No. _____

In the Supreme Court of the United States

JOSEPH OCOL, PETITIONER

v.

CHICAGO TEACHERS UNION, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), this Court held that the First Amendment allows States to compel public employees to accept a union as their exclusive bargaining representative, even when the individual employee strongly opposes the union, its policies, and its bargaining tactics. In *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), this Court did not overrule the holding of *Knight*, but it questioned the soundness of that ruling by observing that an exclusive-representation regime "substantially restricts the rights of individual employees" and constitutes a "significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2460.

Petitioner Joseph Ocol was expelled from membership in the Chicago Teachers Union when he refused to participate in an illegal one-day strike on April 1, 2016. The union and its members have also subjected Mr. Ocol to repeated acts of bullying and persecution for his decision to report to work during the CTU's illegal strike. Yet the state of Illinois compels Mr. Ocol to accept this entity as his exclusive representative, even though this union will not even allow Mr. Ocol into membership. The question presented is:

> Should the Court overrule *Knight* and hold that the First Amendment prohibits States from forcing dissident public employees to accept a hostile union as their exclusive bargaining representative?

2. Does 42 U.S.C. § 1983 provide a "good-faith defense" to private entities who violate another's constitutional rights before the courts have clearly established the illegality of their conduct and, if so, does this "good-faith defense" allow a 42 U.S.C. § 1983 defendant who takes another person's money or property in violation of the Constitution—but in reliance on a statute or court ruling that purported to authorize its conduct and is only later declared unconstitutional—to *keep* that money or property when the owner sues for its return?

PARTIES TO THE PROCEEDING

Petitioner Joseph Ocol was the plaintiff-appellant in the court of appeals.

Respondents Chicago Teachers Union, American Federation of Teachers, Kwame Raoul, Lara Shayne, Steven Grossman, Chad D. Hays, Michelle Ishmael, and Gilbert F. O'Brien Jr. were defendants-appellees in the court of appeals.

A corporate disclosure statement is not required because Mr. Ocol is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Ocol is petitioning for certiorari on two issues. The first is whether this Court should overrule its holding in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and prohibit the states from requiring dissident public employees to accept an unwanted union as their exclusive bargaining representative. There is language in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), suggesting that the Court might be open to reconsidering the holding of *Knight*. *See id.* at 2460. And although the Court has re-

cently passed on opportunities to take up this issue,[1] the facts of this case present an ideal vehicle if the Court wishes to reconsider or overrule *Knight* given the union's egregious treatment of Mr. Ocol and the enmity that the union's leaders and membership have displayed toward him.

Mr. Ocol is also petitioning for certiorari on whether 42 U.S.C. § 1983 allows private defendants to assert a "good-faith defense" if they violate someone's constitutional rights before the courts have clearly established the illegality of their conduct—and what the scope of that "good-faith defense" should be. Earlier this year, the Court denied a host of petitions presenting these issues,[2] and nothing has changed since that time that would make those issues more certworthy. Mr. Ocol, however, is nevertheless petitioning for certiorari on these issues, even though he is not recommending that the Court grant certiorari on those issues at this time, because there is are pending appeals in the Eighth Circuit that might produce a circuit conflict if the court of appeals rules before this Court disposes of Mr. Ocol's

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1. *See, e.g.*, *Reisman v. Associated Faculties of the University of Maine*, No. 19-847 (cert. denied October 5, 2020); *Uradnik v. Inter Faculty Organization*, No. 18-719 (cert. denied April 29, 2019).

2. *See, e.g.*, *Mooney v. Illinois Education Ass'n*, No. 19-1126 (cert. denied January 25, 2021); *Danielson v. Inslee*, No. 19-1130 (cert. denied January 25, 2021); *Lee v. Ohio Education Ass'n*, No. 20-422 (cert. denied January 25, 2021).

petition.[3] If that happens, Mr. Ocol will submit supplemental briefing on how the Eighth Circuit's eventual ruling affects the certworthiness of those issues in Mr. Ocol's petition.

