E-FILED
Friday, 06 December, 2019 05:14:33 PM
Clerk, U.S. District Court, ILCD

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION**

SUSAN BENNETT, Plaintiff, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, et al., Defendants.	)	No. 19 CV 4087 Judge Darrow

PLAINTIFF'S COMBINED RESPONSE TO DEFENDANTS AFSCME COUNCIL 31 AND AFSCME LOCAL 672'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO DEFENDANT MOLINE-COAL VALLEY SCHOOL DISTRICT NO. 40'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO THE STATE DEFENDANTS' MOTION TO DISMISS, AND REPLY IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Government employees have a First Amendment right to not pay money to a union unless the employee affirmatively consents to waive that right. The Supreme Court's jurisprudence on waiving a constitutional right requires that the constitutional right be of a "known right or privilege," that it be freely given, and that it be shown by "clear and compelling" evidence, and thus cannot be presumed. In this case, Plaintiff's signing of the union dues authorization card does not meet the Supreme Court's test for waiving a constitutional right, and therefore cannot serve as a basis to allow Defendants AFSCME Council 31, AFSCME 672, and the School District to withhold and collect union dues from Plaintiff's paychecks.

The First Amendment also protects one's right to not be forced by government to associate with an organization or cause with which one does not wish to associate. Here, Illinois law and Defendants members of the Illinois Educational Labor Relations Board have certified Defendant Council 31 as the exclusive bargaining representative with the School District. Defendant Council 31 is empowered by law to speak on behalf of all employees of the School District within its bargaining union, which includes Plaintiff. Plaintiff's rights of speech and association are violated by this government-compelled arrangement whereby Council 31 lobbies the government on behalf of Plaintiff without her permission and in ways she does not support.

For the reasons set forth below, and in Plaintiff's Memorandum of Law in Support of Her Motion for Summary Judgment, the Court should grant Plaintiff's

motion for summary judgment, deny Defendants' motions for summary judgment, and deny the State Defendants' motion to dismiss.

RESPONSE TO UNDISPUTED MATERIAL FACTS

Plaintiff and Defendants Council 31, Local 672, and the School District have stipulated to the relevant, material facts for purposes of cross-motions for summary judgment. *See* Joint Stipulated Record (Doc. 26). Nonetheless, the Union Defendants' Memorandum (Doc. 31) contains a "Statement of Facts" section and Defendant School District's Memorandum (Doc. 33) contains a "Statement of Undisputed Material Facts" section. Plaintiffs do not dispute the facts listed in each of these sections. Plaintiffs furthermore do not object to the facts listed in the "Background" section of the State Defendants' Memorandum (Doc. 15), save the final paragraph of that section, which is argument and not fact.

ARGUMENT

I. Plaintiff's union dues deduction authorization card does not constitute "affirmative consent" to waive her constitutional right to not pay a union.

Government employees have a First Amendment right to not pay money to a union unless the employee affirmatively consents to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). As explained in Plaintiff's opening brief, in order to waive a government employee's right to not pay money to a union, that employee must affirmatively consent to waive that right. (*See* Pl's Memo., Doc. 28 at 3-6.) Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a

constitutional right must be of a "known 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). Finally, the Court has long held that it 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 Union Defendants assert that *Janus* does not apply to members of a union who signed a contractual membership agreement. (Union Br., Doc. 31 at 5.) But any assertion 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 to waive one's right to not pay a union under *Janus*. The question presented in this case is whether the union dues authorization and/or membership agreement constitutes a proper waiver of Plaintiff's right to not pay money to a union recognized by *Janus*.

