

The Top 10 Tips for Managing the Aftermath of *Janus*

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Introduction

In *Janus* the United States Supreme Court invalidated fair share fees, also known as “agency fees,” by which non-members pay the cost of the representational services they receive from a public sector union, including the cost of collective bargaining and grievance handling. *See Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018). The Supreme Court ruled that fair share fees are unconstitutional under the First Amendment on the theory that they result in compelled speech and association, requiring non-members to pay money to an organization with which they may disagree. Thus, the Court overturned its long-standing precedent established in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that a requirement that non-members must pay agency fees to cover the cost of their union representation does not abridge the First Amendment.

The *Janus* Court mandated a “right-to-work” environment in the public sector nationwide under the Constitution. In other words, public employees can now reap the benefits of union representation without paying for the cost of those benefits. *Janus* has spawned a flurry of unsuccessful litigation in its wake in which anti-union advocates are (1) seeking refunds of fair share fees and union dues collected prior to the *Janus* decision and/or (2) challenging other traditional elements of public sector labor relations. Traditional labor rights that have been under attack since *Janus* include maintenance of dues check-off and union-provided benefits, and indeed the fundamental right of workers to elect an exclusive representative for purposes of collective bargaining. However, *Janus* is limited to the issue of agency fees paid to a Union, and efforts to extend its reach have not been successful.

I. Keep Calm And Carry On – Labor Rights Remain The Same Except For Agency Fees

The first tip is to avoid reading too much into *Janus*. The rights of public sector employees are unaffected by *Janus*, except for the narrow question of agency fees. All other rights and obligations of public employees and employers under the public sector labor laws remain unchanged. Public employees retain the rights described in the Public Employment Labor Relations Act (“PELRA”), Minnesota Statutes, Chapter 179A, and in the Minnesota Charitable Hospitals Act, Minnesota Statutes Sections 179.35-179.39, including the following:

1. the right to organize, form, or join unions, Minn. Stat. § 179A.06, subd. 2;
2. the right to authorize the deduction of their union dues, Minn. Stat. § 179A.06, subd. 6; and
3. the right to be represented by unions for purposes of collective bargaining about terms and conditions of employment, Minn. Stat. § 179A.06, subd. 2.

Public employers remain prohibited from:

1. interfering in the formation or administration of a union, Minn. Stat. § 179A.13, subd. 2(2);
2. encouraging or discouraging membership in a union by discriminating in regards to hiring, tenure of employment or any term or condition of employment, Minn. Stat. § 179A.13, subd. 2(3); and

3. refusing to bargain in good faith with the union, Minn. Stat. § 179A.13, subd. 2(5).

One of the principal lines of attack pursued by anti-union advocates in the wake of *Janus* is the claim that exclusive representation by democratically elected unions supposedly violates the First Amendment. Opponents of unions have focused on dicta in *Janus* stating that exclusive representation is “a significant impingement on associational freedoms that would not be tolerated in other contexts.” 138 S.Ct. at 2478. However, *Janus* did not purport to overrule longstanding precedent on exclusive representation. A First Amendment challenge to exclusive representation by unions was rejected decades ago by the United States Supreme Court in *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984). In *Knight* a group of Minnesota college faculty members argued that the exclusive representation provisions of PELRA violated the First Amendment speech and associational rights of faculty who chose not to be union members. 465 U.S. at 273, 278-79. The Supreme Court concluded that exclusive representation by a democratically elected union under PELRA “in no way restrained appellees’ freedom to speak . . . or their freedom to associate or not to associate with whom they please, including the exclusive representative.” 465 U.S. at 288. Anti-union advocates have argued that *Janus* supposedly limits or supersedes *Knight*.

