UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

HOLLIE ADAMS, JODY WEABER, KAREN UNGER, and CHRIS FELKER, Plaintiffs, v. TEAMSTERS UNION LOCAL 429, LEBANON COUNTY, ATTORNEY GENERAL JOSH SHAPIRO, in his official capacity; JAMES M. DARBY, Chairman, Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; and ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, in their official capacities Defendants.	*No. 1:19-CV-0336* *Judge Rambo*

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO THE MOTIONS OF THE DEFENDANTS

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INTRODUCTION

Government employees have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Prior to *Janus*, Plaintiffs were given the unconstitutional choice between paying union dues as a member of the Teamsters Union Local 429 ("Union" or "Local") or paying union agency fees as a non-member of the Union. The Supreme Court in *Janus* recognized that Plaintiffs should have been given the choice to pay nothing at all to the Union as a non-member. Plaintiffs could not have provided affirmative consent when they joined the union because they were not given a free choice. This lack of freely given consent renders the union cards Plaintiffs signed before *Janus* void, such that any dues withheld from Plaintiffs' paychecks were taken unconstitutionally.

In addition, citizens enjoy a First Amendment right not to be forced by government to associate with organizations or causes with which they do not wish to associate. Yet Pennsylvania law grants public sector unions the power to speak on behalf of employees as their exclusive representative. 43 P.S. §§ 1101.604, 606. Pursuant to this law and by agreement between the Union and Lebanon County, the Union purports to act as the exclusive representative of Plaintiffs and other non-members. Plaintiffs' rights of speech and association are violated by a government-compelled arrangement whereby the Union lobbies their government

employer on their behalf without their permission and in ways that Plaintiffs do not support.

Plaintiffs brought this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from their paychecks.

Plaintiffs and Defendants agree that there are no material facts in dispute, and that all the relevant questions are matters of law. Plaintiffs, therefore, submit this memorandum in support of their motion for summary judgment. The court should grant the motion because the case primarily presents questions of law appropriate for summary disposition.

STATEMENT OF FACTS

Plaintiffs accept the Defendants' Joint Statement of Facts as a complete and accurate rendition of the relevant facts.

SUMMARY JUDGMENT STANDARD

"A party is entitled to summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (quoting Fed. Rule Civ. Proc. 56(a)). Plaintiffs and Defendants stipulate that there are no material facts in dispute and that all the relevant questions are matters of law.

ARGUMENT

I. DEFENDANTS VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS BY COMPELLING THEM TO REMAIN UNION MEMBERS AND BY COLLECTING DUES FROM THEM WITHOUT THEIR AFFIRMATIVE CONSENT (COUNT I).

A. Plaintiffs never provided affirmative consent to the Union or Lebanon County for them to withdraw union dues from their paychecks.

The Supreme Court in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to pay:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Plaintiffs never provided their affirmative consent to union membership. Instead, when they began employment with Lebanon County, they were forced into an unconstitutional choice: pay an agency fee or pay membership dues. *See* 43 P.S. §§ 1101.301(18); 1101.401; and 1101.705; collective bargaining agreement between Union and Lebanon County, Defendants' Joint Statement of Facts ¶¶ 16-

18. Plaintiffs chose to pay the union dues rather than agency fees because agency fees were substantially equivalent to union dues. Had the Plaintiffs enjoyed a free choice, as the Supreme Court eventually required in *Janus*, they would have chosen not to join the Union and to give no money to the Union at all.

Because Plaintiffs were not given a free choice, Lebanon County and the Union could not have obtained Plaintiffs' affirmative consent to waive their First Amendment right to not join or pay the union. Affirmative consent is required because, as the Supreme Court recognized in *Janus*, an employee who agrees to pay a union is waiving their First Amendment right not to pay a union. 138 S. Ct. at 2486. 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 Plaintiffs fail on all these counts. They did not provide *affirmative* consent when they signed their authorizations: their consent was coerced because they were given the unconstitutional choice between paying the Union as a member or paying the Union as a non-member. They did not waive a *known* right or privilege because *Janus* had not yet been decided. Nor did the Union or Lebanon County ever

provide notice to Plaintiffs that they had a right to not join or pay the Union. Thus, at the time they signed the dues authorizations, Plaintiffs did not know that they had a constitutional right to not join or pay the Union. They did not make a *voluntary* waiver because, at the time they signed the union dues authorizations, they were forced into an unconstitutional choice between paying the Union as a member or paying the Union as a non-member.

