**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

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| MARK JANUS and BRIAN TRYGG,<br><br>Plaintiffs,<br><br>v.<br><br>AMERICAN FEDERATION OF STATE COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/ PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; MICHAEL MICHAEL HOFFMAN, Director of the Illinois Department of Central Management Services, in his official capacity,<br><br>Defendants,<br><br>LISA MADIGAN, Attorney General of the State of Illinois,<br><br>Intervenor-Defendant. | ) | No. 1:15-CV-01235<br><br>Judge Robert W. Gettleman<br><br>Magistrate Daniel G. Martin |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs' Second Amended Complaint challenges the constitutionality of the compulsory collection of union fees under the Illinois Public Labor Relations Act ("IPLRA"), 52 ILCS 315/6. *See, e.g.*, Dkt. 145, ¶¶ 1–2. However, since filing this action, Plaintiffs acknowledge that the precedent governing resolution of this matter remains unfavorable to Plaintiffs' arguments, given the Supreme Court's recent decision in *Friedrichs v. California Teachers Ass'n*, ___ U.S. ___, 136 S. Ct. 1083 (2016). *Friedrichs* affirmed, by an equally divided Court, the lower court's dismissal of a suit that, like the instant case, challenged the continued viability of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Thus, while the Supreme Court in *Friedrichs* did not reach the merits of the parties' arguments concerning *Abood*, Plaintiffs concede that the Supreme Court's affirmance of the

lower court's decision means that *Abood* controls in this case. However, as discussed below, Plaintiffs respectfully submit that the substantive bases supporting the reversal of *Abood* remain as strong as they were when the case first began.

Defendants also argue that Trygg's claim should be denied based on claim preclusion. However, the Court need not reach this argument, given Plaintiffs' concession regarding *Abood*. But if this Court does proceed to consider Defendants' claim preclusion argument, as detailed below, Defendants' arguments are without merit and should be rejected.

## I. While *Abood* Remains Controlling, Its Reasoning Remains Faulty and the IPLRA's Compulsory Fee Collection Remains Unconstitutional

Plaintiffs' Second Amended Complaint contends that the collection of compulsory "fair share" union fees from them violates their rights under the First Amendment of the United States Constitution. *See, e.g.*, Dkt. 145, ¶¶ 1–2. In support of that claim, Plaintiffs submit that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was wrongly decided, and should be overruled by the United States Supreme Court, for the reasons set forth in *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014), *Knox v. SEIU Local 100*, 132 S. Ct. 2277, 2289–91 (2012), and the reasons argued by the Petitioners and supporting amici in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2014). *See also* Dkt. 145, ¶¶ 42–72.

However, Plaintiffs concede that because in *Friedrichs* an equally divided Supreme Court affirmed the lower court's dismissal of plaintiffs' challenge to *Abood*, *Abood* remains controlling precedent. Nonetheless, contrary to Defendants' arguments, *see* Dkt. 147 at 5–10, *Abood* was not correctly decided. Rather, the premises of that decision remain as faulty as they were when this suit was first commenced.

Defendants' attempt to prop up *Abood* consists largely of a restatement of its holding and the claim that it has "become the basis of a considerable body of law." Dkt. 147 at 6. But

*Abood*'s holding is clearly contrary to the governing legal principles. And the fact that it may have survived for so many years provides no meaningful basis for allowing its faulty analysis to remain binding on individuals such as Plaintiffs.

**A. *Abood* Failed to Properly Apply Exacting Scrutiny**

Trygg and Janus contend the Supreme Court should reevaluate *Abood*, and it can do so notwithstanding principles of stare decisis. This is because *Abood* failed to determine if its "free-rider" and accompanying rationales satisfy the constitutional test required by the Supreme Court's precedents. Specifically, the Supreme Court has criticized *Abood* for not giving "a First Amendment issue of this importance . . . better treatment." *Harris*, 134 S. Ct. at 2632. This is a flaw intrinsic to *Abood*. The *Abood* majority inexplicably failed to apply the exacting constitutional scrutiny that consistently applies in cases of compelled expressive association, namely that the mandatory association "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. at 2639 (quoting *Knox*, 132 S. Ct. at 2289); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *O'Hare Truck Servs., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *Rutan v. Republican Party*, 497 U.S. 62, 72 (1990); *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976). Justice Powell recognized in *Abood* itself that the majority there failed to apply the requisite constitutional scrutiny. *See* 431 U.S. at 259 (concurring in judgment). This standard applied to compelled association with unions in *Knox*, 132 S. Ct. at 2289, and *Harris*, 134 S. Ct. at 2639.

