553 U.S. 591 (2008), "there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Id.* at 598 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). In the latter context, the Court balances the interests of the employee and those of the government "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

With regard to fair-share fee requirements, the government's interests "as an employer" in the "labor stability" that it reasonably could believe "will be served by a system of exclusive representation and the permissive use of an agency shop," *Abood*, 431 U.S. at 229 – and in avoiding a situation in which union members must bear the costs of "free rider" nonmembers whom the union nonetheless is required to represent – are more than sufficient to justify any impingement on First Amendment rights of speech and association that results from a fair-share fee system. Indeed, in conducting that balance, the Court has upheld far greater and more direct impingements on speech interests than are even arguably presented by a fair-share requirement. *See*, *e.g.*, *Letter Carriers*, 413 U.S. at 564 (upholding broad ban on public employees' partisan activities and associations).

Thus, it is not availing for plaintiffs to point to what they characterize as "the inherently political nature of collective bargaining," R2721 (A17), ¶ 66, and to assert their disagreement with some of the positions their unions have adopted in collective bargaining. R2716-17 (A12-13), ¶¶ 42-47. That public-sector bargaining may have political elements is fully taken into account by the *Pickering* balancing test; indeed, if the subject of the speech in question is *not* a

matter of "public concern," it enjoys no First Amendment protection in the public-employment context at all. *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983).

Nor is the argument that public-sector bargaining has political implications one that "*Abood* failed to appreciate," Appellants' Br. at 7 (quoting *Harris*, 134 S. Ct. at 2632). To the contrary, the *Abood* Court addressed exactly that issue and explained why it was not dispositive:

> There can be no quarrel with the truism that because public employee unions attempt to influence governmental policy-making, their activities – and the views of members who disagree with them – may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees .... Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs .... Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry.

431 U.S. at 231-32. Thus, an employee's desire not to fund certain speech, like employee speech itself, "is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern"; rather, it must be balanced against competing interests. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

4. Finally, whatever might be its merits as a matter of first impression, there is no justification for departing from the 40-year-old *Abood* precedent. The doctrine of *stare decisis* is "a foundation stone of the rule of law," and "'any departure' from the doctrine 'demands special justification.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). No such "special justification" is apparent here. In particular, the plaintiffs' repeated assertion that the Supreme Court has "'struggled repeatedly' with interpreting *Abood* and determining what qualified as a 'chargeable' expenditure and what qualified as a 'non-chargeable,' or political and ideological, expenditure," Appellants' Br. at 15 (quoting *Harris*, 134 S. Ct. at 2633); *see also id.* at 8-9, is entirely off the mark. In the quarter

century since *Lehnert* established the framework for analyzing chargeability issues, only a single case raising such an issue has reached the Supreme Court – and the Court resolved it unanimously. *Locke v. Karass*, 555 U.S. 207 (2009). Nor, in any event, does the fact that "difficult problems in drawing lines" might arise, as the *Abood* Court itself anticipated, 431 U.S. at 236, significantly distinguish this area of the law from any other.

Similarly without merit is the suggestion that *Abood* must be reconsidered because it failed to anticipate "the practical problems that would face objecting nonmembers" in determining whether to challenge their union's calculation of the portion of the fee chargeable to objectors – in light of the "heavy burden" such nonmembers must bear "if they wish to challenge the union's actions." Appellants' Br. at 9 (quoting *Harris*, 134 S. Ct. at 2633). In advancing that criticism of *Abood*, the *Harris* majority appeared not to understand what an objector must do to challenge a fee calculation. Under the regime established by the Court in *Hudson*, a nonmember need only send the union a one-sentence letter stating her desire to challenge the fee calculation – and if even a single nonmember does so, the union bears the burden of proving the accuracy of its calculation to the satisfaction of an independent arbitrator. *See* 475 U.S. at 306-08 & nn.16, 21. Thus, as Judge Posner recognized, writing for this Court over a quarter century ago, "to file a challenge costs only a postage stamp plus a small amount of time to supply the tiny amount of information that the challenge must set forth," *Gilpin v. AFSCME*, 875 F.2d 1310, 1315 (7th Cir. 1989), so that "mounting a challenge is for all practical intents and purposes free." *Id.* at 1316. Notwithstanding the *Harris* Court's dicta, there simply is no "heavy burden" associated with raising a challenge to the fee.

