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

ERICH MANDEL,	)	
Plaintiff,	)	No. 1:18-cv-08385
	)	Honorable John Robert Blakey
v.	)	
SEIU LOCAL 73 and COMMUNITY CONSOLIDATED SCHOOL DISTRICT 15,	)	
Defendants	)	

PLAINTIFF'S COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

I. This case is not moot, and is timely.

A. Plaintiff's claim for declaratory relief is not moot.

As Local 73 points out, Plaintiff no longer seeks injunctive relief or damages. (Union Br. 4, SOF ¶¶ 47, 54.) However, contrary to Defendants' assertions, Plaintiff's remaining claims for declaratory relief are not moot. After Plaintiff learned of his rights under the Supreme Court's decision in *Janus*, he attempted to enforce his rights by demanding that he immediately be allowed to resign his union membership and that union dues no longer be withheld from his paychecks. (SOF ¶ 32-34.) However, he was denied his First Amendment right to not be a member of the union or pay the union by Local 73 and the District. (*Id.* at ¶¶ 35, 37, 39.) Yet soon after the filing of this lawsuit, Local 73 agreed to stop deducting Plaintiff's dues. (*Id.* at ¶¶ 40-42.) Subsequently, Local 73 refunded Plaintiff's dues with interest. (*Id.* at ¶ 47.) Defendants now contend the case is moot, and they should not have to defend the unconstitutional policy that they continue to enforce against any employee who is not determined enough, or has the means, to sue. Unions have attempted to use similar tactics in other similar cases across the country. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice the union's policy required). A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Yet that is precisely what Local 73 is attempting here.

Similarly, in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted fees to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. As in *Knox,* here Local 73 and the District continue to assert the legality of their policy to withhold union dues from employees who have not provided affirmative consent based on union dues deduction authorizations signed prior to the *Janus* decision, but Defendants wish to avoid this Court determining its legality.

B. This case is capable of repetition yet evading review.

In *Gerstein v. Pugh,* the Supreme Court held that a claim where an "individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be [negatively impacted] under the allegedly unconstitutional procedures" was "distinctly 'capable of repetition, yet evading review.'" *Gerstein v. Pugh,* 420 U.S. 103, 110 n. 11 (1975). Absent declaratory relief, there is nothing stopping the Defendants from reversing their decision and deciding that Plaintiff is stuck in his bargaining unit. And there can be no question that

"other persons" are "similarly situated." Again, it took Plaintiff filing this lawsuit for Defendants to stop their unconstitutional garnishment of his wages. Employees of the District who are similarly situated to Plaintiff will continue to have dues withheld from their paychecks without their affirmative consent. Defendants should not be allowed to evade responsibility after the fact.

C. Plaintiff's claim is timely.

The District briefly asserts that Plaintiff's claim is untimely because the complaint arises out of conduct committed in 2014, and there is a two-year statute of limitations. (Dist. Br. 12.) Defendants were illegally garnishing Plaintiff's wages as late as December 2018, after this case was filed. When the wrongful conduct is ongoing, the statute of limitations "starts to run . . . from the date of the last incidence of that violation, not the first." *Turley v. Rednour,* 729 F.3d 645, 651 (7th Cir. 2013). Thus, the District's claim that Plaintiff's claim is untimely has no merit.

II. Plaintiff has stated a claim under Section 1983.

A. Plaintiff's First Amendment right to not pay a union was violated when the District deducted union dues from his paycheck without Plaintiff's affirmative consent.

Government employees have a First Amendment right not to be compelled by their employer to pay money to a union unless an employee "affirmatively consents" to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id*. In this case, Plaintiff did not provide the affirmative consent to waive his First Amendment right to not pay money to a union as articulated by the Supreme Court in *Janus*. The union dues authorization card that Plaintiff signed before the *Janus* decision cannot constitute affirmative consent because it does not meet the Court's standard for waiving constitutional rights: First, Plaintiff's waiver was not freely given or voluntary because

when he signed the union card he was given the unconstitutional choice between paying Local 73 as a member or paying it as a non-member. And second, the union card Plaintiff signed could not constitute waiving a known right or privilege because at the time Plaintiff signed it, the right to not pay a union at all was not yet established and the District and Local 73 did not provide Plaintiff with notice that he had a right to not pay the union. Thus, Plaintiff's First Amendment right to not pay money to a union was violated when union dues were withheld from his paychecks without his affirmative consent. (*See* Pl. Br. 3-5.)