A. In *Bierman v. Dayton* The Eighth Circuit Upheld Exclusive Representation After *Janus*

Minnesota has been ground zero for constitutional challenges to the role of public sector unions as exclusive bargaining representatives after *Janus*. Such challenges have failed. The United States Court of Appeals for the Eighth Circuit issued the first major decision addressing the question of whether *Janus* had any impact on the constitutionality of exclusive representation. The case involved a First Amendment challenge to application of PELRA to a bargaining unit of home care providers in Minnesota. *See Bierman v. Dayton*, 900 F.3d 570 (8th Cir. August 14, 2018), *reh’g and reh’g en banc denied*, Sept. 17, 2018. In a published opinion, the Eighth Circuit followed *Knight*’s holding that exclusive representation under PELRA does not violate the First Amendment. The Eighth Circuit explained that *Knight* was dispositive:

There is no meaningful distinction between this case and *Knight*. The current version of PELRA similarly allows the homecare providers to form their own advocacy groups independent of the exclusive representative, and it does not require any provider to join the union. According to *Knight*, therefore, the State has “in no way” impinged on the providers’ right not to associate by recognizing an exclusive negotiating representative.

900 F.3d at 574 (citations omitted).

Moreover, in *Bierman* the Eighth Circuit dismissed Plaintiffs’ argument that the Supreme Court’s decision in *Janus* superseded *Knight*, finding that exclusive representation remains constitutionally sound after *Janus*:

Recent holdings in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), do not supersede *Knight*. Under those decisions, a State

cannot compel public employees and homecare providers, respectively, to pay fees to a union of which they are not members, but the providers here do not challenge a mandatory fee. *Janus* did characterize a State's requirement that a union serve as an exclusive bargaining agent for its employees as "a significant impingement on associational freedoms that would not be tolerated in other contexts," 138 S. Ct. at 2478, but the decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue. Of course, where a precedent like *Knight* has direct application in a case, we should follow it, even if a later decision arguably undermines some of its reasoning. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Id. Thus, *Knight* remains controlling after *Janus*. After the Eighth Circuit issued its decision, Plaintiffs filed a petition for certiorari with the United States Supreme Court.

B. In *Uradnik v. Inter Faculty Organization* The Eighth Circuit Rejected A Post-*Janus* Challenge To Exclusive Representation Under PELRA

After *Janus* a right-wing group filed constitutional challenges to exclusive representation by public employee unions in Minnesota, Maine, and Ohio. In an opinion authored by Judge Magnuson, the United States District Court for the District of Minnesota denied a motion for a preliminary injunction seeking to block enforcement of PELRA's exclusive representation provisions brought by St. Cloud State University professor Kathleen Uradnik. *See Uradnik v. Inter Faculty Organization*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018). The District Court emphasized that plaintiff had no likelihood of success on the merits under *Knight* and *Bierman*: "Supreme Court and Eighth Circuit precedent foreclose Plaintiff's claims, and in any event, the exclusive representation provisions in question would survive First Amendment scrutiny." *Id.* at *4. Plaintiff immediately appealed the denial of her motion for a preliminary injunction, and promptly moved the Eighth Circuit for summary affirmance of the District Court's decision with the express purpose of petitioning for certiorari to the Supreme Court. The Eighth Circuit affirmed the District Court's decision under *Bierman*, and Plaintiff filed a petition for certiorari with the Supreme Court.

C. Other Courts Have Uniformly Agreed That The Supreme Court's Case Law On Agency Fees Does Not Call Into Question The Constitutionality Of Exclusive Representation.

Every other court to consider this issue has held that *Knight* forecloses the claim that exclusive representative collective bargaining violates the First Amendment. *See Mentele v. Inslee*, ___ F.3d ___, 2019 WL 924815 (9th Cir. Feb. 26, 2019); *Hill v. Serv. Employees Int'l Union, Healthcare Ill.*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 446 (2017); *Jarvis v. Cuomo*, 660 Fed.Appx. 72 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016) (Souter, J., sitting by designation); *Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF No. 52 (S.D. Ohio Jan. 14, 2019); *Reisman v. Associated Faculties*, 2018 WL 6312996 (D. Me. Dec. 3, 2018), *appeal pending*, No. 18-2201 (1st Cir.).