OPINIONS BELOW

The opinion of the court of appeals is available at 982 F.3d 529, and it is reproduced at Pet. App. 1a–6a. The district court's opinion is available at 2020 WL 1467404, and it is reproduced at 7a–12a.

JURISDICTION

The court of appeals entered its judgment on December 9, 2020. Pet. App. 1a. Mr. Ocol timely filed this petition for a writ of certiorari on May 10, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

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3. *See Hoekman v. Education Minnesota*, No. 21-1366 (8th Cir); *Piekarski v. AFSCME Council No. 5*, No. 21-1371 (8th Cir.); *Brown v. AFSCME Council 31*, No. 21-1640 (8th Cir.); and *Fellows v. MAPE*, Nos. 21-1684, 21-1723 (8th Cir.).

> party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT

Joseph Ocol is a math teacher at Earle STEM Elementary School in the Chicago Public Schools. Mr. Ocol also coaches the chess teams at Earle. He coaches a girls team as well as a boys-and-girls team, and his teams include students from the second through the eighth grades. He has also organized the first-ever school chess mentoring club, which includes students from pre-K through eighth grade.[4]

Although Mr. Ocol is paid a limited stipend for the time he spends after school as chess coach, most of the time that he spends as chess coach and chess teacher is not paid for. He spends four days a week after school coaching the chess team from 4:00 P.M. to 6:00 P.M., and he also devotes his Saturdays and Sundays to the chess team when there is a tournament on those days. Mr. Ocol provides food, books, and rewards for the chess team out of his own pocket. The girls chess team that Mr. Ocol coaches has won numerous tournaments and was invited to meet President Barack Obama in October of 2016.

Mr. Ocol was a member of the Chicago Teachers Union (CTU) from 2005 until 2016. On April 1, 2016, the Chicago Teachers Union held an illegal one-day strike

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4. The facts described in this statement reflect the allegations in Mr. Ocol's complaint, which must be assumed true at this stage of the litigation because district court dismissed under Rule 12(b)(6). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

while its members were under contract with the school district. Mr. Ocol, however, refused to participate in this illegal strike and reported to work.

Mr. Ocol decided to work rather than strike on April 1, 2016, for several reasons. First, many of Mr. Ocol's students live below the poverty line and in dangerous neighborhoods, and their safety would be endangered if schools were closed for the day. Second, the parents of these schoolchildren would need to skip work or arrange for childcare if the schools were closed, which imposes an unwelcome cost on many families who are already struggling financially. Third, the CTU's strike was illegal and Mr. Ocol did not want to participate in an unlawful activity. Finally, Mr. Ocol did not believe that the union's demands or its decision to strike would benefit the students. Higher pay and increased benefits for teachers does not provide any inherent benefit to students, and the strike harmed Mr. Ocol's students by depriving them of the day's lessons and forcing their parents to skip work or arrange for childcare at their own expense.

After the strike, the CTU demanded that Mr. Ocol surrender the pay he received for working on April 1, 2016, or face expulsion from the union. The CTU also demanded that Mr. Ocol appear for a "hearing" that the union had scheduled for June 6, 2016, where Mr. Ocol was to respond to the "charges" that the CTU had levelled against him for refusing to participate in the union's illegal strike. Mr. Ocol declined to attend the hearing on June 6, 2016, because it conflicted with a practice session that he had scheduled for his chess team.

The CTU then expelled Mr. Ocol from union membership in September of 2016. But it continued to take "fair-share fees" from his paycheck until this Court issued its ruling in *Janus*. For the next eight months after the CTU expelled Mr. Ocol from membership, the amount of "fair-share fees" that the union garnished from his paycheck was higher than the membership dues that he had been charged as a union member, in violation of state law. *See* 115 ILCS 5/11 ("The exclusive representative shall certify to the employer an amount not to exceed the dues uniformly required of members which shall constitute each non member employee's fair share fee."). On the ninth month after Mr. Ocol's expulsion from the union, the amount of fair-share fees was reduced.