Despite this, the District asserts that "Plaintiff failed to identify any deprivation of his rights, privileges, or immunities secured by the Constitution or laws of the United States" (Dist. Br. 5.) But the District's argument is not really that Plaintiff has failed to identify a deprivation of his constitutional rights. Plaintiff's motion for summary judgment clearly identifies a deprivation of his constitutional rights: withholding union dues without Plaintiff's affirmative consent. Rather, the District simply disputes that Plaintiff's claims are valid. The District incorrectly summarizes Plaintiff's argument as asserting that "his rights are analogous to the rights vindicated in *Janus*" and dismisses it by asserting that "*Janus* concerned nonmembers." (Dist. Br. 5.) But as Plaintiff stated in his memorandum in support of his motion for summary judgment:

> Any assertion that *Janus* applies only to non-members, not members of the union, simply begs the question of whether a membership card and/or dues deduction authorization signed by a government employee before the Court's decision in Janus constitutes affirmative consent under *Janus*.

(Pl. Br. 4.)

The section of the District's brief asserting that Plaintiff failed to identify a deprivation of his constitutional rights does not attempt to explain why the union authorization card signed by Plaintiff constitutes affirmative consent. Rather, the District asserts that "[n]o court has ever held that the deduction of dues from a public employee's paycheck pursuant to a membership card

violates the constitution." (Dist. Br. 6.) But, as explained, the issue is whether the union authorization card signed before *Janus* constitutes affirmative consent of Plaintiff's waiver of his constitutional right to not pay money to a union, not whether deduction of dues from a public employee's paycheck pursuant to a membership card violates the Constitution *per se*. In any event, the lack of court decisions on the subject is not surprising since the Supreme Court only in June 2018 found that affirmative consent is required to waive a public employee's First Amendment right to not pay money to a union.

The District's assertion that Plaintiff has failed to identify a deprivation of his constitutional rights simply ignores Plaintiff's claim that withholding union dues without his affirmative consent violated his First Amendment right to not pay money to the union. Further, the District fails to make any kind of argument in this section of its brief explaining why Plaintiff's claim, made in his complaint and motion for summary judgment, fails as a matter of law. Therefore, the District's assertion that Plaintiff has failed to identify a deprivation of his constitutional rights fails.

B. The District's policy of withholding union dues from Plaintiff without his affirmative consent deprived him of his constitutional rights.

Plaintiff has clearly alleged that the District's policy of withholding union dues pursuant to the Collective Bargaining Agreement with Local 73, which permits withholding of union dues from employee's who have not provided affirmative consent, violates Plaintiff's First Amendment right to not pay money to a union. (See Pl. Br. 3-4.) The Collective Bargaining Agreement between Local 73 and the District provides that the District will deduct union dues from the wages of employees who become or are union members and remit such dues to the union based on the written authorization to deduct dues. (SOF ¶¶ 23-24.) Plaintiff's Complaint clearly alleges that the District is deducting dues pursuant to the CBA even when the District did

not obtain an employee's affirmative consent. (Compl. ¶¶ 27, 29.) A dues authorization signed before *Janus* cannot constitute the affirmative consent that the Supreme Court requires for an employee to pay a union, as thus, required for the District to deduct dues from Plaintiff's paycheck. That's because, according to the Court, affirmative consent requires knowledge of the right that an employee is waiving – which Plaintiff did not have when he signed the dues authorization – and it requires that the waiver be freely given – and Plaintiff could not have freely given affirmative consent because at the time he was forced to pay money to the union either as a member or a non-member.

