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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Thomas Few,

Plaintiff

v.

United Teachers of Los Angeles; Austin Beutner, in his official capacity as Superintendent of Los Angeles Unified School District; Xavier Becerra, in his official capacity as Attorney General of California,

Defendants

Case No. 2:18-cv-09531-JLS-DFM

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: December 6, 2019
Time: 10:30 am
Location: Courtroom 10A
Judge: Hon. Josephine L. Staton

Table of Contents

Table of Authorities

Statutes

Other Authorities

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). Plaintiff, Thomas Few ("Few"), repeatedly notified his employer, the Los Angeles Unified School District ("LAUSD"), that it did not have his affirmative consent to withdraw union dues from his paychecks. These requests were denied. Instead, LAUSD insisted that Few would have to wait to exercise his First Amendment right not to pay union dues until an opt-out period determined by the LAUSD collective bargaining agreement with the union, Defendant United Teachers of Los Angeles ("UTLA" or the "Union").

Plaintiff has 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 his paychecks. Few submits this memorandum in support of his motion for summary judgment. The Court should grant the motion because the case primarily presents questions of law appropriate for summary disposition, and Few can demonstrate that he is entitled to judgment as a matter of law.

STATEMENT OF MATERIAL FACTS

The parties have stipulated and filed with the court a Joint Statement of Undisputed Facts (Dkt. 71) (JSF). Plaintiff includes those facts below for reference.

1. Thomas Few has been a special education teacher employed by the Los Angeles Unified School District ("LAUSD") since August 2016.

2. A true and correct copy of Few's September 8, 2016 UTLA membership application, which Few signed, is attached to the JSF as Exhibit A.

3. A true and correct copy of Few's February 13, 2018 updated UTLA membership application, which Few signed, is attached to the JSF as Exhibit B.

4. A true and correct copy of Few's June 2018 letter received by UTLA is attached to the JSF as Exhibit C.

5. A true and correct copy of UTLA's July 13, 2018 letter to Few, which Few received, is attached to the JSF as Exhibit D.

6. On August 3, 2018, Few submitted another letter to both UTLA and LAUSD, which UTLA and LAUSD received. A true and correct copy of Few's August 3, 2018 letter is attached attached to the JSF as Exhibit E.

7. On or about October 10, 2018, Few submitted a letter to UTLA, which UTLA received. A true and correct copy of Few's October 10, 2018 letter is attached to the JSF as Exhibit F.

8. On October 19, 2018, UTLA sent a letter to Few, which Few received. A true and correct copy of UTLA's October 19, 2018 letter is attached to the JSF as Exhibit G.

9. On or about November 21, 2018, UTLA sent Few a letter dated November 20, 2018, which Few received. A true and correct copy of UTLA's November 20, 2018 letter is attached to the JSF as Exhibit H. UTLA included with the letter a check for $433.31 payable to Few.

10. The check for $433.31 reimbursed Few for all dues deducted from his pay from the beginning of June 2018 to October 31, 2018 (corresponding to the November 5, 2018 pay date), including interest.

11. LAUSD has not deducted any dues from Few's wages since October 31, 2018 (corresponding to the November 5, 2018 pay date).

12. On or about December 5, 2018, Few's counsel responded to UTLA with a letter acknowledging Few's receipt and deposit of the check provided by UTLA. A true and correct copy of the December 5, 2018 letter is attached to the JSF as Exhibit I.

13. From the time he began his employment through October 31, 2018, LAUSD deducted union dues of approximately eighty-six dollars ($86) per month from Few's paychecks and remitted them to UTLA.

14. Prior to the U.S. Supreme Court's decision in Janus v. AFSCME, Council 31 on June 27, 2018, bargaining unit workers who were not UTLA members were required to pay fair-share fees to UTLA, pursuant to the Educational Employment Relations Act.

LAUSD deducted fair-share fees from wages. Compulsory fair-share fees were less than membership dues. LAUSD stopped deducting, and UTLA stopped receiving, fair-share fees after Janus.

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)). "When deciding whether an asserted evidentiary dispute is genuine, [the court] inquire[s] whether a jury could reasonably find in the nonmovant's favor from the evidence presented." *Emeldi v. Univ. of Or.*, 698 F.3d 715, 730 (9th Cir. 2012). In this case, the parties agree that the material facts are not in dispute and have filed a Joint Statement of Undisputed Material Facts (Dkt. 71) for the Court's consideration.

ARGUMENT

I. Refusing to withdraw Few's union membership and continuing to deduct dues from his paycheck violated his First Amendment rights under *Janus*.