On June 27, 2018, this Court announced that public-sector agency shops violate the constitutional rights of public employees. *See Janus*, 138 S. Ct. at 2478. The Court further held that the Constitution forbids public-sector unions to take money from the paychecks of non-union members unless they "clearly and affirmatively consent before any money is taken." *Id.* at 2486. The union stopped diverting fair-share fees from Mr. Ocol's wages in response to *Janus*.

On December 6, 2018, Mr. Ocol sued the Chicago Teachers Union, the American Federation of Teachers, the Attorney General of Illinois, and the members of the Illinois Labor Relations Board. Mr. Ocol demanded a refund of the "fair-share fees" that the union had unconstitutionally taken from his wages after it had expelled him from membership in 2016.

Mr. Ocol also challenged the practice of exclusive representation under the First Amendment. Mr. Ocol argued that he cannot trust the Chicago Teachers Union to look after his interests in the collective-bargaining process, because the union expelled him from membership in 2016 after he had refused to participate in the CTU's illegal one-day strike. This deprives Mr. Ocol of any vote or voice in collective-bargaining matters, yet Mr. Ocol remains bound to the terms of employment negotiated by a union that he does not belong to and that expelled him from membership. Mr. Ocol also does not want to be represented by a union that organizes an illegal strike while he and his fellow teachers are under contract to work—and that ostracizes and retaliates against those who obeyed the law and reported to work as required by their contract.

The district court dismissed Mr. Ocol's refund claims on the authority of the Seventh Circuit's precedent. Pet. App. 8a (citing *Janus v. AFSCME 31*, 942 F.3d 368 (7th Cir. 2019) (*Janus II*), cert. denied January 25, 2021; *Mooney v. Illinois Education Association*, 942 F.3d 368 (7th Cir. 2019), cert. denied January 25, 2021). The district court also dismissed Mr. Ocol's constitutional challenge to exclusive representation on the authority of *Knight*.[5] On appeal to the Seventh Circuit, Mr. Ocol conceded that each of these claims was foreclosed by binding precedent, and he asked the Seventh Circuit to af-

5. Mr. Ocol raised some other claims that the district court rejected, Pet. App. 8a–12a, but Mr. Ocol is not pursuing those claims on appeal.

firm the district court's judgment so that he could pursue these claims before this Court. Pet. App. 2a, 4a.

REASONS FOR GRANTING THE PETITION

The petition presents an ideal vehicle if the Court wishes to reconsider or overrule its holding in *Knight* and end the practice of exclusive representation in public employment. The state of Illinois is forcing Mr. Ocol to accept the representation of a union that *expelled* him from membership after he refused to participate in an illegal one-day strike. Mr. Ocol has no voice or vote in this entity, yet he *must* accept this union as his exclusive representative whether he likes it or not, and he remains bound to the terms of employment negotiated by a union that he does not belong to and that expelled him from membership.

Janus did not go so far as to overrule the holding of *Knight*, but it did call into question the constitutionality of exclusive representation in public-sector employment. *See Janus*, 138 S. Ct. at 2460 (observing that an exclusive-representation regime "substantially restricts the rights of individual employees" and constitutes a "significant impingement on associational freedoms that would not be tolerated in other contexts."). The lower courts, however, remain bound by the holding of *Knight* until this Court overrules it,[6] so there is no chance that a cir-

6. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("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 Court of Appeals should follow the

(continued…)

cuit split will ever develop on this issue. If the Court wants to drop the other shoe and overrule *Knight*, then it is hard to imagine a better vehicle than this case in which to do so.

I. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER THE HOLDING OF KNIGHT IN LIGHT OF JANUS

In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), this Court held that the First Amendment[7] allows States to compel public employees to accept a union as their exclusive bargaining representative, even when the individual employee strongly opposes the union, its policies, and its bargaining tactics. The holding of *Knight* predates this Court's ruling in *Janus*, which holds that the First Amendment prohibits States from requiring public employees to join or pay a union as a condition of employment. But there is tension between the holding of *Janus*, which outlawed the compulsory agency shop in public employment, and the holding of *Knight*, which allows States to continue forcing dissident employees to accept an unwanted union as their exclusive bargaining representative. If the First Amendment gives public employees the right to withhold

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case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

7. For simplicity and ease of exposition, our brief will use "the First Amendment" as shorthand for the *incorporated* free-speech and associational-freedom protections that the Fourteenth Amendment imposes on the States. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

financial support from a union that does not represent their interests, then it is not apparent why those same employees can simultaneously be compelled to accept that union as an *agent* that acts on their behalf.