The other federal Courts of Appeals have uniformly agreed that the Supreme Court’s case law on agency fees does not call into question the constitutionality of exclusive representation. As Justice Souter, sitting by designation, explained for the First Circuit:

[T]he *Harris* distinction does not decide this case. . . Unlike the *Harris* litigants, the appellants are not challenging a mandatory fee *Harris* did not speak to . . . the premise assumed and extended in *Knight*: that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit. . . .

D’Agostino, 812 F.3d at 243-44; *accord Hill*, 850 F.3d at 864-66; *Jarvis*, 660 Fed.Appx. at 74-75.

II. Maintenance Of Dues Checkoff Remains Lawful Because *Janus* Addressed Agency Fees, Not Membership Dues

Under maintenance of dues checkoff (“MOC”) a union member voluntarily agrees in writing that his or her authorization for dues deductions may only be revoked during annual window periods and will be automatically renewed from year to year, even if the member later resigns from the union. In this manner, members mutually commit to provide their Union with budgetary stability that is essential to represent employees effectively. After *Janus* anti-labor groups have questioned the ongoing validity of MOC, even though *Janus* dealt only with agency fees, not membership dues.

MOC is lawful under longstanding case law authority with the imprimatur of the Supreme Court. See *SeaPak v. National Maritime Union*, 300 F. Supp. 1197, 1200-01 (S.D. Ga. 1969), *aff’d* 423 F.2d 1229 (5th Cir. 1970), *aff’d* 400 U.S. 985 (1971); *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Kentucky*, 842 F.3d 407, 421 (6th Cir. 2016) (affirming that the *SeaPak* holding “bears the Supreme Court’s imprimatur and its authority remains essentially unchallenged by any conflicting case law authority.”).

The efforts to use *Janus* to attack MOC are misplaced because *Janus* only addressed agency fees, not membership dues. Arbitrator Jeffrey Jacobs squarely rejected arguments seeking to apply *Janus* to restrict MOC in his well-reasoned, thorough interest arbitration and grievance arbitration decisions in *SEIU Healthcare Minnesota and Chippewa County Montevideo Hospital*, BMS 18-HN-0415 (October 8, 2018). Arbitrator Jacobs emphasized the basic distinction between agency fees—which were ruled unconstitutional in *Janus*—and agreements to continue membership dues—which remain lawful after *Janus*:

Thus, it was clear from a close reading of the *Janus* holding that the Court addressed only whether non-members must pay an agency fee pursuant to a mandatory statutory provision – not whether union members have to pay union dues pursuant to a voluntary agreement. 138 S.Ct. at 2462. The Court’s holding is to be limited to nonmembers and whether they have a First Amendment right not to pay an agency fee to a public sector union.

Id., p. 13. Arbitrator Jacobs thus concluded that MOC authorizations remain valid after *Janus*:

There is nothing in *Janus* that invalidates the portion of these MOC forms regarding the window period within which to stop dues deductions. Certainly, after *Janus*, a member could well revoke such membership during that window period . . .

Id., p. 36. Based on this analysis, and a careful review of longstanding precedent, Arbitrator Jacobs concluded that MOC authorizations remain valid and binding after *Janus*:

The clear and present answer on these facts and based on the law, even after *Janus*, is that the MOC forms *are* valid, they *are* binding and there is nothing in the *Janus* decision or otherwise to allow the employer to stop dues deduction unless the employee complies with those forms and opts out of union membership during the window period set forth in them. The caselaw is crystal clear on this point and validates the use of MOC forms of this very nature and have consistently upheld their binding effect.

Id., p. 73 (italics in original).

Similarly, the courts have rejected challenges to MOC based on the agency fee case law. *See, e.g., Fisk v. Inslee*, No. C16-5889RBL, 2017 WL 4619223 (W.D. Wash. Oct. 16, 2017). In *Fisk*, homecare provider plaintiffs challenged the constitutionality of their binding agreement to continue dues deductions until the opt-out window reopens. Plaintiffs argued that their letter of objection should be effective immediately, especially because the *Harris* decision outlawing agency fees for homecare workers was issued before the applicable opt-out window opened. Nonetheless, the Court determined that plaintiffs voluntarily agreed to abide by the opt-out window period and granted the union’s motion for summary judgment because “[t]he freedom of speech and the freedom of association do not trump the obligations and promises voluntarily and knowingly assumed.” *Id.* at *5. Courts have rejected challenges to MOC after *Janus* for the same reasons. *See, e.g., Belgau v. Inslee*, Case No. 18-5620 RJB, 2018 WL 4931602, *5 (W.D. Wash. October 11, 2018) (“Here, unlike in *Janus*, the Plaintiffs entered into a contract with the Union to be Union members and agreed in that contract to pay Union dues for one year. ‘[T]he First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law.’”).