As discussed above, moreover, *Abood* is a foundational precedent and is fully in accord with the body of law addressing the interplay of public employment and the First Amendment.

Its overruling would call into question a score or more of precedents and would invalidate laws of nearly half the states allowing public-sector fair-share fees, as well as thousands of collective bargaining agreements enacted in reliance on *Abood*. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) ("the demands of [*stare decisis*] are 'at their acme ... where reliance interests are involved'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

In short, the relief the plaintiffs seek from this Court – overturning *Abood* and declaring fair-share requirements unconstitutional in public-sector employment – not only is beyond the power of this Court to provide, but in any event has no basis in the law.

C. To the Extent Plaintiffs' Argument on Appeal is Grounded in Factual Allegations Specific to These Unions, a Remand for Factfinding May Be Appropriate

Although plaintiffs purport to identify the issue on appeal as a facial challenge to the constitutionality of fair-share fees in the public sector, raising the question whether *Abood* should be overruled, *see* Appellants' Br. at 1 – and while the district court clearly understood it as such, *see* R3070-71 (A1-2) – plaintiffs' argument to this Court on the supposed unconstitutionality of fair-share fees is in point of fact based partially on factual allegations specific to the agency-fee notices of the two defendant unions in this case. In particular, plaintiffs contend that AFSCME Council 31's *Hudson* notice leaves plaintiff Janus and other nonmember fair-share payers with "no idea to what degree AFSCME actually charges them for [listed] activities," Appellants' Br. at 10, that AFSCME's notice is based on data that is too old, *id.* at 11, and that the notice of Teamsters Local 916 "utilizes a similar standard." *Id.* at 10 n.4.[5] Plaintiffs also advance factual

[5] To the extent plaintiffs indeed believe the unions' notices to be legally insufficient under *Hudson*, of course, there are means – other than through a facial challenge to the constitutionality of fair-share fees – for raising that issue. *See*, *e.g.*, *Gilpin*, 875 F.2d at 1316. And if the argument is that *Hudson*'s notice requirements themselves are inadequate to protect the interests of nonmember feepayers, that could be argued as well – although, as Judge Posner

assertions about the nature of the issues these unions bargain about, *id.* at 7; which union activities these two plaintiffs disagree with, *id.* at 8; and the "dire financial condition" of the State of Illinois and how it may have been caused by collective bargaining. *Id.* at 15.

These are, to say the least, not issues as to which the district court made any factual findings, and plaintiffs have thus forfeited them by not raising them until their opening brief on appeal, *see, e.g.*, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012). Insofar as plaintiffs now are advancing an argument with respect to the constitutionality of the defendant unions' fair-share fees that turns, in whole or in part, on the facts specific to these two unions that are asserted in plaintiffs' brief, then a remand to the district court for appropriate factfinding may be in order.

II. THE CLAIM BROUGHT BY PLAINTIFF TRYGG IS BARRED BY CLAIM PRECLUSION

Although the district court did not address defendants' contention that plaintiff Trygg's claim was barred by claim preclusion, the issue was fully briefed in that court, and "it is well-settled that [this Court] may affirm on any ground supported by the record, so long as it has been adequately presented below." *Stockwell v. City of Harvey*, 597 F.3d 895, 901 n.2 (7th Cir. 2010). Indeed, affirming the judgment as to Trygg on the ground of claim preclusion would be appropriate in light of the preference for resolving claims, where possible, on the basis of non-constitutional issues. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) ("normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

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noted in *Gilpin*, it may be open to question whether a notice "as long and complicated as an SEC prospectus," *id.*, would really serve the interests of fair-share feepayers.