Mr. Ocol's situation highlights the difficulties of reconciling the regime of exclusive representation with the principle of employee autonomy that this Court so strongly endorsed in *Janus*. Mr. Ocol is no longer a member of the Chicago Teachers Union because the union *expelled* him from membership in retaliation for his refusal to participate in an illegal one-day strike. Yet the law of Illinois and the CTU's collective-bargaining agreement compel Mr. Ocol to accept this hostile entity as his *representative* in negotiating his terms of employment with the school district—and he must allow this union to act on his behalf. *See* 115 ILCS 5/3(b). He must also accept the results of the union's negotiations even though he is unable to join the union, vote on the contract, or influence the negotiating process in any way. Forcing a public employee to allow an unwanted agent to act on his behalf is as much an affront to associational freedom as forcing him to pay monthly agency fees, and it not apparent how the First Amendment can allow these shotgun-marriage arrangements to continue when *Janus* purports to give public employees the right to decide whether and to what extent they will support or associate with a union.

The *Janus* opinion repeatedly acknowledges that exclusive union bargaining abridges the associational freedom of individual employees. *See Janus*, 138 S. Ct. at 2460 ("Designating a union as the employees' exclusive

representative substantially restricts the rights of individual employees."); *id.* at 2478 ("It is also not disputed [in *Janus*] that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts."). *Janus* also recognizes that collective bargaining in public education requires the union to stake out positions on controversial political issues—including merit pay for teachers, the role of seniority and tenure, how teachers should be evaluated, and political issues such as climate change and LGBT rights. *See id.* at 2474–77. So it is inevitable that individual teachers will disapprove of the bargaining positions adopted by the exclusive representative, even when the representative is legally required to act on their behalf. Forcing a non-union teacher to accept the representation of an unwanted union—and forcing that non-union teacher to accept the union-negotiated terms of employment—violates a public employee's freedom of association, and the Court should grant certiorari to consider whether this regime can continue to exist under *Janus* and the First Amendment.

The Court should also grant certiorari because exclusive representation allows the union to pick winners and losers and negotiate contracts that benefit certain employees at the expense of others. This problem is particularly acute in the teaching profession, where collective-bargaining agreements force teachers into a union-imposed salary structure that harms teachers who could negotiate better deals for themselves outside the collective-bargaining process. One of the most perverse fea-

tures of teacher collective bargaining is the insistence on a single salary schedule for teachers regardless of subject matter. There is a well-documented nationwide shortage of teachers in science, technology, engineering, and mathematics (STEM). *See, e.g.*, Dan Goldhaber, John Krieg, Roddy Theobald, and Nate Brown, *Refueling the STEM and Special Education Teacher Pipelines*, Phi Beta Kappan at 56–62 (December 2015 – January 2016). And the reason for this shortage is that college graduates with degrees in STEM fields have more lucrative opportunities in the private sector than those who graduate with degrees in fields such as elementary education. Schools must therefore pay higher salaries to STEM teachers to induce them to accept jobs in the teaching profession—just as universities must pay higher salaries to law professors and business-school professors. But collective bargaining requires teachers to be paid the same across subject matter, which benefits elementary-education instructors at the expense of math teachers such as Mr. Ocol.

Collective bargaining also empowers the union to impose a salary structure that benefits long-tenured incumbent teachers—who often hold leadership positions in the local union and wield the most power and influence over collective-bargaining matters—at the expense of entry-level teachers and lateral hires. Collective-bargaining agreements require school districts to pay exceedingly low salaries to entry-level teachers—no matter how talented and no matter how impressive their academic backgrounds or previous careers may have been. This deters talented and capable individuals from

entering the teaching profession and shields incumbent teachers from competition. And the future entry-level teachers that the union is supposedly "representing" are not even members of the bargaining unit at the time these agreements are made—so they have no vote and no say in the terms of employment that the union negotiates for them.