Both the Union Defendants and the School District assert that because Plaintiff "voluntarily" signed the membership agreement, she cannot now object to dues being taken from her paycheck. (Union Br. at 5; District Memo, Doc. 33, at 4.) But the question presented here is whether the membership agreement meets the Supreme Court's test for waiving a constitutional right. (*See* Pl's Memo. at 3-6.) Defendants focus solely on voluntariness, while ignoring the other requirements of waiver: that the waiver be of a known right or privilege and that it be indicated by

"clear and compelling evidence;" in other words, it may not be presumed. First, the membership agreement could not constitute a waiver of Plaintiff's right not to pay a union because at the time Plaintiff signed the membership agreement the Supreme Court had not yet recognized that right, and thus Plaintiff could not have known of it. (Pl's Memo. at 3-6.) Second, nothing in the membership agreement Plaintiff signed clearly establishes that Plaintiff's signing of the agreement constituted a waiver of her right to not pay money to a union. So the membership agreement itself cannot constitute "clear and compelling" evidence of a waiver of Plaintiff's right to not pay a union. And courts may not presume waiver in the absence of clear and convincing evidence." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). So, even if Plaintiff voluntarily signed the membership agreement, that could not itself constitute a waiver of her constitutional right to not pay a union because at the time she signed it the right was not known and the membership agreement itself did not provide clear and convincing evidence that Plaintiff intended to waive her right to not pay money to a union.

Further, Defendants' assertion that Plaintiff voluntarily agreed to become a union member (and thus voluntarily waived her right to not pay a union) is incorrect. When she signed the union membership agreement, Plaintiff had no choice but to pay money to the union: either as a member or as a non-member through agency fees. The Supreme Court's voluntariness requirement for waiver of a constitutional right is that 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). When Plaintiff had no choice but to pay money to the union, either as a member or non-member, her decision to join the union cannot be said to be a voluntary or knowing waiver of her First Amendment right to not pay money to the union. It is no argument to say that she should have become a non-member because she should have known that the Supreme Court would eventually hold agency fees unconstitutional. Thus, Plaintiff's decision to join the union before the Supreme Court's decision in *Janus* cannot constitute waiver of her constitutional right to not pay money to a union later held by *Janus*.

As explained in Plaintiff's opening brief, the Supreme Court has long held that its interpretation of the constitution must be given full retroactive effect. (*See* Pl's Memo. at 5, *citing Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).) This entitles Plaintiff to damages for dues paid to the Union Defendants before the *Janus* decision. (Pl's Memo. at 6.) But even putting that aside, the Union Defendants and Defendant School District continued to withhold dues from Plaintiff's paycheck after the Supreme Court's decision in *Janus*, even though it had no basis to rely on the membership agreement signed by Plaintiff before the *Janus* decision as a waiver of Plaintiff's constitutional rights after the Supreme Court recognized the constitutional right to not pay money to a union. Indeed, the parties' Joint Stipulated Facts states that Union Defendants and Defendant School District withheld union dues from Plaintiff's paycheck based on the membership agreement until July 29, 2019, over a year after the Supreme Court's decision in *Janus*. (Joint Stip. Facts, Doc. 26, ¶¶34-36, 38-40.)

The Union Defendants invoke *Cohen v. Cowles Media Co.,* 501 U.S. 663, 672 (1991) in defense of its argument. (Union Br. at 7.) But *Cohen* is inapposite because there a newspaper *had* met the requirements for waiving its First Amendment right to protect its publication of the information when it agreed not to reveal a source. The fact that one *can* waiver one's First Amendment right, as the newspaper did in *Cohen* does not support Defendants' claim here that Plaintiff *did in fact* waive her First Amendment right. Plaintiff is not arguing that she can never waive her First Amendment right not to pay money to the union, but simply that in this case, the union membership card she signed does not meet the waiver requirements.

Defendants point to *United States v. Brady*, 397 U.S. 742 (1970) for the proposition that changes in intervening law—even constitutional law—do not invalidate a contract. (Union Br. 8-9.) 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 did not constitute a waiver of her constitutional rights.

Further, whereas in *Brady*, 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.