As set forth above, *supra* pp. 5-6, plaintiff Trygg previously litigated a claim against defendants Teamsters Local 916 and the Department before the Board and the Illinois Appellate Court, challenging the requirement that he pay fair-share fees to his union. Ultimately, Trygg prevailed and obtained a final judgment according him the relief that he sought: that he not be required to pay fair-share fees to Teamsters Local 916 (but instead the equivalent would be paid to a charity of his choosing). During the state court proceedings, Trygg could have, but did not, advance the constitutional theory and seek the relief he seeks in this case – that no fair-share fees be withheld from him at all. His attempt to assert that theory and seek that relief in this action is barred by Illinois preclusion principles, which this Court is bound to apply under the Full Faith and Credit Act, 28 U.S.C. § 1738.

A. In his Second Amended Complaint, Trygg relied on the same facts he asserted in the state proceedings, although he sought a different remedy – indeed one that is inconsistent with the final relief he obtained in the state proceedings. Here, Trygg again complained about fair-share fees. R2714 (A10), ¶ 30. The only difference is the legal theory he invokes and the precise relief he requests. Thus, in this case he contends that the Illinois law authorizing fair-share fees is unconstitutional under the First Amendment, arguing that *Abood* was wrongly decided. R2721 (A17), ¶ 65. And he seeks an injunction against any further withholding of fair-share fees, as well as a recovery of all fees he has paid, including fees paid to a charity as a result of the state court proceedings. A2723 (A19).

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must give the same preclusive effect to a state court judgment that it would be given by a court of that state. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379-83 (1985); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982). Thus, if (1) under the law of the state that rendered the

judgment at issue – here, Illinois – the judgment would be given preclusive effect, and (2) the party against whom preclusion is sought had a "full and fair opportunity" to raise the current federal claim in the state case, the federal court must give the state judgment the same preclusive effect. *Abner v. Ill. Dep't of Transp.*, 674 F.3d 716, 719 (7th Cir. 2012).

Under Illinois law, claim preclusion bars a plaintiff from pursuing a claim if: (1) a court of competent jurisdiction rendered a final judgment on the merits of a claim; (2) there was an identity of causes of action between the case in which the judgment was rendered and the current case; and (3) there was an identity of parties or their privies between the prior and current cases. *Lutkauskas v. Ricker*, 28 N.E.3d 727, 738 (Ill. 2015); *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 889 (Ill. 1998). Claim preclusion applies not only to all matters that were actually asserted and decided in the original action, but also to all matters that could have been asserted. *Lutkauskas*, 28 N.E.3d at 738; *River Park, Inc.*, 703 N.E.2d at 889.

For purposes of identifying the scope a claim, Illinois has adopted the "transactional test," under which "'separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.'" *Lutkauskas*, 28 N.E.3d at 738 (quoting *River Park, Inc.*, 703 N.E.2d at 893); *see also Little v. Illinois Dep't of Revenue*, 626 F. App'x 160, 162 (7th Cir. 2015) (nonprecedential disposition). Thus, "simply alleging a new theory of recovery is insufficient to assert a different cause of action, where multiple theories of recovery are predicated on the same core of operative facts." *Lutkauskas*, 28 N.E.3d at 739; *see also Hudson v. City of Chicago*, 889 N.E.2d 210, 213 (Ill. 2008) (holding that plaintiff may not engage in "claim splitting" to avoid claim preclusion).

Claim preclusion prevents inconsistent judgments on the same issues, conserves judicial resources, and protects defendants from the burdens of having to defend against multiple lawsuits. *River Park, Inc.*, 703 N.E.2d at 889; *Cooney v. Rossiter*, 986 N.E.2d 618, 625 (Ill. 2012). It likewise "preserves the integrity of judgments and protects those who rely on them" by preventing parties from raising claims or defenses in a second proceeding that would undermine rights adjudicated in the first proceeding. *Henry v. Farmer City State Bank* , 808 F.2d 1228, 1232-37 (7th Cir. 1986) (applying Illinois law).

