IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOLLIE ADAMS, et al., Plaintiffs, v. TEAMSTERS UNION LOCAL 429, et al., Defendants	No. 1:19-CV-0336 Hon. Judge Sylvia Rambo

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. Supplemental Statement of Facts

Defendants filed a Joint Supplemental Statement of Facts (Doc. 50) along with their respective briefs in support of their motions for summary judgment and in opposition to Plaintiffs' motion for summary judgment. Concurrent with their respective motions for summary judgment, Defendants filed a Joint Statement of Material Facts (Doc. 36). Plaintiffs, in their brief in support of their combined motion for summary judgment and response in opposition to Defendants' motions for summary judgment, accepted in full Defendants' Joint Statement of Facts. Since Plaintiffs provided no new facts for Defendants to either respond to or supplement, (see Local R. 7.8, 56.1), Defendants have no basis to add additional facts in support of their response/reply briefs.

Nonetheless, Plaintiffs do not believe that the facts contained in the Joint Supplemental Statement of Facts change any of the parties' respective arguments, and, for purposes of summary judgment, Plaintiffs accept the facts as stated in the Joint Supplemental Statement of Facts.

II. Defendants violated Plaintiffs' First Amendment rights by collecting dues from them without their affirmative consent. (Count I)

A. Count I is not moot and Plaintiffs have standing.

Defendants argue that this case is moot because Plaintiffs are no longer members of Defendant Teamsters Local Union No. 429 ("Local 429"), are no

longer having dues deducted, and have had their dues refunded. (County Br. 10-12; Local 429 Br. 32-35; Commonwealth Br. 6-9.) Local 429 also argues that Plaintiffs lack standing to allege their claims in Count I, for the essentially same reasons why Defendants assert Count I is moot. (Local 429 Br. 32-34.) But Count I is not moot and Plaintiffs have standing to bring the claims alleged in Count I.

First, Local 429 only provided a partial refund of the dues Plaintiffs seek in this lawsuit. Local 429 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).) As Plaintiffs pointed out in their earlier brief, (Pls. Br. 11), which Defendants appear to ignore, 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 the false choice between paying the union as a member or paying the union as a non-member – subject only to a statute of limitations defense. Based on the dates from which Local 429 provided refunds, limited to the statute of limitations, 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). Local 429 did not refund these dues to Plaintiffs. Count I is not moot because Plaintiffs still have a claim for damages.

Further, the fact that Lebanon County has ceased deducting dues from Plaintiffs' paychecks and that Local 429 has allowed Plaintiffs to resign their union membership and partially refunded their dues does not moot Plaintiffs' request for declaratory relief in Count I. Defendants' unlawful activity did not cease until after this lawsuit was filed in February 27, 2019. SOF ¶¶ 27-28 (final unlawful deduction for Adams, February/March 2019), 30 (confirmation of Adams resignation, May 2019), 31 (refund of Adams dues, May 2019), 40 (confirmation of Felker resignation, May 2019), 41 (refund of Felker dues, May 2019), 51 (confirmation of Unger resignation, May 2019), 52 (refund of Unger dues, May 2019), 60-61 (final unlawful deduction for Weaber, February/March 2019),[1] 63 (confirmation of Weaber resignation, May 2019), 64 (refund of Weaber dues, May 2019). As Plaintiffs explained in their opening brief (Pl. Br. 7-12), "defendant[s] 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)).

In *Gerstein v. Pugh,* the Supreme Court held that a claim where an "individual could nonetheless suffer repeated deprivations, and it is certain that

[1] Defendants' Joint Statement of Facts ¶ 61 contains an error. It states that Plaintiff Weaber's final dues deduction occurred in March 2018. Plaintiffs did not notice this error when they accepted Defendants' Joint SOF as true in their opening brief. It is clear from the surrounding paragraphs that this is a typographical error, and the correct month is March 2019.

other persons similarly situated will be [negatively impacted] under the allegedly unconstitutional procedures" was "distinctly 'capable of repetition, yet evading review.'" 420 U.S. 103, 110 n. 11 (1975). In particular, courts have found that a case is not mooted when a defendant voluntarily ceases the challenged conduct after a lawsuit challenging such conduct is filed, but continues to assert the legality of such behavior. *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Fisk v. Inslee*, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018).