Nonetheless, the District asserts that Plaintiff has not identified a District policy or custom that caused the alleged constitutional injury he claims here. Plaintiff has quite clearly explained, both in his Complaint and motion for summary judgment, that the District's policy under the CBA was to deduct dues from employees based on a signed dues authorization, even when those authorizations did not constitute affirmative consent. Thus, the District's assertion that Plaintiff has not identified a District policy that caused the alleged constitutional injury is simply incorrect.

The District also asserts that Plaintiff must show a direct causal link between a governmental policy or custom and the alleged constitutional deprivation. (Dist. Br. 8.) Again, the District simply ignores the clear allegations that Plaintiff has made in this case. By following the CBA and withholding union dues from employees even when those employees have not provided affirmative consent, the District has violated Plaintiff's First Amendment rights to not pay money to a union. (See Pl. Br. 4-8.)

The District misunderstands Plaintiff's argument when it asserts that Plaintiff claims that the deprivation of his rights occurred because the membership authorization lack express language

stating that the employee has a constitutional right not to pay a union and the employee is waiving that constitutional right. (Dist. Br. 8.) Rather, the deprivation of Plaintiff's rights occurred because the District, in concert with Local 73 under the CBA, withheld union dues from Plaintiff's paycheck and remitted them to Local 73, even though the District and Local 73 never received the affirmative consent that the Supreme Court requires in order for a public employee to pay money to the union. Local 73 and the District assert that the dues authorization/membership form signed by Plaintiff is sufficient to justify withholding dues from Plaintiff. But, as Plaintiff has explained, the dues authorization cannot constitute Plaintiff's affirmative consent to waive his constitutional right to not pay a union because Plaintiff signed it without knowledge that he had a constitutional right to not pay a union and because Plaintiff did not freely consent because at the time he signed it, he was required to pay money to the union either as a member or a non-member. (Pl. Br. 5-8.)

The District's assertion that Plaintiff could have not joined the union and paid less money to the union as a non-member and that the CBA did not force Plaintiff to be a member (Dist. Br. 8) misses the point. The First Amendment violation occurred because the District withheld union dues from Plaintiff's paycheck pursuant to the CBA and Plaintiff's union authorization, even though at the time Plaintiff signed the union card he had to pay Local 73 either as a member or a non-member. The Supreme Court found that this arrangement was unconstitutional; that public employees must be given the option of paying nothing to a union. Because the union card was based on an unconstitutional choice, the District was not permitted to rely on it as a basis to withhold union dues from Plaintiff's paycheck because Plaintiff's signature on the union card could not have constituted affirmative consent.

Plaintiff has made a clear showing that the District's policy of withholding union dues from employees based on the CBA and an employees' signed union authorization, even without affirmative consent, deprived Plaintiff of his First Amendment right to not pay money to a union. The District's arguments fail.

III. This Court should grant summary judgment to Plaintiff because Defendants' actions ran afoul of *Janus*.

This Court should grant summary judgment to Plaintiff because Defendants violated his *Janus* rights in presenting him a false choice between paying an agency fee as a nonmember and paying full dues as a member.

A. Plaintiff never provided affirmative consent to waive his First Amendment right to not pay union dues.

In their motions, Defendants frame an agreement forced on Plaintiff as a choice he affirmatively made. (Union Br. at 8; Dist Br. 10-11.) But Plaintiff's choice was not made freely; he *never* had the option – as he was entitled to under *Janus* – to pay *nothing*. (SOF ¶ 12.) Faced with the choice between paying something for nothing and paying more for benefits he did not consider worth the cost, he decided to take the latter option. *Id.*

The Supreme Court has long held that certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972).

The union dues authorizations signed by the Plaintiff fail on all these counts. He did not provide affirmative consent when he signed his authorizations: his consent was coerced because he was given the unconstitutional choice between paying Local 73 as a member or paying it as a

non-member. He did not waive a known right or privilege because *Janus* had not yet been decided. Nor did Local 73 or District ever provide notice to Plaintiff that he had a right to not join or pay Local 73. Thus, at the time he signed the dues authorizations, Plaintiff did not know that he had a constitutional right to not join or pay Local 73. He did not make a voluntary waiver because, at the time he signed the union dues authorizations, he was forced into an unconstitutional choice between paying Local 73 as a member or paying it as a non-member. Therefore, it is false to characterize the obligations resulting from this unconstitutional choice as "voluntary contractual obligations" or "voluntary contractual commitments," as Defendants do. (Union Br. 9.)