Among its other problems, *Abood* also never evaluated whether the "free rider" argument satisfies the narrow tailoring requirement. That is, *Abood* never evaluated whether exclusive representation can be "'achieved through means significantly less restrictive of associational freedoms'" than compulsory fees. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

Moreover, *Abood*'s lack of constitutional analysis has only grown more aberrant. *Abood* now conflicts with a host of subsequent precedents concerning the constitutional scrutiny applicable to instances of compelled-expressive association—*i.e.*, *Harris*, *Knox*, *Dale*, *O'Hare*, *Rutan*, and *Burns*. *Harris*, 134 S. Ct. at 2639; *Knox*, 132 S. Ct. at 2289; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *O'Hare Truck Servs., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *Rutan v. Republican Party*, 497 U.S. 62, 72 (1990). This alone serves as a basis as to why *Abood* should be revisited.

In attempting to downplay the proper level of scrutiny, the Defendants cite *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008). Dkt. 147 at 8. But these cases do not save *Abood*. *Pickering* governs workplace discipline for employee speech, not forced support for ideological activities. *Harris*, 134 S. Ct. at 2641–42; *Pickering*, 391 U.S. at 574–75. Moreover, the Supreme Court has already rejected *Pickering* as a basis for upholding *Abood*, noting: "even if the permissibility of the agency-shop provision in the collective bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld." *Harris*, 134 S. Ct. at 2643. Indeed, not even the dissenters in *Harris* insinuated that compulsory fees are permissible under *Pickering* if they subsidize speech about matters of public concern, which they plainly do. *Engquist*, which also involved a claim of workplace discipline for employee speech, fares no better. 553 U.S. at 594.

**B. Labor Peace Does Not Justify Mandatory Agency Fees**

Defendants further claim that the government's interest in "labor stability" or "labor peace" justifies compelling the payment of compulsory fees. Dkt. 147 at 9. But, the government's interest in labor peace has been held to justify having only one union. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983). It does not justify the

government forcing employees to support a union. *Harris* noted this very point: "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." 134 S. Ct. at 2640.

Nor does a union need forced fees to serve as an effective bargaining agent because a union's unique powers as an exclusive representative facilitate its ability to recruit and retain dues-paying members. *See Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) (holding that a union is "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table"). Trygg and Janus are prohibited from expressing their views in bargaining because exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). No other advocacy group has the power to speak for and bind employees. Indeed, dissenting employees who do not support the union's actions in bargaining are the ones being taken on a "forced-ride" on many topics of public concern. *See, e.g.*, Dkt. 145, ¶¶ 42–46.

Exclusive representation by itself burdens nonmembers' speech by silencing dissenters. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (holding that "regardless of whether [an employee] can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship"). So even if exclusive representation itself satisfies strict scrutiny, employees should not be made to pay unions to impinge on their First Amendment rights through such exclusive representation.

Further compounding the constitutional problems with compulsory fee collection is the fact that exclusive representatives often receive government support, such as detailed lists of

personal information about employees they represent. *See* 5 ILCS 315/6(c). Government bodies in many instances also assist exclusive representatives with obtaining financial support from employees by directly deducting union dues from their paychecks. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); Dkt. 145, ¶¶ 21–22.

The union's control over grievance adjustment and arbitration is another boon. Control over contract enforcement grants a union singular control over the employer's policies. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69–70 (1975) (finding that a union "has a legitimate interest in presenting a united front on [grievances] . . . as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests"). That control is a unique privilege in the public sector. While other advocacy groups can petition government over its policies, only unions are empowered to *bind* policymakers to their promises in multi-year enforceable contracts. For example, a teachers' union can force a school district to abide by a particular education policy required in a contract, even if the district's officials wish to change that policy.

Ultimately, the Defendants' assumption that agency fees and exclusive representation are linked is incorrect because of a public sector union's control of the employment agreement and the powers bestowed upon it. Dkt. 147 at 6. The extraordinary powers and privileges that come with being an exclusive representative *are their own reward*, which unions will continue to willingly assume without compulsory fees. Far from creating a free-rider incentive amongst employees, a union's authority over the employment contract and grievance adjustment creates a strong incentive for employees to join and support the union. Employees are far more likely to join and support an organization that has control over their jobs, benefits, and relations with their employer than one that does not have a monopoly. *Abood* turned reality on its head in

speculating that exclusive representation makes it more difficult for unions to recruit members and financial support. 431 U.S. at 222. As set forth above and in Plaintiff's Second Amended Complaint, the facts and reality are far different.