It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974). Although Defendants insist that no one will face the same unconstitutional choice Plaintiffs were subjected to, (Local 429 Br. 34; Commonwealth Br. 7), Local 429 and the County continue to deduct dues from employees even where such employees have not provided 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. Further, absent declaratory relief, there is nothing stopping Local 429 and the County from reversing their decision and deciding that the Plaintiffs are stuck in their bargaining unit. Defendants assert that under the collective bargaining agreement Plaintiffs will never again be subject to the maintenance of membership provisions because they are no longer members. (Commonwealth Br. 7; Local 429

Br. 34). But there is no reason to believe that collective bargaining agreement is a barrier to actions taken by Defendants, since in an attempt to moot this case, Local 429, acting contrary to the provisions of the collective bargaining agreement, removed Plaintiffs as membership, stopped withholding union dues from their paychecks, and partially refunded their dues payments. Now that Local 429 has acted contrary to the collective bargaining agreement to attempt to moot this case, it argues that the harm Plaintiffs suffered cannot be repeated because of the collective bargaining agreement. Absent a declaratory judgment finding that withholding union dues from employees' paychecks without their affirmative consent is unconstitutional, and that the signing of a union card before the *Janus* decision – when an employee was faced with the unconstitutional choice between paying money to a union as a member or paying money to a union as a non-member – cannot constitute affirmative consent, Plaintiffs, as well as other employees similarly situated to Plaintiffs, could, in the future, have dues withheld from their paychecks.

Thus, Count I's request for declaratory relief is not moot.

B. The Commonwealth Defendants' Eleventh Amendment immunity argument is irrelevant to Count I.

The Commonwealth Defendants argue that Plaintiffs failed to address their alleged Eleventh Amendment immunity claim. (Commonwealth Br. 3.) But the Commonwealth Defendants' Eleventh Amendment immunity argument seeking to

bar them from liability from Count I of Plaintiffs' Complaint is irrelevant (Commonwealth Mot. 15-17), because none of the relief Plaintiffs seek in Count I involve the Commonwealth Defendants. (See Compl. P. 10-14, 16-18). And the Commonwealth Defendants certainly do not (and cannot) argue that they have Eleventh Amendment immunity from Count II's claim that 43 P.S. § 1101.606 is unconstitutional.

C. The dues deduction authorizations signed by Plaintiffs prior to the Supreme Court's decision in *Janus* could not have constituted "affirmative consent" required by the Supreme Court in order to waive Plaintiffs' First Amendment rights.

In *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), the Supreme Court held that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to pay. As explained in their opening brief, Plaintiffs never provided affirmative consent for the union to deduct dues from their paycheck. (Pls. Br. 3-7.) Instead, when Plaintiffs were forced into an unconstitutional choice: pay an agency fee to the union or pay membership dues to the union. Because Plaintiffs were not given the option of paying nothing to Local 429 as non-members, they could not have provided affirmative consent to waive their First Amendment right to not pay the union. (Pl. Br. 3-7.)

Defendant Lebanon County argues that Plaintiffs voluntarily joined Local 429, and that their signing of their dues authorization forms constituted "affirmative consent." (County Br. 3-10.) Likewise, Defendant Local 429 argues

that Plaintiffs voluntarily became union members, (Local 429 Br. 21-26), and, as such, Defendants never imposed an unconstitutional choice on Plaintiffs (Local 429 Br. 17-21). And the Commonwealth Defendants argue that because Plaintiffs had a choice to pay a fair share fee instead of joining the union, they were not subject to an unconstitutional choice. (Commonwealth Br. 2-6.) All the Defendants ignore the clear holding in *Janus*: that requiring a government employee to choose between paying union dues as a member or paying agency fees as a non-member is unconstitutional. At the time Plaintiffs joined Local 429, they were not given what the Supreme Court held in *Janus* is a constitutionally-required option: to pay no money to the union as a non-member. Because Plaintiffs were not given that option, they could not have provided affirmative consent to waive their constitutional right to not pay money to the union.

"By agreeing to pay, nonmembers are waiving their First Amendment rights, *and such a waiver cannot be presumed." Janus,* 138 S. Ct. at 2486 (emphasis added). Defendants assert that Plaintiffs have waived their First Amendment rights by signing the dues authorization forms. But it is precisely because such a waiver cannot be presumed that Defendants' argument here fails. In order for a waiver to be effective, it must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). At no point prior to *Janus* could the Plaintiffs have waived their constitutional right to pay nothing to Local 429, because that

right had yet to be recognized. Nor did Defendants Local 429 or Lebanon County inform Plaintiffs that they had the right to pay nothing to the union as a non-member.