Likewise, the District argues that Plaintiff's claim is barred by contract. (Dist. Br. 10-11.) But dues-deduction authorizations are not traditional two-party contracts; they are better thought of as a three-party assignment. *See, e.g., NLRB v. Cameron Iron Works, Inc.*, 591 F.2d 1, 3 (5th Cir. 1979); *Brotherhood of Locomotive Firemen & Enginemen v. Northern P. R. Co.*, 274 F.2d 641 (8th Cir. 1960); *United Ass'n of Journeymen & Apprentice Plumbers & Pipefitters v. IBEW, Local 313*, 2015 U.S. Dist. LEXIS 8855, *21 (D. Del.) (discussing 29 U.S.C. § 186(c)(4)). Dues-deduction authorizations or collective bargaining agreements themselves often also use the language of assignment. *See, e.g., NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 398 (4th Cir. 1977); *Ozolins v. Northwood-Kensett Community Sch. Dist*., 40 F. Supp. 2d 1055, 1071 (N.D. Iowa 1999); *Halsey v. Cessna Aircraft Co*., 626 P.2d 810, 811 (Kas. App. 1981).

As a three-party assignment, union authorizations clearly involve state action: the employee (party one) directs the public employer (party two) to assign a portion of his wages to the union (party three). The state is an integral party to the process, and thus execution of the authorization is appropriately considered state action subject to First Amendment scrutiny.

Alternatively, unions in other contexts have argued that dues deduction authorizations are contracts between the employer and the employee. *See, e.g., Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) ("A dues-checkoff authorization is a contract between an employer and employee for payroll deductions. . . . The union itself is not a party to the authorization . . ."). If the dues authorization is a contract with the District as employer, then clearly it is state action and not a private contract.

Even if the dues authorization is private contract between the employee and the union, it is well-established that private contracts that require a person to waive a constitutional right must meet certain standards for informed, affirmative consent without pressure, which the union cannot do here. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (establishing the standards for waiver of constitutional rights in private contracts). Applying *Janus* retroactively, *see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), Plaintiff could not have knowingly and voluntarily waived his rights because he did not know of them at the time. The dues authorizations did not meet the standards set forth by the Supreme Court for knowing and voluntary waiver of constitutional rights. The dues authorizations signed by Plaintiff did not inform him of his right to pay a fee instead of paying full membership dues, which is essential information before someone can make a valid, enforceable waiver of rights in a union dues authorization. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998) ("If a union negotiates a union security clause, it must notify workers that they may satisfy the membership requirement by paying fees to support the union's representational activities, and it must enforce the clause in conformity with this notification.").

B. As there were no voluntary contractual obligations, Plaintiff never attempted to renege on them.

Defendants argue that the First Amendment does not entitle Plaintiff to "renege on his voluntary contractual obligations." (Union Br. 9.) Defendants' entire argument is misplaced

because the obligations were not voluntary. The Supreme Court in *Janus* set forth a First Amendment right that Plaintiff was unaware of when he signed his union membership cards. Therefore, per *Johnson* and *D. H. Overmyer,* his waiver of his First Amendment rights was not proper.

Defendants argue that *Overmyer* supports *their* position, because in that case the Court found that an agreement was voluntary, knowing, and intelligently-made without specifically mentioning the waived constitutional right. (Union Br. 15.) That case concerned waiver of due process rights to notice and hearing prior to a civil judgment. *Overmyer,* 405 U.S. at 185. The Court held that "the hearing required by due process is subject to waiver" was "settled" prior to the events of that case. *Id.* (quoting *Boddie v. Connecticut,* 401 U.S. 371, 378-79 (1971) and *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315 (1964)). In other words, the due process rights to notice and hearing were well-known prior to the agreement at issue in *Overmyer,* as was the fact that such rights could be waived. The waiving party could reasonably have been aware that such rights existed and that he was waiving those rights. Not so here, with an agreement signed prior to the Court's *Janus* decision.