**C. Any Interest in Preventing "Free Riding" Does Not Justify Forced Fees**

Defendants also defend *Abood* on so-called "free-rider" grounds. Dkt. 147 at 4 n.2, 6–7. But such "free-rider arguments" are "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. The Supreme Court has wrongly tolerated the "free-rider" justification because of the false distinction between collective bargaining and lobbying in the public sector. Collective bargaining is a political activity; thus, the line *Abood* has drawn—where employees may be forced to subsidize "bargaining," but not political activity—is a mirage. Dkt. 145, ¶¶ 59–62.

In *Harris*, the Supreme Court noted "*Abood* failed to appreciate" that collective bargaining with government concerns "important political issues." 134 S. Ct. at 2632. Illinois law provides that union representation extends to wages, hours of employment, and other terms and conditions of employment, including health and other benefits. 5 ILCS 315/6(c). These issues—the spending of public dollars and the maintenance of state government—are all political in nature, and are matters over which individuals may have different opinions. Dkt. 145, ¶¶ 42–47, 59–63.

Indeed, the facts and circumstances of Illinois public-sector bargaining since its inception in 1984 under the IPLRA have caused the "fair share" contract provisions to impose significant infringement on dissenting non-members. In coordination with their express political advocacy, unions routinely take positions in the collective-bargaining process that greatly affect the State's budget. Dkt. 145, ¶¶ 59–63. Thus, Illinois public-sector labor costs have imposed and will

continue to impose a significant impact on the State's financial condition, plainly demonstrating the degree to which Illinois state employee collective bargaining is inherently political. *See Knox*, 132 S. Ct. at 2289 (a "pubic-sector union takes many positions during collective bargaining that have powerful political and civic consequences"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion) ("[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one.").

As *Harris* held, *Abood* failed to recognize the "conceptual difficulty" of distinguishing collective bargaining with government from political advocacy and lobbying, as all are speech "directed at the government." *Harris*, 134 S Ct. at 2632–33. In fact, *Abood* itself acknowledged that "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political." 431 U.S. at 231; *see id*. at 256–57 (Powell, J., concurring in judgment) (finding "no principled distinction" between public sector unions and political parties because the objective of both "is to influence public decision making in accordance with the views and perceived interests of its membership").

Given that "[a] State may not force every person who benefits from [a lobbying] group's efforts to make payments to the group," *Harris*, 134 S. Ct. at 2638, and that bargaining today with government is indistinguishable from lobbying, it follows that it is unconstitutional to force employees to support bargaining with government.[1] *Abood* was wrong and should be overruled.

[1] Moreover, as noted above, the "free-rider" argument is weaker in the collective bargaining context because of the Union's power of exclusive representation, which cuts off dissenting employees' ability to engage in bargaining speech and compels them to "free ride" only on the union's conflicting speech. The government has no interest in demanding forced payments to those people it already takes on a forced ride with the union.

### D. Stare Decisis *Supports* Overturning *Abood*

The Union's final contention that stare decisis compels the affirmance of *Abood*—notwithstanding its constitutional infirmities—is easily dispelled on numerous grounds. Dkt. 147 at 10. *First*, *Abood* eliminates a First Amendment right that simply cannot be erased by stare decisis, which has never been invoked to trump the fundamental rights afforded by the Constitution. Indeed, the Supreme Court has long recognized that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citation omitted). As such, the Supreme Court has "not hesitated to overrule decisions offensive to the First Amendment." *Citizens United v. F.E.C.*, 558 U.S. 310, 363 (2010).

*Second*, the Supreme Court has recognized that stare decisis must yield where a prior decision creates an anomaly in Supreme Court decisions. *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). This is precisely what *Abood* does. Indeed, in *Knox*, the Court specifically acknowledged that the "[a]cceptance of the free-rider argument as justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." *Knox*, 132 S. Ct. at 2290. The Supreme Court tacitly conceded the anomalous nature of *Abood* in *Harris* when no Justice defended *Abood* on its stated rationale. Where, as here, no one "defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished." *Citizens United*, 558 U.S. at 363.

*Third*, the Union overstates any reliance interests predicated on *Abood*. Invalidating the compulsory fees would not disturb existing collective-bargaining agreements, but would simply enable nonmembers to decline subsidizing Union efforts they reject. The only "reliance interest" at issue are public-sector unions' desire to augment their coffers by perpetuating an unconstitutional boon, which far from "outweigh[s] the countervailing interest in that all

individuals share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). Where, as here, "a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any . . . 'entitlement' to its persistence." *Id.*

*Fourth*, post-*Abood* developments have eradicated its premise that there is a principled distinction between public-sector collective bargaining and lobbying. Dkt. 145, ¶¶ 59–63. Even assuming the vitality of this premise at the time of *Abood*, which is questionable, it simply rings hollow in the 21st century. *Id.* This false distinction is magnified in the State of Illinois, where public-sector labor costs have imposed and will continue to impose a significant impact on the State's dire financial condition. *Id.* This plainly demonstrates the degree to which Illinois state employee collective bargaining is inherently political.