And there can be no question that the Supreme Court's *Janus* holding is retroactive. "When 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 . . . as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97 (1993). *See also United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years"); *Kolkevich v. AG of the United States,* 501 F.3d 323, 337 n.9 (3rd Cir. 2007) (declining to apply a ruling "only in a purely prospective fashion").

D. There is no good faith defense under Section 1983 against Plaintiffs' First Amendment claim.

Defendant Local 429 argues that it has a good-faith defense against dues recovery. (Local 429 Br. 29-32.) They note that "private parties" have a good-faith defense when sued under section 1983. *Id.* at 30. But the Supreme Court has never recognized a good faith defense in Section 1983. Indeed, "*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." *Richardson v. McKnight*, 521 U.S. 399, 413 (1997). Local 429 asserts that several courts have found a good-faith defense exists for private defendants under Section 1983. (Local 429 Br. 30.) However, the cases that Local 429 cites all involve courts that have found a good faith defense to Section 1983 where malice and lack of probable cause were underlying elements of the Fourteenth Amendment due process claims alleged by the plaintiffs in those cases. A review of the case law reveals that the published appellate decisions finding 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.

Local 429 notes that the Supreme Court in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992), left open the possibility of a good faith defense to Section 1983 claims for private defendants. But Local 429 ignores the justification that the Court gives for leaving open the possibility of a good faith defense. The Court noted that the claim alleged 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. Justice O'Connor's majority opinion in *Wyatt* focused on the fact "that 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 165. Justice Kennedy's concurrence similarly focused on the analogous elements of a common law malicious prosecution claim, under which "a plaintiff was required to prove that a reasonable person, knowing what the defendant did, would not have believed the prosecution or the suit was well grounded." *Id*. at 172 (Kennedy. J., concurring). The reason that the Court left open the possibility of a good faith defense to Section 1983 liability was because bad faith was a defense in common law to malicious prosecution and abuse of process, which was the basis of the underlying claim. There is no such bad faith requirement for violations of First Amendment rights.

On remand in *Wyatt v. Cole*, the Fifth Circuit held the defendants could raise a good faith defense because malice and lack of probable cause are elements of the due process claim. 994 F.2d 1113, 1119–21 (5th Cir. 1993). 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). Similarly, the cases that Local 429 relies on recognized that good faith is a defense to a due process deprivation arising from a 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 it 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 published appellate decisions 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 all constitutional rights and statutory rights actionable under Section 1983 require proof of malice and lack of probable cause. Such a holding 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.

These cases are irrelevant to Plaintiffs' First Amendment claim because malice and lack of probable cause are not elements of, or a defense to, a First Amendment claim. In general, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). State of mind is not an element or defense to a First Amendment compelled subsidization of speech violation. *Janus* requires only that a state and union seize union fees from employees without their prior consent. 138 S. Ct. at 2486. Thus, the cases Local 429 cites as a basis for a good faith defense are irrelevant to Plaintiffs' First Amendment claim.

Local 429's attempt to expand a very limited good faith defense to cover any defendant that deprives a person of a constitutional right that claims it had a good faith, but mistaken, belief that its conduct was lawful would undermine the Supreme Court's holding in *Wyatt* that private parties generally do not enjoy immunity to Section 1983 liability. 504 U.S. at 159. Ignoring the reasoning of the cases it cites, Local 429 would turn a defense limited to cases where the violation arises from a private party's invocation of a state's statutory remedy, to essentially establishing qualified immunity for any private defendant in Section 1983 cases. Not only is there no legal basis for doing so, but recognizing such a broad defense would undermine Congress's intent in passing Section 1983.