Because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). Especially given these constitutional commands for courts to err on the side of respecting rights and against waiver of rights, this Court should declare the dues deduction authorizations invalid.

The Union and Lebanon County can find no safe harbor by claiming they were operating in accordance with pre-*Janus* case law. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Supreme Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the

controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." The Third Circuit has called it a "truism" that "in the context of adjudication, retrospectivity is, and has since the birth of this nation been, the norm." *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 394 (3d Cir. 1994). The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

Thus, at the time Plaintiffs signed their union dues authorizations, the Union and Lebanon County needed to secure Plaintiff's *affirmative consent* for the *knowing* and *voluntary* waiver of their rights not to join a union. This the Union and Lebanon County did not do. Because they did not secure Plaintiffs' affirmative consent, the Union cannot compel them to remain members of the Union or to continue to pay union dues. In other words, Plaintiffs' union card is void under *Janus*. Because it is void, any dues withheld from Plaintiffs before *Janus* were unconstitutional and therefore need to be returned.

The Union's liability for dues paid by Plaintiffs, therefore, extends backward before *Janus*; limited only, if at all, by a statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be

returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to keep the monies it seized from Plaintiffs' wages before the Supreme Court put an end to this unconstitutional practice. Plaintiffs are entitled to a refund of their dues.

B. Count I is not moot.

After Plaintiffs learned of their rights under the Supreme Court's decision in *Janus*, they attempted to enforce them by demanding that they immediately be allowed to resign their union membership and that union dues no longer be withheld from their paychecks. Defendants' Joint Statement of Facts ¶¶ 22, 24 (Adams); 35 (Felker); 46 (Unger); 56-57 (Weaber). However, they were denied their *Janus* rights by the Union and Lebanon County. *Id.* at ¶¶ 23, 25 (Adams); 36 (Felker); 58 (Weaber). Yet soon after the filing of this lawsuit, the Union agreed to refunds with statutory interest for all the Plaintiffs from the date of their initial resignation letters to the date when the Union told Lebanon County to stop dues

deductions. *Id*. at ¶¶ 31 (Adams); 41 (Felker); 52 (Unger); 64 (Weaber). Defendants now contend the case is moot, and they should not have to defend the unconstitutional policy that they and Lebanon County 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 the Union is attempting here.

The Ninth Circuit has already rejected the same mootness argument Defendants present here. As it explained:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review."

> *Johnson v. Rancho Santiago Cmty. Coll. Dist.,* 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk v. Inslee, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018). The Ninth Circuit recognized that claims like Plaintiffs' would never be addressed by courts if the union is allowed to moot them in this way. Indeed, since most windows are annual, few cases would reach judgment in a district court, much less have the opportunity for appellate review.[1]

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

[1] The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Plaintiffs now present to this Court. The circuit court therefore found such arguments had been waived. *Id.* at *3.

> 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 the Union continues to assert the legality of its withdrawal window policy but wishes to avoid this Court determining its legality.

It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court there pointed to *Roe v. Wade,* 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire,* 416 U.S. at 125. The Union and Lebanon County continue to force employees to remain in the Union and withhold union dues from employees without their affirmative consent, based on the collective bargaining agreement and state statute. *See* 43 P.S. § 1101.301(18); 1101.401; and 1101.705; Defendants' Joint Statement of Facts ¶¶ 16-18. This policy continues to impact present interests, as the County, the Union, and General Shapiro continue to enforce it and

assert its legality. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of a declaration that these provisions of the collective bargaining agreement and the statutes they rely on are unconstitutional.