*Fifth*, *Abood* has proven unworkable. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (noting that stare decisis must yield when a prior decision proves "unworkable"). In divisive decisions post-*Abood*, the Supreme Court (and employees alike) have "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. *Harris*, 134 S. Ct. at 2633 (citing *Locke v. Karass*, 555 U.S. 207 (2009); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Teachers v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)). This struggle is apparent before lower courts and administrative agencies as well. For example, despite the fact the Supreme Court has held union lobbying expenses are constitutionally nonchargeable, except for "contract ratification or implementation," *Lehnert*, 500 U.S. at 522 (plurality), the chargeability of lobbying expenses remains a contested issue. *See Knox*, 132 S. Ct. at 2294–95 (reversing Ninth Circuit decision that unions could charge nonmembers for "lobbying . . . the electorate"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415,

1422–23 (D.C. Cir. 1997) (holding nonchargeable pilot union's expenses in lobbying federal agencies); *United Nurses & Allied Prof'ls (Kent Hosp.)*, 359 NLRB 469 (2012) (National Labor Relations Board deems lobbying expenses chargeable to nonmembers if the "specific legislative goal [is] sufficiently related to the union's core representational functions").

Each of the foregoing reasons clearly demonstrates a meritorious argument for modifying or reversing existing law, but Plaintiffs recognize that *Abood* is the existing law that is currently binding on this Court.

## II. Trygg's Claim Is Not Barred By Claim Preclusion

Notwithstanding the current application of *Abood*, Defendants' motion to dismiss Trygg's claims under *res judicata*, or claim preclusion, should be denied. Defendants claim it was incumbent upon Trygg to raise his constitutional claim in administrative proceedings before the Illinois Labor Relations Board ("ILRB"), or in subsequent judicial review of the ILRB. Dkt. 147 at 14. But that is contrary to black letter law, under which there can be no *res judicata* arising from a proceeding in which there could have been no subject matter jurisdiction over the claim at issue.

"[C]laim preclusion generally does not apply where the plaintiff was unable to rely on a certain theory of the case to seek a certain remedy **because of the limitation on the subject matter jurisdiction of the courts** . . . ." *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 382 (1985) (emphasis added and quotation omitted); *accord River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 896 (Ill. 1998) ("[T]he doctrine of *res judicata* does not bar a claim if a court would not have had subject matter jurisdiction to decide that claim in the first suit involving the same cause of action") (citations omitted).

Here, at no point whatsoever in Trygg's unfair labor practice proceedings before the ILRB and the Illinois Appellate Court was there ever subject matter jurisdiction to hear Trygg's claim under the First Amendment.

*First*, the ILRB itself has no jurisdiction to hear First Amendment claims. *Bd. of Educ. of Peoria Sch. Dist. 150 v. Peoria Fed'n of Support Staff, Security/Policeman's Benevolent & Protective Ass'n Unit No. 114*, 998 N.E.2d 36, 47 (Ill. 2013) ("[A]dministrative agencies have no authority to declare statutes unconstitutional or even to question their validity."). Thus, Trygg could not have brought or litigated the instant claim before the ILRB, and Defendants admit as much in their motion to dismiss, noting Trygg could not have raised his constitutional claims before the ILRB. Dkt. 147 at 14. Similarly, this Court has recently ruled, in the related context of issue preclusion and estoppel, that "seeking relief before the [Illinois Educational Labor Relations Board] would [not] bar a party from also pursuing a Section 1983 First Amendment retaliation claim." *Meade v. Moraine Valley Cmty. Coll.*, No. 13 C 7950, 2016 WL 826394, at *3 (N.D. Ill 2016).[2]

*Second*, no Illinois court in Trygg's administrative review proceeding ever had subject matter jurisdiction to hear any First Amendment claims. The Illinois circuit courts never had jurisdiction to review Trygg's ILRB matter at all, because judicial review of ILRB decisions is conducted solely by the Illinois Appellate Court. *See* 5 ILCS 315/11. And while the Illinois Appellate Court had jurisdiction to review the ILRB, that court has no original subject matter jurisdiction to hear a First Amendment claim newly raised for the first time in the Appellate Court: it is an *appellate* tribunal, not a court of general jurisdiction. ILL. CONST. art. VI, §§ 6, 9. Thus Defendants are dead wrong to assert that Trygg could have raised his instant First

[2] The IELRB is a sister labor board to the ILRB, with jurisdiction over educational employees. Its decisions are also only directly appealable to the Illinois Appellate Courts.