Under Illinois law, even though an administrative agency lacks the power to declare a statute unconstitutional, *Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Sec.*, 776 N.E.2d 166, 192 (Ill. 2002), a party may raise such a claim in the agency and make a factual record necessary to support it, and it may then be asserted in an action for judicial review of the agency's decision. *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1975) (applying Illinois law); *Board of Educ. v. Brown*, 724 N.E.2d 956, 965 (Ill. App. Ct. 1999); *Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill. App. Ct. 1976); *see also Cinkus v. Village of Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1020 (Ill. 2008).

Thus, in his action for administrative review, Trygg could have claimed – as he does in this federal proceeding – that the Illinois statute authorizing the withholding of fair-share fees was unconstitutional and that, under the First Amendment, no such fees could be withheld from his compensation, even if they went to a charity of his choice. The claims he asserted in that proceeding arise from the same group of operative facts as his claims here – the requirement that he pay a fair-share fee to the union that represents him. Thus, even if Trygg now relies on a distinct legal theory and seeks different relief, his claims in this case are based on the same core of operative facts and are barred as a matter of law under the doctrine of claim preclusion. *See*

Durgins v. City of E. St. Louis, 272 F.3d 841, 843 (7th Cir. 2001); *Little*, 626 F. App'x at 162 (nonprecedential decision).

That conclusion is all the more obvious because Trygg's claim in this case, if successful, would conflict with the relief he obtained in the earlier proceedings and thus undermine the rights established in those proceedings. That relief, which Trygg specifically requested from the Board and the state appellate court, was the withholding of funds from his compensation equal to the fair-share fees that would have been paid to Teamsters Local 916 and their payment instead to a charity of his choice. In this litigation, he now demands that there be no withholding at all. That relief cannot coexist with the relief he already obtained, and it would improperly undermine the rights established in the earlier proceedings and defeat the reliance interests established in them. *See Henry*, 808 F.2d at 1232-37.

B. In his response to the Motion to Dismiss before the district court, Trygg argued only that the appellate court lacked "subject matter jurisdiction" to adjudicate the constitutional validity of the Illinois statute under which fair-share fees are withheld from a public employee's compensation, and that its judgment therefore could not have preclusive effect as to that question. R3058-61. Although Trygg is right that, under Illinois law, a judgment will not have preclusive effect over a matter as to which the court lacked subject matter jurisdiction, *Hudson*, 889 N.E.2d at 216, there is no merit to his contention that the state appellate court lacked jurisdiction to rule on the First Amendment issue he seeks to assert in this case.

As discussed above, *see supra* p. 24, even though under Illinois law an administrative agency has no authority to declare a statute unconstitutional, such a constitutional challenge can be included in an action for judicial review of the agency's decision. *Chicago Bar Ass'n v. Dep't of Revenue*, 644 N.E.2d 1166, 1170 (Ill. 1994) ("This court has long recognized that where, as

here, a statute is challenged on the grounds that it violates the constitution, the constitutional issues may be raised in the context of a complaint for administrative review."); *see also Holstein v. City of Chicago*, 29 F.3d 1145, 1148 (7th Cir. 1994) (describing Illinois law); *Howard v. Lawton*, 175 N.E.2d 556, 557 (Ill. 1961). In such a situation the court decides the constitutional issue *de novo*. *McElwain v. Office of Ill. Sec'y of State*, 39 N.E.3d 550, 553 (Ill. 2015); *see also Holstein*, 29 F.3d at 1148; *Byrd v. Hamer*, 943 N.E.2d 115, 129-30 (Ill. App. Ct. 2011).[6]

Trygg attempted to attach significance to the fact that his action for administrative review of the Board's decision was not filed in the trial court, but instead was filed directly in the state appellate court, as authorized by statute. R3059-61. He is mistaken. Illinois Supreme Court Rule 335, which governs proceedings for direct administrative review in the appellate court, expressly adopts by reference section 3-110 of the Illinois Administrative Review Law (and other sections), which states that review extends "to all questions of law and fact presented by the entire record," 735 ILCS 5/3-110 (emphasis added). Rule 335 further adds: "The Appellate Court has all of the powers which are vested in the circuit court by the above enumerated sections." And that provision, in line with its plain language, has been recognized as including review of constitutional issues relevant to the validity of the agency's action. *See, e.g.*, *Reich*, 527 F.2d at 671 (holding that state court in action for administrative review had authority to consider constitutional challenges to agency action and that, where it did so, collateral estoppel barred relitigating the same constitutional issues in subsequent federal suit); *Howard*, 175 N.E.2d at 557; *Head-On Collision Line*, 343 N.E.2d at 538.