Finally, the Union's partial refund of dues taken from Plaintiffs cannot fully moot Count I because the Union only provided a refund for dues that were taken from Plaintiffs as of the dates of their resignation letters. Defendants' Joint Statement of Facts ¶¶ 29, 31 (Adams), 39, 41 (Felker), 50, 52 (Unger), 62, 64 (Weaber). But Plaintiffs' claim in Count I seeks damages in the form of the return of all dues deducted since they signed the union dues authorizations when they were forced into this false choice, subject only to a statute of limitations defense. Thus, limited to the statute of limitations, based on the dates from which the Union provided refunds, Plaintiffs are entitled to damages in the form of dues deducted from February 27, 2017 to July 10, 2018 (Adams, Unger); from February 27, 2017 to July 16, 2018 (Weaber); and from February 27, 2017 to September 28, 2018 (Felker).

Count I is not moot. Plaintiffs are entitled to both declaratory relief – that their signing the union dues authorization did not constitute affirmative consent as required by *Janus*; that forcing Plaintiffs to remain members of the Union without affirmative consent violates their Frist Amendment rights, and that withholding union dues from their paychecks without affirmative consent violates their First

Amendment rights – and damages in the form of the union dues withheld from their paychecks.

C. The Union does not have a good-faith defense against paying back union dues that were unconstitutionally taken from Plaintiffs.

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 Teamsters be held liable to Plaintiffs for damages.

2. A good faith defense is incompatible with the statutory basis for qualified immunity and Teamsters' lack of 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). Defendants are 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).

The Union has never claimed qualified immunity to Section 1983 liability. And nor could it. 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 Teamsters argues, 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. As one scholar recently noted: "[t]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49 (2018); *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 the Union 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 defendants who are 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 Teamsters 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 re-sult 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 Plaintiffs and other employees who had agency fees seized from them. Under the union'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 the Teamsters' 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.

This defense would deny citizens compensation for their injuries, as well as burden the courts with having to adjudicate whether defendants acted in good faith. Courts would have to determine both if a defendant violated the Constitution and weigh the reasonableness of their subjective motives for so doing.

Even if Section 1983's text did not preclude courts from refusing to hold defendants who act in good faith liable to injured parties in actions at law—which it does—practical concerns justify not creating this massive exemption to Section 1983 liability. Doing so would undo Congress' remedial purpose in passing Section 1983.

5. Other circuit courts recognized a good faith defense not to all Section 1983 claims, but only to certain constitutional deprivations.

Teamsters assert that several circuit courts found that private defendants have a good-faith defense to Section 1983 damages liability. Union Br. 24. A close reading of those cases, however, reveals that the courts did not recognize a defense to Section 1983 writ large, but found that good faith was a defense to a particular due-process deprivation actionable under Section 1983.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." 42 U.S.C. § 1983. The elements and defenses material to different constitutional and statutory deprivations vary considerably. For example, the elements of a Fourteenth Amendment due-process deprivation are different than those of a Fourth Amendment search and seizure violation. Most importantly here, state of mind is

material to some constitutional deprivations, but not others. For instance, a specific intent is required in "due process claims for injuries caused by a high-speed chase," "Eighth Amendment claims for injuries suffered during the response to a prison disturbance," and invidious discrimination claims under the Equal Protection clauses. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In contrast, "free speech violations do not require specific intent." *Id.*

A chronological review of the case law reveals that the published appellate decisions that found defendants can raise a good-faith defense did so because bad faith and lack of probable cause were material to the Fourteenth Amendment due-process deprivations at issue in those cases. The Sixth Circuit was the first appellate court to find that private parties can raise a "common law good faith defense to malicious prosecution and wrongful attachment cases" brought under Section 1983. *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). The court did so because malice and lack of probable cause are elements of those types of due process deprivations. *Id*.

At the time, *Duncan's* holding conflicted with other appellate decisions holding that private parties enjoy good-faith immunity to Section 1983 liability. *See id*. at 1265. A "defense" and an "immunity" are different things: a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from Section 1983 liability, even if there is a deprivation. *See Richardson*, 521 U.S. at 403. "As the *Wyatt* concurrence pointed out, a legal defense may well involve 'the essence of the

wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Id*. (quoting *Wyatt*, 504 U.S. at 171– 72 (Kennedy, J., concurring)). The Sixth Circuit in *Duncan* believed that "courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense." 844 F.2d at 1266.