All of this makes this case an especially attractive vehicle for reconsidering the constitutionality of exclusive representation in the public sector. Mr. Ocol is uniquely harmed by the laws that compel him to accept the Chicago Teachers Union as his exclusive bargaining representative. Not only because the union *expelled* him from membership—making it impossible for Mr. Ocol to have any voice or vote in the entity that purports to represent him—but also because Mr. Ocol is a STEM teacher who is harmed by the union-negotiated one-size-fits-all salary structure that fails to account for the fact that certain fields are in higher demand than others. (Is there any university in the United States that pays its humanities professors the same salary as its law professors and business-school professors?) The continued existence of *Knight* means that a circuit conflict will never develop on this issue, and it is hard to imagine a better vehicle than this case for reconsidering the holding of *Knight*.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE SCOPE OF THE GOOD-FAITH DEFENSE UNDER 42 U.S.C. § 1983 IF A CIRCUIT CONFLICT EMERGES BEFORE THE DISPOSITION OF THIS PETITION

Mr. Ocol is also seeking certiorari on the scope of the "good-faith defense" under 42 U.S.C. § 1983, but the Court denied certiorari on that question earlier this year and no circuit conflict has emerged since the disposition of those petitions.[8] So Mr. Ocol is not recommending that the Court grant certiorari on that issue at this time.

But Mr. Ocol is nevertheless petitioning for certiorari on the good-faith issue because there are pending appeals in the Eighth Circuit that might produce a circuit conflict before this Court disposes of Mr. Ocol's petition.[9] If that happens, Mr. Ocol will submit supplemental briefing on whether (and how) the Eighth Circuit's anticipated rulings affects the certworthiness of those issue. For now, however, Mr. Ocol sees no basis for distinguishing his petition on his issue from the myriad petitions that this Court denied on January 25, 2021.

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8. *See, e.g.*, *Mooney v. Illinois Education Ass'n*, No. 19-1126 (cert. denied January 25, 2021); *Danielson v. Inslee*, No. 19-1130 (cert. denied January 25, 2021); *Lee v. Ohio Education Ass'n*, No. 20-422 (cert. denied January 25, 2021).

9. *See Hoekman v. Education Minnesota*, No. 21-1366 (8th Cir); *Piekarski v. AFSCME Council No. 5*, No. 21-1371 (8th Cir.); *Brown v. AFSCME Council 31*, No. 21-1640 (8th Cir.); and *Fellows v. MAPE*, Nos. 21-1684, 21-1723 (8th Cir.).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2021

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1668

JOSEPH OCOL, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CHICAGO TEACHERS UNION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 18 CV 8038 — **Harry D. Leinenweber**, *Judge.*

SUBMITTED[1] SEPTEMBER 29, 2020 — DECIDED
DECEMBER 9, 2020

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1. This court granted the parties' joint motion to waive oral argument. The case is therefore submitted on the briefs.

Before ROVNER, SCUDDER, and ST. EVE, *Circuit Judges*.

ROVNER, *Circuit Judge*. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (*Janus I*), the Supreme Court reversed course on 41 years of jurisprudence sanctioning agreements between state-government agencies and unions authorizing the unions to collect fair-share fees from non-union members to cover costs incurred representing them. Joseph Ocol, a math teacher in the Chicago public school system, then filed this putative class action lawsuit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 against the Chicago Teachers Union and the American Federation of Teachers ("Union defendants") as well as the Attorney General of Illinois and the chair and members of the Illinois Educational Labor Relations Board ("state defendants"). As relevant here, he sought recovery of payments he had previously made under protest to the Chicago Teachers Union and also challenged the constitutionality of the exclusive representation provisions of Illinois law as they applied to non-union members. Ultimately the district court dismissed or granted summary judgment to all defendants, and Ocol appeals. As Ocol admits, however, his claims are barred by existing precedent, and we therefore affirm.

I.