A. Under *Janus*, Unions may only claim membership and deduct dues if they first receive "affirmative consent."

The Court in *Janus* explained that payments to a union could be deducted from a non-member'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).

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).

In Few's case, he could not have waived his First Amendment right to not join or pay a union. First, neither the Union nor his employer informed him of his right not to pay a union because, at the time he signed his union membership application, the Supreme Court had not yet issued its decision in *Janus*. Second, neither the Union nor his employer informed him of his right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Few had no choice but to pay the Union and did not voluntarily, knowingly, or intelligently waive his First Amendment right.

Because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.*, 301 U.S. at 307, 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)). The union application Few signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right not to pay a union and because it did not expressly state that he was waiving that right. *See* JSF ¶ 2-3, Exhibits A, B (union membership applications with no

language expressly waiving rights).

B. Requiring employees to withdraw their union membership only within arbitrary time periods set by the union violates *Janus.*

After the decision in *Janus*, the Union maintained that Few could only end his dues deduction during an arbitrary time period of the Union's choice, despite Few's repeated requests to stop the dues deduction from his paycheck. JSF ¶ 5, 8, Exhibits D, G. LAUSD also maintained that Few could only end his dues deduction during an arbitrary time period of the Union's choice. In his official capacity as Superintendent of LAUSD, Austin Beutner is the official responsible for past and present actions of LAUSD. Such actions were undertaken pursuant to Cal. Educ. Code §§ 45060 and 45168, under the color of which Few's constitutional rights were abridged.

The union dues authorization applications signed by Few before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus.* 138 S. Ct. at 2484. Therefore, Superintendent Beutner and the Union cannot hold employees like Few to a time window to withdraw their union membership based on these invalid authorizations.

Since being informed of his constitutional rights by the *Janus* decision, Few has not signed any additional union authorization application. Therefore, he has never knowingly waived his constitutional right to pay nothing to the Union, and has, therefore, never given the union the "affirmative consent" required by the *Janus* decision. In the absence of "affirmative consent," this Court should declare that a request to end dues deductions is effective immediately.

C. The Union cannot avoid a judgment of this Court by releasing Few from union membership on its own timing after the filing of this lawsuit.

For months, Few was denied his right to withdraw his union membership. Yet soon after the filing of this lawsuit, in a ploy to avoid the jurisdiction of this Court, the Union

attempted to placate Few without subjecting their policies to judicial scrutiny. They paid Few part of the union dues unconstitutionally taken from him. *See* JSF ¶ 12, Exhibit I. Defendants have suggested that they intend to use this fact to claim the case is now moot, and they should not have to defend the unconstitutional policy that they continue to enforce against any employee who is not determined enough to sue. Few, therefore, addresses this argument in the first instance.

Such a claim of mootness is the same avoidance strategy that other unions have employed across the country, as they attempt to dodge employees who would challenge them. *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 their policy required). This Court should not allow the Union to avoid judicial review by picking off employees one by one. 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 would like the Court to allow in this case. Few respectfully submits that this Court should not countenance such gimmicks.

The Ninth Circuit has already rejected the exact same mootness argument plaintiffs 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, 759 F.App'x 632, 633 (9th Cir. 2019). The Ninth Circuit recognized that claims like Few's would never be addressed by the Court if the union is allowed to moot them in this way. Indeed, since most union withdrawal time periods are annual, few cases would reach judgment in a district court, much less have the opportunity for appellate review.[1]

Such tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted fees to an entire class:

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

Knox, 567 U.S. at 307. As in *Knox*, here the Union continues to assert the legality of its withdrawal window policy but wishes to avoid this Court determining its legality. The Court should grant Few his right to a legal determination because Few still maintains his claims for past union dues, for declaratory relief, and for his attorneys' fees.

These principles of law finding an active case or controversy are not novel or

[1] The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Few now presents to this Court. The Court found such arguments had been waived. 759 F.App'x at 634.

unique to this case: 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 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 opt-out window Few was subject to is a policy of LAUSD, embodied in an agreement it negotiated with the Union. This policy continues to impact present interests, as Superintendent Beutner, the Union, and Attorney General Becerra 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 declaratory relief.

Count I is not moot. Few is entitled to declaratory relief: that his signing the union dues authorization did not constitute affirmative consent as required by *Janus*; that forcing Few to remain a member of the Union without affirmative consent violated his Frist Amendment rights, and that withholding union dues from his paychecks without affirmative consent violated his First Amendment rights. As well, Few is entitled to damages in the form of the union dues withheld from his paychecks and his statutory attorneys' fees.