Similarly, the Union Defendants' reliance on *Coltec Industries, Inc. v. Hodgood*, 280 F. 3d 262 (3d Cir. 2002) is inapposite. Union Br. 9. In that case, a coal company entered into a settlement agreement for a lawsuit it filed under the Coal Industry Retiree Health Benefit Act of 1992. When the Supreme Court subsequently found application of that Act to companies similar to the plaintiff unconstitutional, the coal company attempted to reopen the claims it had already waived via the settlement agreement, which the court rejected. *Id*. at 274-75. In contrast, here, Plaintiff never settled claims she wishes to reopen. Rather, she was faced with a

choice when she joined to the union to pay money to the union as a member or a non-member; a choice which the Supreme Court later found unconstitutional. Now, because she decided to pay the union as a member rather than a non-member when faced with that unconstitutional choice, Defendants assert that she has waived a constitutional right she never could have known would exist.

As for the fact that other district courts have held that "[t]he fact that [she] would not have opted to pay union membership fees if *Janus* had been the law at the time of [her] decision does not mean [her] decision was therefore coerced" (Union Br. at 8, quoting *Seager v. United Teachers Los Angeles,* 2019 WL 3822001 at *2), it is regrettable that so many district courts have chosen to ignore the Supreme Court's direction with respect to how a constitutional right can be waived, as laid out in *Johnson* and *D. H. Overmyer*. The fact remains that public-sector employees have a constitutional right to not join or support a union. *Janus,* 138 S. Ct. at 2486. Waiver of that right must be voluntary, knowing, and intelligently made. *D. H. Overmyer,* 405 U.S. at 185-86. Only a known right or privilege can be waived. *Johnson,* 304 U.S. at 464. It is therefore impossible to seriously contend that Plaintiff's waiver of her *Janus* rights before *Janus* was decided was proper.

II. The Union Defendants and the Defendant School District acted under the color of state law in violating Plaintiff's First Amendment rights by withholding money from Plaintiff's paycheck for union use without her affirmative consent to do so. [1]

A. The Union Defendants acted under the color of state law.

Defendant AFSCME asserts that did not act, and Plaintiff cannot show that it acted, under color of state law in enforcing its Constitutionally-offensive dues collection provisions. Union Br. 10-15. But as the Seventh Circuit has recently held in *Janus v. AFSCME Council 31,* --- F.3d ---, 2019 WL 5704367 ("*Janus II*") that the defendant union acted under color of state law when the Illinois Department of Central Management Services "deducted . . . fees from employees' paychecks and transferred that money to the union." *Janus II* at *15.

The Union Defendants attempt to differentiate this case from *Janus II* by asserting that "the source of Plaintiff's alleged harm is the Union's . . . membership agreement – not any state statute or collective-bargaining-agreement provision." Union Br. 13 n.4. But this distinction is irrelevant to the Seventh Circuit's reasoning in *Janus II.* The Seventh Circuit noted that "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at *15, quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478 (1988) (quote marks omitted). In *Janus II,* the defendant union "was a joint participant with the state in the agency-fee arrangement," and spent

[1] There is no basis to assert that there is no state action with respect to Count II because Plaintiff challenges the constitutionality of a state statute allowing only one union representative to collectively bargain with a government employer for each employee bargaining unit. 115 ILCS 5/8.

the money garnered from the plaintiff's paycheck "on authorized labor-management activities pursuant to the collective bargaining agreement." *Id.* The Court found this "sufficient for the union's conduct to amount to state action." *Id.* Here, Plaintiff was the victim of an unconstitutional scheme between the Union Defendants and the state to garnish her wages and spend the money on union activities.[2] The distinction between union dues and agency fees is thus irrelevant. The Union Defendants are legitimate defendants against Count I of the Complaint.