In 1992, the Supreme Court in *Wyatt* held that private parties seldom enjoy good-faith immunity to Section 1983 liability. 504 U.S. at 161, 168. *Wyatt* involved "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional" for violating due process guarantees. 504 U.S. at 159. The claim was analogous to "malicious prosecution and abuse of process," and at common law, "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id*. at 164–65. The Court determined that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.

The *Wyatt* Court left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id*. at 168–69.

As the Supreme Court later explained in *Richardson*, "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." 521 U.S. at 413. The Court in *Richardson*, "[l]ike the Court in *Wyatt*," also "[did] not express a view on this last-mentioned question." *Id*. at 414. The Supreme Court has yet to resolve the question.

On remand in *Wyatt*, the Fifth Circuit held the defendants could raise this defense because malice and lack of probable cause are elements of the due-process claim. 994 F.2d at 1119–21. The Fifth Circuit recognized that the Supreme Court "focused its inquiry on the elements of these torts," and found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Id*. at 1119 (first emphasis added).

Three other circuits later followed the Sixth and Fifth Circuits' lead and recognized that good faith is a defense to a due-process deprivation arising from private party's *ex parte* seizure of property. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008). The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "malicious prosecution is the most closely analogous tort and look[ed] to . . . for the elements that must be established in order for [the plaintiff] to prevail on his § 1983 damages claim." 79 F.3d at 312–13. The Third Circuit in *Jordan* required proof of "malice" for the same reason, recognizing that

while "section 1983 does not include any *mens rea* requirement in its text, . . . the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim." 20 F.3d at 1277 (emphasis added).

This line of cases recognized only a "rule to govern damage claims for due-process violations under § 1983 where the violation arises from a private party's invocation of a state's statutory remedy." *Pinsky*, 79 F.3d at 313. The cases did not hold that all deprivations of constitutional rights and statutory rights actionable under Section 1983 require proof of malice and lack of probable cause, which would be absurd. Nor did the cases hold good faith to be a blanket defense to Section 1983 liability itself—i.e., find it an immunity. In fact, the Supreme Court in *Wyatt* rejected the proposition that private parties generally enjoy immunity to Section 1983 liability. 504 U.S. at 159.

D. The dues authorization is not protected from constitutional scrutiny because it is supposedly a private contract.

The Union further contends that "[t]he union authorization cards signed by Plaintiffs constitute valid private contracts, and, therefore, do not implicate the First Amendment." Union Br. 22-23. According to the Union, "Courts considering First Amendment claims challenging dues deductions made pursuant to union authorization cards have concluded that no necessary state action was involved and, therefore, dismissed plaintiff's claims." *Id*. This is wrong on several counts.

First, a dues-deduction authorization is a three-party *assignment*, not a traditional two-party contract. 29 U.S.C. § 186(c)(4) (part of the Taft-Hartley Act) provides, "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, *a written assignment* which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." (emphasis added). *Accord* 5 U.S.C. § 7115 (referring to payroll union dues authorizations by federal employees as a "written assignment"). There are a number of cases which also refer to dues-deduction authorizations as an assignment, not as contract. *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). 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 (in this case, the County) 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 County 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 – which it is not – 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, drawing upon *D. H. Overmyer Co. v. Frick Co*., 405 U.S. 174 (1972)). Applying *Janus* retroactively, per *Harper*, the Plaintiffs could not have knowingly and voluntarily waived their rights because they did not know of them at the time. But even setting *Janus* aside, the dues authorizations did not meet the standards for knowing and voluntary waiver of rights. The dues authorizations signed by Plaintiffs Adams, Unger, and Weaber did not inform them of their 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.").

II. FORCING PLAINTIFFS TO ASSOCIATE WITH THE UNION AS THEIR EXCLUSIVE REPRESENTATIVE VIOLATES PLAINTIFFS' FIRST AMENDMENT RIGHTS TO FREE SPEECH AND FREEDOM OF ASSOCIATION (COUNT II).

Recognizing the Union as Plaintiffs' exclusive representative for bargaining purposes violates their First Amendment rights of speech and association. Plaintiffs cannot be forced to associate with a group that they disagree with.