Ocol is a math teacher at Earle STEM Elementary School and was a member of the Chicago Teachers Union from 2005 through 2016. According to his complaint, in September 2016 he was expelled from the Union after refusing to participate in a one-day strike on April 1, 2016. He did, however, remain obligated to pay so-called

"fair-share fees" to the Union under the portion of the Illinois Educational Labor Relations Act, 115 ILCS 5/1-5/21, authorizing unions and public employers to include in their collective bargaining agreements a fair share clause "requiring employees covered by the agreement who are not members of the organization to pay the organization a fair share fee for services rendered." *Id.* § 5/11.

Ocol continued paying the required fair-share fees until 2018, when the Supreme Court in *Janus I* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and concluded that extraction of such fees from non-union members violated those employees' First Amendment rights, *see Janus I*, 138 S. Ct. at 2478. The district court then dismissed the state defendants on their motion. The Union defendants moved for summary judgment, but the parties agreed to stay consideration of the motion until after our court resolved *Janus I* on remand. In that appeal, we considered and rejected Mark Janus's argument that he was entitled to a refund for some or all of the fair-share fees he had paid under protest. *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("Janus II"); *see also Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019) (rejecting plaintiff's assertion that she was entitled to the equitable remedy of restitution of past fair-share fees). Ocol then conceded defeat on his Section 1983 claim for a refund of his fair-share payments as well as his First Amendment challenge to exclusive representation. The district court thus

granted the Union defendants' motion for summary judgment.[2]

II.

On appeal, Ocol renews his constitutional challenges to his past payment of fair-share fees to the Chicago Teachers Union and to its designation as exclusive representative of both union and non-union members alike under Illinois law. He admits, however, that both claims are squarely foreclosed by precedent and requests that we summarily affirm judgment in the defendants' favor so that Ocol may appeal to the Supreme Court.

As Ocol recognizes, our holding in *Janus II*, 942 F.3d at 367, precludes his argument that he is entitled to a refund of his past compulsory fair-share payments. The plaintiff in *Janus I*, who, like Ocol, had paid fair-share fees under protest to a union designated as the representative of his employee unit (the Illinois Department of Healthcare and Family Services), sought recovery of his

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2. In addition to his constitutional claims, Ocol sought repayment of his fair-share fees under a state-law tort of conversion claim. He also mounted an antitrust challenge to the Union's collective bargaining agreements, arguing that the alleged anti-competitive effects of designating the Union as the exclusive representative of both members and non-members alike amounted to a violation of the Sherman Act. The district court rejected both of these claims, noting that the tort law claim was pre-empted by the Illinois Educational Labor Relations Act, 115 ILCS 5/1-5/21, and that the antitrust claim fared no better: the principle of exclusive representation has longstanding judicial acceptance and in any event the state action exception to the Sherman Act would surely apply in light of the designation by the Illinois legislature of exclusive bargaining as the authorized system governing labor relations for Illinois public employees. Ocol is not pursuing either of these claims on appeal.

past payments. We held that a private party acting under color of state law for § 1983 purposes was entitled to a good-faith defense, which applied to the union's collection of fair-share fees before the Supreme Court's decision. *Janus II*, 942 F.3d at 364–65. We thus concluded that Janus was limited to "declaratory and injunctive relief, and a future free of any association with a public union." *Janus II*, 942 F.3d at 367. As Ocol admits, the exact same rationale applies to bar his claim for repayment of past fair-share fees from the Chicago Teachers Union.

Likewise, Ocol's constitutional challenge to the Union's exclusive representation goes nowhere. The Illinois Educational Labor Relations Act, 115 ILCS 5/1-5/21, governs labor relations between public educational employers and employees through a system of exclusive representation allowing the representative union to negotiate employment conditions, resolve disputes, and select employee representatives pursuant to collective bargaining agreements. Ocol argues that the Act's exclusive representation provisions violate the First Amendment by restricting his right to bargain as an individual for the terms and conditions of his employment. Here again, as Ocol himself acknowledges, precedent forecloses his claim. Specifically, in *Minnesota State Board for Community Colleges v. Knight*, the Supreme Court rejected a First Amendment challenge to a similar exclusive representation provision applicable to state colleges in Minnesota, 465 U.S. 271 (1984) (upholding a provision of Minnesota Public Employment Labor Relations Act that precluded non-designated faculty representatives from bargaining directly with college employers). And more recently in *Janus I*, the Court gave no indication that its ruling on fair-share fees necessarily undermined the sys-