The key connection between the state and the union establishing state action on behalf of the union is that but for state law, the Union Defendants would have no entitlement to any portion of Plaintiffs' wages whatsoever. *Davenport v. Wash. Ed. Ass'n*, 551 U.S. 177, 187 (2007). State labor laws establish the conditions governing "the union's extraordinary state entitlement to acquire and spend other people's money." *Id. See also Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 99 (S.D. Cal. 1984) ("The state action in the instant case is the law, implemented by the Union and the Transit District, which allows the Union to operate an agency shop and thus compel non-members to finance Union political expression."); *Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 121 F. Supp. 2d 498, 505 (E.D. Va. 2000) ("state action [] is the source of" the union's "authority to impose a fee on nonmembers.").

[2] And the School District doesn't simply withhold dues on behalf of any private entity: Council 31 is the "exclusive bargaining" representative required by state law, 115 ILCS 5/8, and recognized by Defendants members of the Illinois Educational Labor Relations Board.

The state action underlying Plaintiff's complaint is the School District's deduction of union dues from her wages, without her affirmative consent, for the purposes of subsidizing a political organization (the Union Defendants). *See Int'l Ass'n of Machinists Dist. Ten and Local Lodge 873 v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018); *Stewart v. N.L.R.B.*, 851 F.3d 21, 22 (D.C. Cir. 2017); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 201 (2018) ("[S]tate statutes authorizing the collection of agency fees are unconstitutional state action, just as in *Lugar* [*v. Edmonton Oil Co.*, 457 U.S. 922, 934 (1982)]. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*.") (footnotes omitted).

Further, dues deduction authorizations signed by government employees are not simply contracts between two private actors. 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 School District) 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 School 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 – 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*, Plaintiff could not have knowingly and voluntarily waived her rights because she did not know of them at the time.

B. Defendant School District acted under the color of state law.

Defendant School District falsely asserts that it played no role "with respect to plaintiff's Union membership and the terms of her Union dues deductions." (District Br. 5.) The stipulated facts demonstrate, however, that Defendant School District was complicit in the Union's efforts to garnish the wages of employees who had not provided the explicit consent required by *Janus*. Specifically, Defendant School District deducted union dues from the wages of union members, including Plaintiff, and remitted those dues to Council 31. (Stip. Facts ¶ 26.) And the deduction of any monies from the paycheck of an unwilling participant is a constitutional violation. In short, the District simply ignores Plaintiff's complaint and opening brief. As explained in Section II.A above, the scheme by which the Union Defendants and School District withheld dues from employees' paychecks pursuant to the collective bargaining agreements necessarily involves state action.

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

Defendant School District and the Union Defendants insist that if Plaintiff is entitled to monetary relief for dues she paid before *Janus*, that Plaintiff would be

barred from those damages because Defendants are entitled to a "good faith" defense from Section 1983 liability. (District Br. 8; Union Br. 10, n. 3.) As a preliminary matter, Plaintiff is not seeking any damages against Defendant School District, so the District's invocation of the "good faith" defense is irrelevant.[3]

There is no good-faith defense to Section 1983 liability.[4] 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.

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

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

---

[3] For the same reason, the District's assertion of "qualified immunity" is also irrelevant, as Plaintiff is not seeking damages against the School District. In any event, "qualified immunity" does not shield the School District from Plaintiff's claim for declaratory relief. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

[4] To the extent that *Janus v. AFSCME Council 31*, --- F.3d ---, 2019 WL 5704367 (7th Cir. Nov. 5, 2019) controls, Plaintiff makes this argument to preserve it.

> 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.

B. A good faith defense is incompatible with the statutory basis for qualified immunity and the Union Defendants lack 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). The Union 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).

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 the Union Defendants seek 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.

C. 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 the Union Defendants' 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.

D. 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 Union Defendants' 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. 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.

IV. Forcing Plaintiff to associate with the Union as her exclusive representative violates Plaintiff's First Amendment rights to free speech and freedom of association.

Defendants allege that exclusive representation does not violate the First Amendment, relying primarily on *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984). (State Defs Memo. Doc. 15, at 4-5; Union Br. 16-21.) In that case, the Supreme Court held that the plaintiffs' speech was not infringed by an exclusive representation provision because Minnesota had not "restrained [the plainitffs'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, *including the exclusive representative." Knight,* 465 U.S. at 288 (emphasis added).