III. Signed Authorizations Are Sufficient To Show Lawful Consent For Payroll Deductions Of Dues

In *Janus* the Court stated that non-members must “clearly and affirmatively consent” to pay fees to a Union. 138 S.Ct. 2486. However, the courts have emphasized that *Janus* did not address agreements by members to pay dues to their unions. Thus, the case law establishes that there is no need for unions to obtain new dues authorizations from their members after *Janus*. *See, e.g., Belgau v. Inslee*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019) (“Plaintiffs’ assertions that the agreements are not valid because they had not waived their First Amendment rights under *Janus* in their authorization agreements because they did not know of those rights yet, is without merit. Plaintiffs seek a broad expansion of the holding in *Janus*. *Janus* does not apply here – *Janus* was

not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here.”).

As one court explained, “Plaintiffs’ assertions that they didn’t knowingly give up their First Amendment rights before *Janus* rings hollow. *Janus* says nothing about [when] people join a Union, agree to pay dues, and then later change their mind about paying union dues.” *Belgau v. Inslee*, Case No. 18-5620 RJB, 2018 WL 4931602, *5 (W.D. Wash. October 11, 2018). Courts considering this question have emphasized that “[t]he relationship between unions and their voluntary members was not at issue in *Janus*.” See *Cooley v. California Statewide Law Enforcement Ass’n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019). The notion that employees may have made a different choice if they knew “the Supreme Court would later invalidate public employee agency fee arrangements [in *Janus*] does not void” their previous knowing agreements. *Id.* Employees “cannot now invoke the First Amendment to wriggle out of [their] contractual duties.” See *Smith v. Superior Court, County of Contra Costa*, 2018 WL 6072806 (N.D. Cal. Nov. 16, 2018).

IV. Management Should Refer Employees To The Union If They Inform The Employer That They Seek To Resign From The Union And Revoke Their Authorization For Dues Checkoff

If an employee states that they wish to resign from the union and asks to revoke their dues checkoff, management should direct the employee to make their request to the union. Obviously, management has no say in the process of resigning from a union, which is an internal union process. Moreover, a dues authorization is a voluntary agreement between the member and the union. See, e.g., *Belgau v. Inslee*, 359 F.Supp.3d 1000, 1017 (W.D. Wash. 2019) (emphasizing that “the State is not a party” to the dues authorization agreement); *Fisk v. Inslee*, No. C16-5889RBL, 2017 WL 4619223, *4-5 (W.D. Wash. Oct. 16, 2017) (noting that a signed dues authorization “is a valid contract” between the employee and the union); see also *Anoka-Hennepin Ed. Ass’n v. Ind. Sch. Dist. No. 11*, 305 N.W.2d 326 (1981) (PELRA provision authorizing dues checkoff authorizations for exclusive representative is controlling over statute under which an employee can enter into a contract with an employer to make payroll deductions). If the member seeks to revoke their dues authorization agreement with the union, they must address that request to the union as the other party to the agreement and follow the procedures for revocation contained in the agreement.

Moreover, if any refund of dues would need to be provided because of delays in processing a request, it would likely be the union’s responsibility to refund the money it received. Thus, it is important that the union be made aware as soon as possible of the employee’s request. In addition, management may not be familiar with the terms or proper interpretation of those revocation procedures and should not purport to give guidance to the member regarding those procedures. If management fails to adhere to the terms of that dues authorization agreement, it risks facing legal action brought by the union, including via the grievance procedure. Accordingly, the legally proper approach, and the lowest risk approach, is for management to direct the employee to communicate their request to the union.

V. The Union Should Respond Promptly To Requests To Resign And Revoke Dues Checkoff And Make Sure To Remind The Employee Of Their Rights And Obligations Under The Dues Authorization Agreement

If a member resigns from the union and seeks to revoke dues checkoff, the union should respond promptly to reduce the risk of misunderstandings or potential litigation and to avoid the need to provide any refund of dues. The request to resign from the union should become effective immediately. *See* Minn. Stat. § 179.06, subd. 2.

Resignation from membership is a separate question from revocation of dues checkoff, particularly when the member has signed an MOC authorization. If the request to revoke dues checkoff is untimely, for example, because it is outside of the window period specified in the MOC card signed by the employee, the union should provide a copy of the card to the employee and identify the next window period for revocation. The union should remind the employee of the rights and obligations under the dues authorization agreement so the employee's decisions in relation to dues checkoff remain knowing and voluntary. If the employee's request to revoke their dues authorization is timely and procedurally proper, the union should process the request promptly and ask that the employer cease dues checkoff for the next pay period.

VI. Management And The Union Should Adhere To The Written Terms Of The Dues Authorization, Including Maintenance Of Dues Checkoff Obligations Of A Resigning Member

Management and the union should adhere to the language of the dues authorization as written because it is an enforceable contract between the union and its member. *See, e.g., Belgau v. Inslee*, 359 F.Supp.3d 1000, 1017 (W.D. Wash. 2019) (emphasizing that “the State is not a party” to the dues authorization agreement); *Fisk v. Inslee*, No. C16-5889RBL, 2017 WL 4619223, *4-5 (W.D. Wash. Oct. 16, 2017) (noting that a signed dues authorization “is a valid contract” between the employee and the union). This includes compliance with the maintenance of dues checkoff obligation for a resigning member. This may mean that a former member will continue to pay dues by payroll deduction for a time period after resigning from the union, per their voluntary agreement to maintain dues checkoff with annual revocation window periods. If either party departs from the written agreement, this could result in legal action, including via the grievance procedure.

VII. The Parties Should Negotiate Collective Bargaining Agreement Language To Clarify Rights And Duties Regarding Internal Organizing And Dues Deduction Procedures

In a post-*Janus* world many unions are placing greater emphasis on the effectiveness of dues checkoff procedures and are developing internal organizing programs to keep members engaged in their unions and educate them about their rights and benefits as employees. In order to secure reliable funding through dues checkoff procedures and establish reasonable internal organizing rights, public employee unions should consider proposing language along the following lines.

A. Maintenance of Dues Checkoff

One of the major proposals that unions have made both before and after *Janus* is maintenance of dues checkoff so that they can ensure budgetary stability to represent their members effectively. The following is an example of such language:

Section ____ – Maintenance of Check-Off

The Employer shall adhere to the provisions in each dues check-off authorization agreed to by the employee regarding automatic annual renewal of the authorization and the provisions agreed to by the employee regarding revocation of the authorization only during specified window periods, even if the employee has resigned membership in the Union.

B. Electronic and Audio Dues Authorizations

As a result of *Janus*, unions have explored more efficient ways of signing-up new members using more effective technology. The use of electronic and audio signatures for membership applications and dues authorizations has been accepted by multiple public employers and unions in Minnesota. The union can provide the employer with copies of electronic or audio files confirming the employee's consent for payroll deduction of dues.

Minnesota has adopted the Uniform Electronic Transactions Act ("UETA"), Minn. Stat. Chapter 325L. The statute makes electronic signatures valid where a signature is required in any business, commercial, or governmental transaction such as these. See Minn. Stat. § 325L.07(b) ("A record or signature may not be denied legal effect or enforceability solely because it is in electronic form"); Minn. Stat. § 325L.07(d) ("If a law requires a signature, an electronic signature satisfies the law."). Electronic signatures include any "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Minn. Stat. § 325L.02(h). A record "means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Minn. Stat. § 325L.02(m). Under this statutory language, an electronic or recorded telephone consent to the terms of a membership application or payroll deduction agreement is binding under Minnesota law.