tem of exclusive representation. *See Janus I*, 138 S. Ct. at 2467 (noting that union's duty of fair representation to both members and nonmembers continues despite elimination of fair-share fees because benefits of exclusive representation ?greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers"). As Ocol recognizes, *Knight* and its progeny firmly establish the constitutionality of exclusive representation, and the Supreme Court is the proper forum for challenging that rule. We thus grant his request for summary affirmance so that he may seek a petition for certiorari to pursue his arguments there.

III.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment.

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

JOSEPH OCOL, on behalf of himself and all others similarly situated, Plaintiff, v. CHICAGO TEACHERS UNION, et al., Defendants.	Case No. 18 C 8038 Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

This lawsuit is one of several filed across the United States in the wake of the Supreme Court's decision in *Janus v. AFSCME 31*, 138 S. Ct. 2448 (2018). The plaintiff, a non-union public school teacher in the Chicago public schools, seeks to recover for himself and a putative class the so-called fair share fees he paid to the union prior to *Janus*, both pursuant to Section 1983 and the state tort law of conversion. He also seeks a declaration that his constitutional rights are violated by forcing him to accept the Unions as his exclusive bargaining agent and that the exclusive bargaining provision of the defendants' collective bargaining agreement with the Chi-

cago public schools violates the United States antitrust laws.

While Defendants' Motion for Summary Judgment was pending in this Court, the parties agreed to stay consideration of the Motion until the Seventh Circuit disposed of *Janus* on remand from the Supreme Court because that court was considering the same issue, i.e., the return of the fair share fees. The Seventh Circuit recently held that the defendant union need not return fair share fees collected prior to *Janus*. *Janus v. AFSCME 31*, 942 F.3d 368 (7th Cir. 2019). *See also Mooney v. Illinois Education Association*, 942 F.3d 368 (7th Cir. 2019). Plaintiff acknowledges that this decision forecloses his Section 1983 claim for refunds of the fair share payments and his First Amendment challenge to the Union's exclusive representation.

However, Plaintiff still has two arrows in his quiver: namely, a claim for refund of the fair share fees under state tort law (as opposed to Section 1983), and an antitrust challenge to the Union's collective bargaining agreements that command uniform salaries for teachers regardless of subject matter and that compels entry-level teachers to accept exceedingly low salaries negotiated by a bargaining unit to which they do not belong. The Unions respond by arguing that the Illinois Educational Labor Relations Act ("ILERA") preempts the Plaintiff's tort claim and in any event reliance in good faith on an unconstitutional statute is a defense to Illinois tort law. They also argue that antitrust claim is subject to dismissal due to action immunity, statutory labor exemption, and the *Noerr–Pennington* immunity.

II. DISCUSSION

A. The Illinois Tort of Conversion

Plaintiff contends that he is entitled to recover his past fair share payments because they were collected pursuant to an unconstitutional statute, *i.e.*, the statute that authorized the fair share dues scheme. He responds to Defendants' preemption argument by claiming that the Defendants have taken the particular statutory provision that they relied upon out of context and that ILERA only provides the exclusive remedy for such a claim for fair share when the statute is triggered by the employee filing an objection to the fair share fees. Since plaintiff did not file and objection with ILERA, he argues that the statute does not apply and there is no preemption. However, this argument ignores a host of Illinois cases in which the state and federal courts have held tort claims to be exactly the type of claims preempted by ILERA. A claim for conversion, being a tort claim, is thus preempted. Plaintiff fails to cite any case in which an employee has been allowed to proceed in state court on a tort claim against either the Union or the school employer, while Defendants have cited a host of cases to the contrary. *See Shaikh v. Watson*, 2011 WL 589638 (N.D. Ill. 2011); and *Pugh v. Chicago Teachers Union*, 2012 WL 1623222 (N.D. Ill. 2012).