Moreover, the Defendants' reliance on *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.

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

The State and Union Defendants mislead the Court with respect to the Seventh Circuit's holding in *Hill v. SEIU,* 850 F.3d 861 (7th Cir. 2017). (Union Br. at 17-18; State Br. at 5-6.) In *Hill*, as the Union Defendants reluctantly note, the plaintiffs were not considered "full-fledged" public employees. (Union Br. at 18 n.7.) The

plaintiffs in *Hill* were home care workers hired by qualifying individuals, but were paid by the State, and child care providers hired by qualifying individuals, but again paid by the State. *Hill*, 850 F.3d at 862. That distinction matters, because in *Hill*, the law limits the scope of the collective bargaining that the union may engage in on behalf of these "partial" employees, home care and child care workers to the "terms and conditions of employment *that are within the State's control*." 20 ILCS § 2405/3(f) (emphasis added). The exclusive representative cannot organize a strike negotiate over retirement benefits, or even govern the hiring or firing of employees because they are private employees hired by the families in need of their services. By contrast, Plaintiff is a public employee in every aspect of the meaning of the phrase. The Union has a much wider latitude to collectively bargain with the government employer, and thus a wider latitude to speak on Plaintiff's behalf.

The *Janus* case clearly recognized the difference between government employees like Plaintiff and privately hired employees like those in *Hill* when it ended the collection of agency fees from non-members of the union for government workers only and not for private employees. 138 S. Ct. at 2486.

Legally compelling a public employee, like Plaintiff, to associate with a union demeans her First Amendment rights. *See Janus*, 138 S. Ct. at 2483 (questioning whether exclusive-representation in the public-sector context imposes a "significant impingement" on public employees' First Amendment rights).[5]

[5] In the alternative, Plaintiff asserts that *Hill* and *Knight* should both be overturned because exclusive bargaining "substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460.

V. The Attorney General is an appropriate defendant.

The State Defendants, in their Motion to Dismiss, assert that Attorney General Kwame Raoul should be dismissed from these proceedings because "he has no direct enforcement connection to the challenged statutes." (Motion to Dismiss, Doc. 15, at 8.) Count II challenges the Illinois Educational Labor Relations Act, under which the State of Illinois allows only one union representative to collectively bargain with a government employer for each employee bargaining unit. 115 ILCS 5/8. As the Illinois Attorney General, Defendant Raoul is tasked with enforcing the statute that Plaintiff alleges violates her First Amendment rights to speech and association. "The Attorney General, however, is responsible for prosecuting violations of Illinois Labor Relations Board orders and for seeking injunctive relief in Illinois' courts on behalf of parties complaining of Labor Act violations. Although tangential to the enforcement role of the Illinois Labor Relations Board, the Court considers these powers sufficient to establish a connection to the enforcement of the IPLRA." *Sweeney v. Madigan*, 359 F. Supp. 3d 585, 592 (N.D. Ill. 2019). The Attorney General has similar responsibilities under the Illinois Educational Labor Relations Act. 115 ILCS 5/8. Attorney General Raoul is thus a proper defendant for purposes of defending the constitutionality of the Illinois Educational Labor Relations Act.

CONCLUSION

For the forgoing reasons, and the reasons stated in Plaintiff's motion for summary judgment, the Court should grant summary judgment in favor of Plaintiff, and deny Defendants' motions for summary judgment and to dismiss.

Dated: December 5, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab

Jeffrey M. Schwab
James J. McQuaid
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

Undersigned counsel for Plaintiff Susan Bennett hereby certifies that the foregoing Memorandum contains 6,486 words and thus complies with the type volume limitation of Local Rule 7.1(B)(4).

/s/ Jeffrey Schwab
Jeffrey M. Schwab