[6] The court in an action for judicial review may consider such a constitutional challenge forfeited if the issue was not raised before the agency or backed by evidence offered in support. *Carpetland U.S.A., Inc.*, 776 N.E.2d at 192; *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 695 N.E.2d 481, 489 (Ill. 1998). But that is not a limit on the court's jurisdiction.

Because there are several state agencies whose administrative decisions are reviewed directly by the Illinois Appellate Court, Illinois Supreme Court Rule 335 not only extends review to all questions or facts in a record, but also incorporates other specific judicial power ordinarily vested in the state trial courts. These powers include the authority to order a remand from the appellate court to the administrative agency to take evidence on any question pending before the court, and they answer Trygg's contention that the appellate court lacks original jurisdiction to conduct evidentiary hearings. Such a remand procedure has, in fact, been followed. *See Illinois Nurses Ass'n v. State Labor Relations Bd.*, 509 N.E.2d 1307 (Ill. App. Ct. 1987). Other federal courts have followed that understanding of Illinois Law. *See AFSCME v. Tristano*, 698 F. Supp. 149 (N.D. Ill. 1988).

In both situations, therefore, the court entertaining an action for administrative review has "jurisdiction" to consider a constitutional attack on an agency's action, and, under Illinois law, the court's judgment has preclusive effect in later litigation. *See Little*, 626 F. App'x at 162 (nonprecedential disposition) (holding state court judgment in administrative review action barred federal-law claim arising from same group of operative facts).

Those principles are dispositive here. In the earlier litigation, Trygg was required to raise, or to risk losing, all available legal challenges to the fair-share deductions. Confronted with a statutory requirement that fair-share fees be withheld from his compensation, Trygg could have, but did not, challenge the constitutionality of the entire statutory framework. First before the Board, and then in the appellate court, he chose to pursue only a limited remedy: to have these fair-share fees paid to a charity of his choice instead of to the union representing his bargaining

unit.[7] Under these circumstances, he cannot now ask for fundamentally inconsistent relief – that no fair-share fees at all be withheld from his compensation – based on the claim that the statute violates the First Amendment. Ultimately, this Court should not decide his First Amendment question given this record that establishes that his claims are barred by claim preclusion.

CONCLUSION

The judgment of the district court should be affirmed.

[7] Trygg also argued below that the Illinois Appellate Court was not a forum in which he could assert his First Amendment challenge to fair-share fees because "[i]n an appellate court, parties can raise constitutional objections to actions of *the deciding agency*," but "[h]ere, it is the Teamsters and CMS, and not the ILRB, that are violating Trygg's First Amendment rights." R3061 n.3 (emphasis in original). This argument is legally and factually unsound. Teamsters Local 916 and the Department were both parties to the unfair labor practice claim Trygg filed against them before the Board, in which he asserted a violation of his rights related to fair-share fees withheld from his compensation. *See* 9 N.E.3d at 1246-51. And although his action for administrative review challenged only the Board's rejection of his claimed *statutory* right not to have any fair-share fees *paid to the union*, nothing prevented him from challenging the *constitutionality* of having *anything withheld* from his pay. *Cf. Evanston Firefighters Ass'n Local 742 v. Ill. State Labor Relations Bd.*, 609 N.E.2d 790, 797 (Ill. App. Ct. 1993) (reversing Board and holding that enforcement of municipal policy against certain communications violated employees' First Amendment rights and constituted an unfair labor practice). And that claim, if successful, would have resulted in reversal of the Board's decision.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I caused the foregoing Brief of Appellees to be filed electronically with the Court through the CM/ECF system. I further certify that all participants in the appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John M. West
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