C. *Janus* is applicable to cases where, such as here, the plaintiff is a union member because he was presented with an unconstitutional choice.

Defendants try to avoid the clear requirement in *Janus* that an employee provide affirmative consent before waiving his or her right to not pay money to a union by arguing that "*Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members." (Union Br. 11.) Defendants point out that the *Janus* plaintiff was a non-member, whereas Plaintiff here was a member. (Union Br. 11; District Br. 12.) But, as Plaintiff pointed out in his motion, asserting that *Janus* applies only to non-members simply begs the question of whether a membership card and/or dues deduction authorization signed by a

government employee before the Court's decision in *Janus* constitutes affirmative consent under *Janus*. (Pl. Br. 4.) Constitutional rights are available to everyone unless one waives a specific constitutional right. *See Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937) ("[w]e do not presume acquiescence in the loss of fundamental rights"). This issue in this case is whether a union card signed before the *Janus* case properly constitutes affirmative consent by the Plaintiff to waive his constitutional rights. Thus, Defendants' assertion that *Janus* does not apply because it involved a non-member is incorrect and irrelevant.

D. In the absence of affirmative consent, Plaintiff's union dues deduction agreements are an invalid waiver of his *Janus* rights.

Defendants assert that Plaintiff's union dues deduction agreements constitute a waiver of his First Amendment rights. (Union Br. 14-18.) As Plaintiff explained, these agreements were not an effective waiver because the rights at issue were not recognized at the time. (Pl Br. 7.) Defendants argue that the right recognized in *Janus* "is not relevant to Plaintiff" (Union Br. 15; Dist. Br. 12), but this is not true. *Janus* recognized the rights of public employees not to pay an agency fee, but also recognized that public employees could waive this right by providing affirmative consent to paying union dues. The question in this case is whether Plaintiff's signing of the union authorization before *Janus* constitutes affirmative consent. As Plaintiff has explained, the signing of the union dues authorization before the Janus decision could not have constituted affirmative consent because it was not done knowingly or voluntarily. (Pl. Br. 5-9.)

Defendants point to *United States v. Brady,* 397 U.S. 742 (1970) and *Parker v. North Carolina,* 397 U.S. 790 (1970) for the proposition that "agreements can be knowing and voluntary even if an alternative to that agreement is later held to be unconstitutional." (Union Br. 16.) Those cases concerned defendants who took guilty pleas in order to avoid risking getting the death penalty, where the death penalty statutes were later ruled unconstitutional. *Brady,* 397 U.S.

at 750, 755; *Parker,* 397 U.S. at 794-95. In *Brady*, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. 397 U.S. at 743-44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id*. at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id*. at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication: "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id*. at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id*. at 749. There is nothing like that in this case. Plaintiff does not ask that this Court find its way around *res judicata*, only that it find an alleged contract between the parties unenforceable.

Further, whereas in the criminal cases Defendants cite the offer of a plea deal itself was constitutional, here the *choice* presented to Plaintiff was not. In the criminal cases, either the defendant would plead guilty, or he would go to trial. Even after the Supreme Court struck down the death penalty as unconstitutional, the criminal defendant's choices between pleading guilty or going to trial were the same. There was no "third option" the defendant could have taken that was unconstitutionally withheld from him. In contrast, in this case before *Janus* Plaintiff was given the option of paying money to the union as a member or as a non-member. He was not given the option of paying nothing to the union. It was the deprivation of this choice that prevented Plaintiff in this case from making a knowing, voluntary choice to waive his constitutional right to not pay the union.

Defendants' citation to similar cases from earlier this year from district courts in California or Alaska denying similar claims, (Union Br. 17-18) are not binding on this Court and are likely to be, or are already been appealed. And all those cases, unfortunately, seem to ignore the fact that affirmative consent cannot be unknowingly given. *Johnson*, 304 U.S. at 464; *D. H. Overmyer Co,* 405 U.S. at 185-86.