II. When Few exercises his First Amendment right to withdraw his affirmative consent to pay union dues, ULTA cannot rely on a contract that was based on a mutual mistake of what his rights were.

Based on the positions taken by unions in similar cases, Few expects the union to argue that he "voluntarily" entered into an agreement to pay union dues. Quite the

contrary, Few was mandated by a state law that has now been ruled unconstitutional to either pay union dues or pay their virtual equivalent in agency fees. This mandatory agreement, based on an unconstitutional choice, is not enforceable when Few asserts his First Amendment right to withdraw his affirmative consent to pay union dues.

For over 100 years, the Supreme Court has recognized that a contract based upon a mutual mistake is voidable by one of the parties upon discovery of the mistake: "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918). Here, Few discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus*. He then requested out of the contract, but the assertion of his First Amendment right was denied.

California expressly recognizes the doctrine of mutual, or "bilateral," mistake by statute. Cal Civ Code § 1578. "A mistake of law arises from '[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law.'" *Harris v. Rudin*, 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552, 557 (2002) (quoting § 1578); *see also Kurwa v. Kislinger*, 4 Cal. 5th 109, 117, 226 Cal. Rptr. 3d 328, 334, 407 P.3d 12, 17 (2017) (citing *Harris* for the proposition that "the parties' lack of knowledge that a crucial statute had been amended could constitute a mistake of law that would justify rescinding a settlement agreement"). "As a general rule, a mistake of this sort constitutes grounds for unwinding the transaction and giving the parties the chance to make a new run at the problem." *Kurwa*, 4 Cal. 5th at 117.

The Ninth Circuit likewise explains that "[t]he law has long recognized that it is unjust to permit either party to a transaction, in which both are laboring under the same mistake, to take advantage of the other when the truth is known. To the extent feasible, the law seeks to return the parties to their original positions." *Gayle Mfg. Co. v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 582 (9th Cir. 1990) (citing *Hannah v. Steinman*, 159 Cal.

142, 146-47, 112 P. 1094, 1096 (1911) (en banc); *Benson v. Bunting*, 127 Cal. 532, 537, 59 P. 991, 992 (1900); *Guthrie v. Times-Mirror*, Co., 51 Cal. App. 3d 879, 884, 124 Cal. Rptr. 577, 580 (Ct. App. 1975). Restatement (Second) of Contracts § 152 (1979); 3 Corbin on Contracts § 616 (1960); 13 Williston on Contracts § 1549 at 135 (3d ed. 1970)). It is for this reason that § 1578 "allows for rescission of a contract where consent to the contract was obtained through mutual mistake of law." *Gayle Mfg. Co.*, 910 F.2d at 582 n.5.

The "mutual mistake of law" doctrine applies to the circumstances of this case. Both Few and UTLA were laboring under the same mistake at the time the contract was ostensibly formed—that they were permitted to take money from him whether he signed or not. This misapprehension of law by all parties was something all the parties thought they knew, and they assumed that it would continue to govern their actions. Yet the Supreme Court's clarification now frustrates the purposes toward which the parties all made the same mistake. This Court should find, therefore, that the mutual mistake that agency fees were permissible renders the claimed contract unenforceable, such that UTLA is not permitted to take advantage of him now that the truth is known.

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

While UTLA may now cite their reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to absolve them for improperly exacted dues, there is no good-faith defense this 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 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.

"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 UTLA be held liable to Few for damages.

B. A good faith defense is incompatible with the statutory basis for qualified immunity, and UTLA lacks that immunity.

Section 1983 "on its face does not provide for any immunities." *Malley v. Briggs*,

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

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 UTLA 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 Few 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.

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's rationale, every defendant that deprives any person of any constitutional right can escape damages liability by claiming it had a good faith, but mistaken, belief its conduct was lawful.

This ostensible defense would be available not just to unions, but to all defendants sued for damages under Section 1983. Of course, individuals with qualified immunity would have little reason to raise the defense, since their immunity is similar. But defendants who lack immunity, such as private parties and municipal governments, would gain the functional equivalent of a qualified immunity.

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

A good-faith defense is exceedingly broad. It would apply to any private party acting in concert with the state. In effect, a reasonable mistake of law would become a cognizable defense to depriving a citizen of his or her constitutional rights.

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 whether a defendant violated the Constitution and whether their

subjective motives for so doing were reasonable.

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.

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

The Union asserts that several circuit courts found that private defendants have a good-faith defense to Section 1983 damages liability. 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 from 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.

CONCLUSION

For the forgoing reasons, this Court should grant Few's Motion for Summary Judgment.

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Respectfully submitted,

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