Defendants also argue that there can be no such tort claim because the Defendants' actions were taken pursuant to a statute that was existing at the time and thus were taken in good faith. They claim this as a defense to Illinois tort law. Plaintiff argues, citing *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), that unconstitutional statutes are void ab initio and therefore cannot be a justification for a wrongful taking even if done in good faith.

However, as Defendants point out, the Norton case has been distinguished by the Seventh Circuit in *Ryan v. County of DuPage*, 45 F.3d 1090, 1094 (1995), which held that existing statutes are "hard facts" on which people must be allowed to rely in making decisions and in shaping their conduct. Thus, conduct lawful under a statute cannot be later found wrongful due to a Supreme Court decision striking down that statute. Plaintiff criticizes the *Ryan* decision, but this Court is bound by it.

There have been numerous cases throughout the United States seeking state tort relief in lieu of Section 1983 proceedings after *Janus*, but none has been successful. At least Plaintiff has failed to cite any. The latest such case that denies recovery for fair share fees under state tort law comes from the Sixth Circuit in *Lee v. Ohio Education Association*, No. 19-3250 (slip op. February 24, 2020). For these reasons the Defendants' Motion for Summary Judgment of Plaintiff's tort claim for conversion under Illinois law is granted.

B. The Antitrust Claim

Plaintiff's antitrust claim is based on a tea leaf reading of the Supreme Court's *Janus* decision, in which the majority opinion stated that designating a union to be the exclusive bargaining agent, "substantially restricts the rights of individual employees" and that such designation constitutes "a significant impingement on associational freedoms that would not be tolerated in other contracts." *Janus*, 138 S. Ct. 2448 (2018). However, the constitutionality of exclusive representation was not before the Court and the statements quoted were dicta and made in response to the argument that requiring the Union, as the exclusive bargaining agent, to represent non-union members without fee (the so-called "free rider"

argument) constituted a benefit to the non-union employee and a detriment to the union. However, the connection between associational freedom and the First Amendment was considered in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), in which the Supreme Court held that the First Amendment permitted giving "the exclusive representative a unique role" that justified infringement of the rights of nonmembers. In addition, the Plaintiff admits that the Supreme Court has never gone so far as to hold that the Constitution requires public employers to permit non-union employees to negotiate outside the Union negotiation. Knowing he is foreclosed from making this constitutional argument, he instead relies on the antitrust laws to make his case.

Plaintiff's antitrust argument is based on what he believes to be the anticompetitive evils of the present system that result from designating a Union to be the exclusive bargaining agent to the exclusion of non-members. He contends that such an arrangement allows the Union, through negotiation of a collective bargaining agreement, the power to benefit some teachers to the detriment of others by forcing a uniform salary structure regardless of subject matter and which allows the union to reward long-term incumbent teachers (who often hold leadership positions within the union) at the expense of payment of low salaries to entry level teachers. The exercise of these powers resulting from the exclusive bargaining agent role is clearly anti-competitive and a violation of the rule of reason.

Regardless of what Plaintiff thinks of the principle of exclusive representation for public employees and the collective bargaining agreements that result from such

exclusive representation, it has been the accepted system in Illinois for the last 35 years and is the system adopted in most sister states. It is difficult to see how such a system can be in violation of the federal antitrust laws. Moreover, since the exclusive bargaining principle has been designated by the Illinois legislature to be the system employed for labor relations for Illinois public employees, the state action exception to the Sherman Act clearly applies. *Parker v. Brown*, 317 U.S. 341 (1943). Finally, there is no way under current statutes and Supreme Court decisions that the Plaintiff's antitrust claim could be viable, and he has suggested none. Accordingly, Summary Judgment of dismissal of the antitrust claim is granted.

III. CONCLUSION

For the reasons stated herein, Defendants' Motion for Summary Judgment is granted in favor of the Defendants and against the Plaintiff on all claims.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Judge

Dated: 3/26/2020