E. The District's continued deduction of union dues at Local 73's request satisfies the state action requirement.

As explained above in section III-A, the union authorizations clearly involve state action and are invalid and unenforceable because Plaintiff did not provide affirmative consent. Although Defendants argue that the District's actions were "limited to notifying Plaintiff that it could not terminate his dues deductions until it received notice from the Union to do so" (Union Br. 19), this is not an accurate representation of the District's role. The District negotiated a collective bargaining agreement with Local 73, under which it was required to deduct union fees or fair-share fees. (SOF ¶¶ 17, 18, 23, 24.) In doing so, the District agreed to enforce an unconstitutional scheme whereby Plaintiff and other public employees were given an unconstitutional choice between paying money to the union as a member and paying money to the union as a non-member. Further, neither the District nor Local 73 ever provided Plaintiff or the District's employees notice that they had the union to pay no money to the union as a non-member of the union. As a result, the District withheld union dues from its employees, including plaintiffs, even when those employees had not provided affirmative consent to waive their constitutional right to not pay the union. The District, at Local 73's direction, continued deducting Plaintiff's union dues after the *Janus* decision was issued. (SOF ¶ 31.) The District continued to do so despite Plaintiff's repeated requests that this violation of his First Amendment

rights cease. (SOF ¶¶ 32, 36, 38, 39.) This is not the "purely ministerial task" that Defendants assert. (Union Br. 19.)

F. Defendants do not have a good faith defense to § 1983 liability.

There is no good-faith defense to Section 1983 liability. The ostensible defense is: (1) incompatible with the statute's text, which mandates "that "every person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . ." 42 U.S.C § 1983; (2) incompatible with the statutory basis for immunities and the union's lack of an immunity; and (3) incompatible with "[e]lemental notions of fairness [that] dictate that one who causes a loss should bear the loss." *Owen v. City of Indep*., 445 U.S. 622, 654 (1980). Moreover, creating this sweeping mistake-of-law defense would undermine Section 1983's remedial purposes and burden the courts with having to evaluate defendants' motives for depriving others of their constitutional rights.

1. A good faith defense conflicts with Section 1983's text.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 1983 states:

> 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 party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Section 1983 means what it says: "[u]nder the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is]

answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)) (emphasis added).

A good-faith defense to Section 1983 cannot be reconciled with the statute's mandate that "every person"—not some persons, but "every person"—who deprives a party of constitutional rights "shall be liable to the party injured in an action at law . . ." The term "shall" is not a permissive term, but a mandatory one. The statute's plain language requires that the union be held liable to Plaintiff for damages.

2. A good faith defense is incompatible with the statutory basis for qualified immunity and Local 73 lacks that immunity.

Section 1983 "on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Thus, courts can "not simply make [their] own judgment about the need for immunity" and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. Rather, courts only can "accord[] immunity where a 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine'" when it enacted section 1983. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992)). These policy reasons are "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citing *Richardson*, 521 U.S. at 409–11). Local 73 is not entitled to qualified immunity to Section 1983 damages claims unless these exacting strictures are satisfied. *See, e.g., Owen*, 445 U.S. at 657 (holding municipalities lack qualified immunity).

Private defendants are not usually entitled to qualified immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 164–65. A narrow exception to that rule is for private individuals who "perform[ ] duties [for the government] that would otherwise have to be performed by a public official who would clearly have qualified immunity." *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir. 1995) (citation omitted) (private physician contracted to provide medical services at state prison); *see, e.g., Filarsky*, 566 U.S. at 393–94 (holding private attorney retained by a city to conduct an official investigation entitled to qualified immunity).

There is no history of unions enjoying immunity before section 1983's enactment in 1871. Public sector unions did not exist at the time. The government's interest in ensuring that public servants are not cowed by threats of personal liability has no application to the union.