Here is sample language:

Section ____ – Electronic and Audio Dues Authorizations

The Union will provide to the Employer verification that dues deductions have been authorized by the employee upon request. Employees may provide such authorization for payroll deduction of dues by submitting to the Union a written application form, through electronically recorded phone calls, by submitting to the Union an online deduction authorization, or by any other means of indicating agreement allowable under state or federal law.

C. Employee Contact Information, New Employee Orientation, and Worksite Access

In order to connect with employees for purposes of internal organizing, educating employees about their rights and benefits, and engaging employees in their union, it is critical for the union to be able to get in contact with employees readily both inside and outside the workplace. The following are sample clauses for those purposes:

Section _____ – Employee Information

The Employer shall provide each month to the Union an updated electronic bargaining unit list of employees including name, address, telephone number (home and mobile), email address, work hours, classification, date of hire, and seniority date.

Section _____ – New Employee Orientation

It is in the interest of the Employer and the Union that all newly hired employees are informed of the rights, obligations, and benefits of their employment with the Employer. Accordingly, the Employer shall notify the Union and the Union Steward of all new employees immediately upon hire. The Employer shall supply the following information to the Union regarding each newly hired employee immediately upon hire: name, address, telephone number (home and mobile), email address (if available), work hours, classification, and date of hire. Each newly hired bargaining unit employee shall, during the employee's first week of employment, be scheduled at a time mutually agreeable to the parties for an orientation which shall be provided by the Union. The Union orientation period shall be one (1) hour, and shall take place during the employee's regular working hours with no loss of pay to the employees involved.

Section _____ – Access to Worksite

Union representatives shall have the right to meet with bargaining unit employees on Employer property and to distribute Union information to them during non-work time in a manner that does not disrupt work.

VIII. Non-Members Do Not Have The Right To Union-Provided Benefits

Prior to *Janus*, and in the wake of *Janus*, opponents of labor have brought legal claims alleging that non-members have been unconstitutionally excluded from receiving benefits provided by the union to its members. Such challenges have not succeeded. After *Janus*, unions still do not have an obligation to provide member benefits to non-members.

In *Bain v. California Teachers Association*, 2016 WL 6804921 (C.D. Cal. May 2, 2016), the plaintiff teachers, all of whom were voluntary dues-paying members, challenged the fact that non-members could not vote for union leadership and vote on union contracts and could not access union-provided benefits and programs, such as the unions' disability insurance program, legal representation in cases of employment disputes, death and dismemberment compensation, and disaster relief. Plaintiffs claimed that the existence of these non-contract, non-employer benefits provided by the union to its members allegedly "compelled" (rather than persuaded)

them to join the Union and thus violated their right of freedom of speech under the U.S. and California Constitutions.

On May 2, 2016, the court granted the defendants' motion to dismiss because the plaintiffs failed to establish a plausible theory of state action because the union is not a state actor, nor is the union's conduct in offering benefits attributable in any way to the state. *Id.* Plaintiffs appealed, and on June 11, 2018, the Ninth Circuit dismissed plaintiffs' appeal as moot, holding that because plaintiffs had disassociated from their respective unions, they could no longer benefit from the injunctive and declaratory relief they sought. *Bain v. California Teachers Association*, 891 F.3d 1206 (9th Cir. 2018).

IX. Non-Members Do Not Have The Right To Serve In Union Representational Roles

Both before and after *Janus*, opponents of labor have argued that non-members have the right to serve in representational roles in the union, suggesting that it is purportedly unconstitutional to exclude them from participating as representatives of their co-workers. Non-members have no such constitutional right to serve as union representatives. In making this argument, anti-union groups have overlooked that in a system of workplace democracy, like in any democratic system, employees elect their representatives. A person who is opposed to, or refuses to join, the elected representative cannot insist on acting on behalf of that representative.

In the landmark *Knight* case, plaintiffs who were not members of the faculty union challenged PELRA's provision that grants the democratically elected exclusive representative the right to choose faculty representatives on official "meet and confer" committees with the employer. 465 U.S. at 274-75, 279; *see* Minn. Stat. § 179A.07, subd. 4. Plaintiffs argued that by denying them the right to participate on meet and confer committees as representatives of other faculty, PELRA allegedly violates their First Amendment rights of freedom of speech and association. The Supreme Court rejected plaintiffs' theory, explaining that in a system of workplace democracy, as in any democratic system, the existence and role of an elected representative does not infringe on anyone's rights of speech or association:

[The Union's] ability [not to select] those who dissent from its views no more unconstitutionally inhibits appellees' speech than voters' power to reject a candidate for office inhibits the candidate's speech. . .

Appellees may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the "meet and confer" committees or to give them a voice in the representative's adoption of positions on particular issues. . . . [That] pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.

Knight, 465 U.S. at 289-90. Thus, the Court ruled that the First Amendment allows a system of workplace democracy in which a democratically elected union selects those members who will act as representatives of the bargaining unit.

After *Janus* an anti-labor group filed a case seeking to overturn *Knight* in *Uradnik v. Inter Faculty Organization*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018). As the Eighth Circuit held in *Bierman*, *Janus* does not supersede *Knight* and did not even mention *Knight*. 900 F.3d at 574. Thus, *Knight* remains binding.

X. Public Employee Unions Should Not Charge Non-Members For Representational Services Under Current Law

As explained above, *Janus* did not invalidate the role of unions as democratically elected exclusive representatives of public employee bargaining units. Under PELRA, as exclusive representative a union has the duty to fairly represent all employees in the bargaining unit, regardless of membership or non-membership in the union. See *Eisen v. State, Dep't of Pub. Welfare*, 352 N.W.2d 731, 735 (Minn. 1984).

It is well established that the duty of fair representation prohibits a union from charging a fee to non-members for vital collective bargaining services such as grievance handling. See *IUE Local 282*, 291 NLRB 182 (1988) (“Where [the] law prohibits a labor organization from compelling membership, a union may not require a fee for vital collective-bargaining services, including grievance processing, which is due nonmembers as a matter of right”); *Columbus Area Local, APWU*, 277 NLRB 541 (1985); *Operating Engineers Local 49 v. City of Minneapolis*, 233 N.W.2d 748, 752 (1975) (“In interpreting provisions of the PELRA, it is often instructive to refer to decisions interpreting the National Labor Relations Act (NLRA), 29 U.S.C.A., §§ 151 to 168.”).

In *Janus* the Supreme Court suggested in dicta that unions could charge non-members a fee for representational services in the disciplinary process or even deny them representation altogether:

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated through means significantly less restrictive of associational freedoms than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether.

138 S.Ct. 2468-69 (citations and quotation marks omitted). In a footnote the Court referred approvingly to state laws that allow unions to charge religious objectors to pay a fee for use of the grievance and arbitration procedure. *Id.* at n.6. However, in a subsequent passage discussing the duty of fair representation the Court seemed to contradict its previous analysis by suggesting that the duty of fair representation is essential to avoid serious constitutional questions and that the rights of non-members cannot be disregarded:

Protection of [the non-members’] interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious constitutional questions [would] arise if the union were *not* subject to the duty to represent all employees fairly.

138 S.Ct. 2469 (citations and quotations marks omitted). Thus, the Court’s decision says both that non-members can be “denied union representation altogether” and that under the duty of fair

representation unions are not “free to disregard” the rights of non-members. 138 S.Ct. 2468-69. Given this seemingly contradictory discussion in dicta—and the suggestion that the duty of fair representation has constitutional implications—the best course of action is for a union to proceed cautiously and assume that the duty as traditionally understood remains unchanged by *Janus*. Thus, a union should not charge non-members for representational services despite the dicta in *Janus*.

However, if a statute is passed in Minnesota allowing public sector unions to charge non-members for grievance and arbitration services, then the analysis may change given the Court’s footnote that seemed to approve of California and Illinois statutes establishing a fee-for-service model for grievances and arbitrations for non-members. In the absence of such a change in the law, adhering to current legal standards is the prudent course.