Amendment claim in "his action for judicial review of the ILRB's administrative decision." Dkt. 147 at 14. There was never any opportunity at any point in those proceedings, because subject matter jurisdiction was lacking at all points.

Illinois circuit courts are courts of general jurisdiction which can hear federal claims, and they also are the appropriate judicial forum for most review of Illinois administrative decisions, but *not* for ILRB decisions like the one here. That is why every case on this issue that Defendants cite is inapposite: every one arises from the fundamentally different situation of administrative review **in circuit court** where there is plenary subject matter jurisdiction to hear newly pleaded federal constitutional claims alongside the administrative review. *See Little v. Ill. Dep't of Revenue*, 626 F. App'x 160, 162 (7th Cir. 2015) (employee could have joined his discrimination and retaliation claims as independent causes of action at the trial court); *Durgins v. City of E. St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001) ("Illinois permits constitutional claims . . . to be joined with administrative review proceedings and explored in discovery."); *Reich v. City of Freeport*, 527 F.2d 666, 668 (7th Cir. 1975) (review of administrative order conducted before Illinois circuit court); *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1016 (Ill. 2008) (judicial review of administrative order from elections board conducted before circuit court); *Bd. of Educ. v. Brown*, 724 N.E.2d 956, 964 (Ill. App. Ct. 1999) ("A trial court, reviewing agency action pursuant to the Administrative Review Act, may examine, *de novo*, constitutional issues"); *Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill App. Ct. 1976) (company could have raised constitutional claims against state taxing agency's action during administrative proceedings before that agency not before circuit court).

Therefore, in all of Defendants' cited cases, absent a need to exhaust administrative remedies, each plaintiff could have brought their constitutional claims originally before a trial

court so as to join them with review of an administrative decision. *See, e.g.*, *Dookeran v. Cnty. of Cook, Ill.*, 719 F.3d 570, 576 (7th Cir. 2013) ("[A] federal civil-rights claim may be joined with an action in Illinois circuit court seeking judicial review of a decision by an administrative agency, which provides the 'full and fair opportunity to litigate' necessary for claim preclusion to apply.").

That is not so here. Trygg's ILRB proceedings and related judicial review in state appellate court provided no opportunity to assert his instant First Amendment claim against Teamsters Local 916 and Illinois Department of Central of Management Services ("CMS").[3] Because there was never subject matter jurisdiction over that claim at any point in the Illinois proceedings related to the ILRB. *Marrese* and *River Park* control and rule out the application of *res judicata*.

[3] The fact that Trygg's First Amendment claims lie against CMS further proves the inadequacy of the Appellate Court's review of the ILRB as a forum for Trygg to raise such claims. In an appellate court, parties can raise constitutional objections to actions of *the deciding agency*. Here, it is the Teamsters and CMS, and not the ILRB, that are violating Trygg's First Amendment rights. Trygg could not litigate that constitutional claim against CMS and Teamsters through the Illinois Appellate Court's review of the ILRB's statutory decision.

Dated: August 30, 2016

Respectfully submitted,

MARK JANUS and BRIAN TRYGG

By: /s/ Joseph J. Torres
One of Their Attorneys

Dan K. Webb
Lawrence R. Desideri
Joseph J. Torres
Brook R. Long
WINSTON & STRAWN LLP
35 West Wacker Dr.
Chicago, IL 60601
312.558.7334
312.558.5700 (fax)
dwebb@winston.com
ldesideri@winston.com
jtorres@winston.com
blong@winston.com

William L. Messenger
Aaron B. Solem (*pro hac vice*)
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION
8001 Braddock Rd., Suite 600
Springfield, VA 22160
703.321.8510
703.321.9319 (fax)
wlm@nrtw.org
abs@nrtw.org

Jacob H. Huebert
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle St., Suite 1500
Chicago, IL 60603
312.263.7668
312.263.7702 (fax)
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

**CERTIFICATE OF SERVICE**

The undersigned attorney states that on the 30th day of August, 2016, he caused a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss to be electronically filed with the Clerk of the Court using the CM/ECF system, to which all parties' counsel of record are registered users.

By: ____/s/ Joseph J. Torres_____
One of Their Attorneys

Joseph J. Torres
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
312.558.7334
312.558.5700 (fax)
jtorres@winston.com