III. Forcing Plaintiffs to associate with Local 429 as their exclusive bargaining representative violates Plaintiffs' First Amendment rights to free speech and freedom of association. (Count II)

A. Exclusive Representation infringes on Plaintiffs' First Amendment right to not partake in union speech.

As Plaintiffs explained in their opening brief, recognizing Local 429 as Plaintiffs' exclusive representative for bargaining purposes violates their First Amendment rights to free speech and association. (Pl. Br. 26-29.) Local 429 and the Commonwealth Defendants argue that exclusive representation "does not infringe First Amendment rights." (Local 429 Br. 15-17; *see also* Commonwealth Br. 9-11.) But as the Supreme Court noted in *Janus,* exclusive representation "gives the union a privileged place in negotiations over wages, benefits, and working conditions." *Janus,* 138 S. Ct. 2448, 2467. *Contra* Local 429's argument that *Janus* is not relevant to the exclusive representation claim (Local 429 Br. 13-15), this language demonstrates why a public employee's right to bargain is a First Amendment right. When the employer is the government, "wages, benefits, and working conditions" are matters of public policy. *Janus,* 138 S. Ct. at 2473 ("When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged.") This speech, then, is political speech, which is protected under the First Amendment. *See Federal Election Comm'n v. Wisconsin Right to Life,* 551 U.S. 449, 457 (2007) ("[T]he First Amendment

requires us to err on the side of protecting political speech rather than suppressing it").

B. Defendant's reliance on *Knight* remains misplaced.

Local 429 argues that Plaintiffs' exclusive representation claim is foreclosed under *Minnesota State Bd. for Cmty. Colls. v. Knight,* 465 U.S. 271 (1984). (Local 429 Br. 7-13). According to Local 429, "*Knight* held that exclusive representation in public employment does not 'create an unconstitutional inhibition on [the] associational freedom' of employees who disagree with the majority-chosen union representative 'restrain[] [such employees'] freedom to speak.'" (Local 429 Br. 7, citing *Knight*, 465 U.S at 288-90.) But Local 429's reading of *Knight* ignores its facts and limited holding. The Supreme Court framed the issue in *Knight* as follows:

> The State of Minnesota authorizes its public employees to bargain collectively over terms and conditions of employment. It also requires public employers to engage in official exchanges of views with their professional employees on policy questions relating to employment but outside the scope of mandatory bargaining. If professional employees forming an appropriate bargaining unit have selected an exclusive representative for mandatory bargaining, their employer may exchange views on nonmandatory subjects only with the exclusive representative. The question presented in these cases is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views.

Id. at 273. The Court further explained that:

> "Meet and confer" sessions are occasions for public employers, acting solely as instrumentalities of the State, to receive policy advice from their professional employees. Minnesota has simply restricted the class of persons to whom it will listen in its making of policy. Thus, appellees' 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. In *Knight*, in other words, the plaintiffs sought a right to have the government listen to their policy views in a formal setting.

Plaintiffs' challenge in this case, in contrast, does not seek the right to make the County listen to their policy views, or even their views on wages and hours. Rather, Plaintiffs simply seek the right to not associate with Local 429, as exclusive bargaining representative, when it bargains (lobbies) with the County on behalf of all workers in the bargaining unit, including non-members. Plaintiffs here, unlike the plaintiffs in *Knight*, are not seeking a place at the table to force the government to hear their policy views; rather Plaintiffs simply seek to stop Local 429 from forcing Plaintiffs to associate with them when Local 429 bargains with the County and purports to do so on behalf of Plaintiffs.

Local 429 asserts that "*Knight* held that whether individual bargaining unit members' First Amendment rights not to associate with the Union were impaired under these circumstances turned not upon the union's mere status as representative of all bargaining unit employees, but upon whether bargaining unit

members were required to become union members or financial supporters." (Local 429 Br. 8.) But this observation simply ignores the facts in *Knight*. In that case where the union, as exclusive representative, participates in a non-mandatory-subject exchange process on policy questions outside the mandatory bargaining process, there is no indication that the union purports to speak on behalf of non-members, as it is required to do in collective bargaining under Pennsylvania law in this case. *Knight* doesn't turn on the union's status as representative of all bargaining unit employees, because the non-mandatory-subject exchange process itself, the union does not purport to speak on behalf of everyone in the bargaining unit. In other words, the union's status as exclusive bargaining representative was irrelevant in *Knight*.

IV. Conclusion

For the reasons stated above and in their opening brief, Plaintiffs request that this Court grant their Motion for Summary Judgment and deny Defendants' Motions for Summary Judgment.

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Respectfully Submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab*
Daniel R. Suhr*
Liberty Justice Center
190 S. LaSalle St., Ste. 1500

Chicago, IL 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

Charles O. Beckley II
Beckley & Madden LLC
212 N. Third St., Ste. 301
Harrisburg, PA 17101
Phone: (717) 233-7691

Attorneys for Plaintiffs

* Admitted *pro hac vice*