A. Forcing Plaintiffs to have the Union serve as their exclusive representative is unconstitutional.

Under 43 P.S. §§ 1101.604-606, as a condition of their employment, Plaintiffs must allow the union to speak (lobby) on their behalf on wages and hours, matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. Pennsylvania law grants the union prerogatives to speak on Plaintiffs' behalf on not only wages, but also "terms and conditions of employment." 43 P.S. §§ 1101.606. These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When the Commonwealth certifies the Union to represent the bargaining unit, it forces all

employees in that unit to associate with the Union. This coerced association authorizes the Union to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, even if the employees disagree with the Union's positions and speech.

This arrangement has two constitutional problems: it is both compelled speech (the union speaks on behalf of the employees, as though its speech is the employees' own speech) and compelled association (the union represents everyone in the bargaining unit without any choice or alternative for dissenting employees not to associate).

Legally compelling Plaintiffs to associate with the Union demeans their First Amendment rights. Although the issue has not been directly before the Supreme Court, it has questioned whether exclusive-representation in the public-sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive representation forces the employees "to voice ideas

with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. Pennsylvania laws command Plaintiffs' involuntary affirmation of objected-to beliefs. The fact that they retain the right to speak for themselves in certain circumstances does not resolve the fact that the Union organizes and negotiates as their representative in their employment relations.

Exclusive representation is also forced association: the Plaintiffs are forced to associate with the Union as their exclusive representative simply by the fact of their employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Yet Plaintiffs have no such freedom, no choice about their association with the Union; it is imposed, coerced, by the Commonwealth's laws.

Exclusive representation is therefore subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at 2465-69. And Plaintiffs are not seeking the right to form a rival union or to force the government to listen to their individual speech, as will be discussed below; they only wish to disclaim the Union's speech on their behalf. They are guaranteed that right, not to

be forced to associate with the union, not to let the union speak on their behalf, by the First Amendment.

B. The Union's reliance on *Knight* is misplaced.

In defending Pennsylvania's exclusive representation scheme, Defendants rely heavily on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271(1984). *Knight* held that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id*. at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

The court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282.

Confronted with this claim, the court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Plaintiffs here do not claim that their employer—or anyone else—should be compelled to listen to their views. Instead, they assert a right against the compelled association forced on him by exclusive representation. *Knight* is inapposite.

The Defendants' collective invocation of *Knight* makes two important missteps. First, in its brief the Union asserted that the "the Supreme Court summarily affirmed the lower court's rejection of the Knight plaintiffs' 'attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment.'" Union Br. 15 (quoting *Knight,* 465 U.S. at 278-79). But the Union did not clarify what was summarily affirmed. What was summarily affirmed was a rejection of the argument that collective bargaining violates the non-delegation doctrine, not that it violates a right of association, as the relevant portion of the lower court opinion makes clear. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n.*, 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is demonstrated when the Supreme Court cites to *A.L.A.*

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co*., 298 U.S. 238 (1936), neither of which address a right to freedom of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of negotiating rights to the union as a delegation of legislative power to a private organization, and the district court rejected the claim, explaining simply that the claim "is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 (1977)." *Knight,* 571 F. Supp. at 4. The statutory arrangement did not violate the non-delegation doctrine "merely because the employee association is a private organization." *Id.* at 5. In its own *Knight* decision, the Supreme Court was not affirming a claim of exclusive representation equivalent to Count II.

Defendants' second misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Plaintiffs' claim that the government cannot compel them to associate with the Union by making the Union bargain on their behalf.

In arguing that these two distinct claims are the same, the Defendants pointed only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to associate or not associate with whom

they please." *Knight*, 465 U.S. at 288. Yet the Defendants' own quotations from that portion of the opinion reinforced that the Court was still addressing the question of being heard. *See* Union Br. 21. The Court explains that the government's right to "choose its advisers" is upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight,* 465 U.S. at 288. The Court raises the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This, again, is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Plaintiffs now raise: whether someone else can speak in their name, with their imprimatur granted to it by the government. Plaintiffs do not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. They do not demand that the government schedule meetings with them, engage in negotiation, or any of the other demands made in *Knight*. They demand only that the Union not do so in their name, and they respectfully request that this Court issue a declaration to that effect.

CONCLUSION

For the forgoing reasons, the Court should grant summary judgment in favor of Plaintiffs.

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Respectfully Submitted,

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