The relevance of the foregoing is three-fold. First, qualified immunity law shows that exemptions to Section 1983 liability cannot be created out of whole cloth. Immunities are based on the statutory interpretation that Section 1983 did not abrogate entrenched, pre-existing immunities. *See Filarsky*, 566 U.S. at 389–90. The good-faith defense to Section 1983 for which Defendants argue, by contrast, is based on nothing more than (misguided) notions of equity and fairness. Given that courts "do not have a license to create immunities based on [their] view[s] of sound policy," *Rehberg*, 566 U.S. at 363, it follows that courts do not have license to create equivalent defenses to Section 1983 liability based on policy reasons.

Second, unlike with recognized immunities, there is no common law history prior to 1871 of private parties enjoying a good-faith defense to constitutional claims. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a good faith defense "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Anderson v. Myers*, 238 U.S. 368, 378 (1915) (rejecting good-faith defense).

Finally, it is anomalous to grant defendants that lack qualified immunity the functional equivalent of an immunity under the guise of a "defense." Yet that is what Local 73 seeks here. Qualified immunity bars a damages claim against an individual if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That accurately describes the ostensible "defense" the union asserts. It makes little sense to find that the union who is not entitled to qualified immunity to Section 1983 damages liability are nonetheless entitled to substantively the same thing, but under a different name.

3. A good faith defense to Section 1983 is inconsistent with equitable principles that injured parties be compensated for their losses.

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). That especially is true here. There is nothing equitable about depriving relief to victims of constitutional deprivations. Nor is there anything equitable about letting wrongdoers like the union keep ill-gotten gains. Equity cannot justify writing into Section 1983 a defense found nowhere in its text.

If anything, equity favors enforcing Section 1983 as written, for "elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654. The Supreme Court in *Owen* wrote those words when holding municipalities are not entitled to a good-faith immunity to Section 1983. The Court's two equitable justifications for so holding are equally applicable here.

The *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be

tolerated." *Id*. at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations will be left remediless if defendants to Section 1983 suits can escape liability by showing they had a good faith, but mistaken, belief their conduct was lawful. Those victims include not just Plaintiff and other employees who had union dues taken from them. Under Local 73's argument, every defendant to every Section 1983 damages claim can assert a good faith defense. For example, the municipalities that the Supreme Court in *Owen* held not to be entitled to a good-faith immunity could raise an equivalent good-faith defense, leading to the very injustice the Court sought to avoid.

The *Owen* Court further recognized that Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651–52 (emphasis added). The same rationale weighs against a good-faith defense to Section 1983.

4. Recognizing a good faith defense to Section 1983 will undermine the statute's remedial purposes.

The Court should pause to consider the implications of recognizing this sweeping defense. Under Local 73's rationale, every defendant that deprives any person of any constitutional right can escape damages liability by claiming it had a good faith, but mistaken, belief its conduct was lawful.

This ostensible defense would be available not just to unions, but to all defendants sued for damages under Section 1983. Of course, individuals with qualified immunity would have little reason to raise the defense, since their immunity is similar. But defendants who lack immunity,

such as private parties and municipal governments, would gain the functional equivalent of a qualified immunity.

These defendants could raise a good-faith defense not just to First Amendment compelled-speech claims, but against any constitutional or statutory claim brought under Section 1983 for damages. This includes claims alleging discrimination based on race, sex, or political affiliation.

A good-faith defense is exceedingly broad. It would apply to any private party acting in concert with the state. In effect, a reasonable mistake of law would become a cognizable defense to depriving a citizen of his or her constitutional rights. Such a broad defense would create a massive exemption to Section 1983 liability, essentially denying all citizens who are victims of constitutional injuries from obtaining compensation. Doing so would undo Congress' remedial purpose in passing Section 1983.

CONCLUSION

For the reasons stated in this brief and in Plaintiff's motion for summary judgment, this Court should grant Plaintiff's motion for summary judgment and deny Defendants' motions for summary judgment.

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Respectfully Submitted,

By: /s/ Jeffrey Schwab

Jeffrey M. Schwab (#6290710)
James J. McQuaid (#6321108)
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jschwab@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on August 6, 2019, I served Plaintiff's Combined Response in Opposition to Defendants' Motions for Summary Judgment and Reply in Support of His Motion for Summary Judgment on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab