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Attorneys for Plaintiff
PATRICIA GROSSMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICIA GROSSMAN, Plaintiff, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION / AFSCME LOCAL 152;	Civil No. 18-00493-DKW-RT **PLAINTIFF'S REPLY TO HAWAII GOVERNMENT EMPLOYEES ASSOCIATION / AFSCME LOCAL 152'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND**

DAVID LASSNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF HAWAII; AND CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF HAWAII,

Defendants.

PLAINTIFF'S OPPOSITION TO HGEA'S CROSS-MOTION FOR SUMMARY JUDGMENT (DKT. 63)

Hearing: Friday, January 24, 2020
Time: 9:30 A.M.
Judge: Derrick K. Watson

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION

Plaintiff, Patricia Grossman, submits this Reply to the Opposition of Defendant Hawaii Government Employees Association / AFSCME Local 152 ("HGEA") to Plaintiff's Motion for Summary Judgment and submits this Opposition to the HGEA Cross-Motion for Summary Judgment ("HGEA MSJ") (Dkt. 63). Plaintiff incorporates her arguments from her own Memorandum of Law in Support of Motion for Summary Judgment ("Plaintiff MSJ") (Dkt. 60-1) on Count I of her Complaint because she anticipated many of the HGEA arguments and addressed them forthwith.

HGEA has gone to great lengths in this case to interpret and reinterpret both the facts and the law in an effort to stop Plaintiff from receiving a ruling on the constitutionality of Hawaii Act 7 (2018) ("Act 7"), the first law in the nation to force union members to keep paying union dues for up to one year after exercising their right under *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018) to pay nothing to the union. This Court should strike down Act 7 as an overly ambitious statute, enacted two months before the *Janus* decision, that failed to anticipate the Supreme Court's sweeping protection of worker rights to free speech and free association. Plaintiff deserves a ruling on this statute. This Court should grant Plaintiff her day in court.

STATEMENT OF MATERIAL FACTS

To facilitate the Court in determining judgment as a matter of law, the parties entered a joint Stipulation Regarding Undisputed Facts ("UF") (Dkt. 57). In filing its cross-motion for summary judgment, HGEA introduced a significant number of additional alleged facts, some of which it was presenting to Plaintiff for the first time. *See* HGEA's Statement of Additional Facts, (Dkt. 64 at 4) ("HGEA SAF"). Plaintiff addresses the additional alleged facts one-by-one below, according to their numbered paragraphs in the HGEA SAF.

24. HGEA members have access to members-only benefits, including discounts on various good services.

Grossman does not dispute that union members receive certain privileges denied to nonmembers.

25. HGEA's Fiscal Office on Oahu is responsible for processing all member requests to resign union membership or end dues deductions.

Plaintiff is without personal knowledge of HGEA's internal processes. To the extent a response is required, Plaintiff disputes this fact and denies that it would be material, if true.

26. It has consistently been HGEA's policy and practice that if one of HGEA's island division offices receives a written request from a member to resign or end dues deductions, the island office forwards that request to the Fiscal Office on Oahu for processing.

Plaintiff is without personal knowledge of HGEA's internal policies. To the extent a response is required, Plaintiff disputes this fact and denies that it would be material, if true.

27. When HGEA's Hawaii Island Division received Grossman's resignation letter on or about July 14, 2018, the Hawaii Island Division attempted to follow HGEA policy and forward that letter to the Fiscal Office on Oahu.

Plaintiff does not dispute that on or about July 13, 2018, she sent a letter which was received on or about July 14, 2018. *See* UF ¶ 15, Exhibit 3. Plaintiff is without personal knowledge of HGEA's internal policies or HGEA's alleged attempts to follow them. To the extent a response is required, Plaintiff disputes this fact beyond what is stipulated in UF ¶ 15 and denies that it would be material, if true.

28. As the result of an inadvertent administrative error or mail lost in transit, HGEA's Fiscal Office on Oahu did not receive Grossman's resignation letter.

Plaintiff is without personal knowledge of HGEA's internal policies or HGEA's alleged attempts to follow them. To the extent a response is required, Plaintiff disputes this fact beyond what is stipulated in UF ¶ 15 and denies that it would be material, if true.

29. HGEA's Fiscal Office first learned of Grossman's resignation letter in

January 2019, after Grossman filed this lawsuit.

Grossman vigorously disputes this fact. See Section I. A. below.

30. After HGEA's Fiscal Office learned of Grossman's resignation letter, HGEA promptly instructed DAGS to end Grossman's deductions, and HGEA sent Grossman an unconditional refund of all dues deducted for the period July 1, 2018 forward.

For the reason stated above in Paragraph 29, Grossman vigorously disputes that HGEA instructed DAGS to end Grossman's deductions "promptly". Grossman does not dispute that HGEA sent Grossman a check in the amount of $402.60 on January 10, 2019. *See* UF ¶ 18, Exhibit 4.

31. When Hawaii Act 7 was enacted on April 24, 2018, HGEA assumed it applied to all HGEA members.

Grossman does not dispute this fact because HGEA explicitly referenced Act 7 as the reason it denied her from ending her union dues deductions. *See* UF ¶ 14, Exhibit 2.

32. In August 2018, HGEA reevaluated its interpretation of Act 7, and HGEA now interprets Act 7 as not applying to union members who signed membership and dues authorization agreements before Act 7 was enacted.

Grossman disputes this alleged internal reevaluation of the HGEA legal interpretation of Act 7 the month following her resignation letter

because HGEA did not end her dues deduction in August 2018. In addition, Grossman disputes that the HGEA interpretation of Act 7 is material, as she is pleading for the Court to interpret it.

33. On August 15, 2018, HGEA's Fiscal Office instructed DAGS to stop dues deductions for all individuals of which HGEA's Fiscal Office was aware who had signed an HGEA membership and dues authorization agreement before Act 7 was enacted and who had requested that dues deductions end after Act 7 was enacted. HGEA also sent checks to each of these individuals, unconditionally refunding all dues that had been deducted from their pay after they each had asked that deductions end.

Grossman disputes this allegation because the HGEA Fiscal Office was aware she had signed a union card before Act 7 was enacted, she had requested that the dues deductions end after Act 7 was enacted, and HGEA did not instruct DAGS to stop dues deductions from her.

34. Grossman was not included in the list of employees whose deductions ended and who received refunds in August 2018 because the Fiscal Office was not aware that Grossman had requested to resign and end her dues deductions. Had the Fiscal Office received Grossman's resignation letter in July 2018, her deductions would have ended in August 2018 and she would have received an unconditional refund of dues deductions made after her request.

Grossman disputes this allegation.

35. HGEA never applied Hawaii Act 7 to Grossman. When HGEA's Fiscal Office first was made aware of Grossman's request to resign and end dues deductions, HGEA promptly instructed DAGS to end her deductions and sent Grossman an unconditional refund of all post-resignation dues.

Grossman vigorously disputes that "HGEA never applied Hawaii Act 7 to Grossman" because all parties stipulated to the veracity of an e-mail from HGEA to Grossman in which the union explicitly stated that it was applying Act 7 to Grossman. *See* UF ¶ 14, Exhibit 2.

ARGUMENT

I. HGEA's shifting positions cannot deny Grossman her right to a ruling on the constitutionality of Act 7.

After the filing of this lawsuit, HGEA first claimed it did not apply Act 7 to Grossman. When presented with an e-mail stating otherwise, it next claimed that it changed its interpretation of the statute after the e-mail was sent. When this fact was disputed, it next claimed that its office in Honolulu never received notice of Grossman's resignation request. Grossman shows below that this position, too, is untenable.

A. HGEA's shifting positions for denying Grossman her right to leave the union and end her dues deductions all constitute state action.

HGEA argues it should be immune from § 1983 liability because its actions

were the result of incompetence, rather than intent or malice. This argument is inconsistent with the facts to which HGEA stipulated and is not material as a matter of law.

First, in correspondence to which HGEA stipulated, the union denied Grossman's request to resign her membership pursuant to the powers granted it under Act 7. UF ¶ 14, Exhibit 2 at 5. On July 10, 2018, Grossman e-mailed HGEA representatives Lorena D. Kauhi and Ginalyn Shinagawa to "confirm my status" as a non-member and asked that they "have [her non-member status] reported to DAGS within the next ten business days." E-mail of Grossman to Union Agents Lorena D. Kauhi and Ginalyn Shinagawa, July 10, 2018, UF Exhibit 2 at 6. HGEA responded rejecting her request, and in doing so explicitly relied on Act 7:

> [R]ecent legislation (HB 1725) was passed this last session and enacted into law(Act 007) designating a "window" where active members can elect to discontinue dues deductions. Since your records show that you did activate your membership in 1995, you'd be subject to this window. If, after our discussion, you'd still like to move forward with suspending your dues, your "window" for discontinuing dues would fall next year between 5/23/19 – 6/23/19 (appears you signed up around 5/23/95).

E-mail of Union Agent Lorena D. Kauhi to Grossman, July 10, 2018, UF Exhibit 2 at 5. Therefore, in its own words, HGEA admitted it denied Grossman's right to resign under color of state law— the state law of Hawaii Act 7.

HGEA attempts to get around this inconvenient fact by arguing that, due to an administrative error, or perhaps a failing of the U.S. Postal Service, Grossman's

July 13, 2018 follow-up letter never got to the HGEA Fiscal office on Oahu for processing. HGEA SAF ¶ 28. Had the Fiscal Office been aware of her request, we are told, HGEA would have processed her resignation.

There is a significant problem with this narrative, however: HGEA's Fiscal office *was* aware of Grossmans request. Exhibit 2 to the Undisputed Facts includes a series of e-mails between Grossman and HGEA agent Ginalyn Shinagawa, including the e-mails quoted above. Shinagawa is employed in the Fiscal office *in Honolulu*. *See* UF Exhibit 2 at 6 (E-mail signature listing Shinagawa's office address as "888 Mililani Street, Suite 401, Honolulu, HI, 96813"); *see also* E-mail of Union Agent Claire Ancheta to Grossman, July 10, 2018, UF Exhibit 2 at 7 ("Our fiscal department will be able to assist you on your inquiry. I have CC'd them on this email.").

The e-mails to which HGEA stipulated make clear that union representatives on both the Hawai'i Island and Oahu denied Grossman's right to end her dues deductions based on the recently enacted state law; therefore, they acted under color of state law.

Second, while HGEA claims it denied Grossman's right to resign due to "administrative error," it is legally irrelevant whether HGEA intended to violate Grossman's rights or did so only due to negligence because "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074

(9th Cir. 2012). In particular, a compelled speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial.

B. HGEA's shifting interpretations of Act 7 cannot confer or deny standing for Grossman to challenge the constitutionality of Act 7.

HGEA claims that it now interprets Act 7 not to apply to Grossman and that its change in legal interpretation of the statute denies her standing to bring suit. If changing one's legal interpretation could reverse a constitutional violation, it would be utilized more often. Such arbitrary, post hoc actions, easily capable of being reversed, are exactly what courts warn against when analyzing questions of standing and jurisdiction.

HGEA asserts that its actions should be absolved of § 1983 liability because its actions were illegal under its new interpretation of Hawaii Act 7. In addition to misunderstanding standing doctrine, HGEA's argument misunderstands the state action requirement. HGEA's actions violated Grossman's First Amendment rights, whether or not they violated Hawaii law. HGEA asserts that to act "under color of state law," one must act pursuant to a correct interpretation of that law. That is not the requirement. Rather, a valid § 1983 claim requires illegal conduct. It means to act with the claimed imprimatur of authority from the state. As the Supreme Court has explained, the question is not "whether state law has been violated but whether

an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.'" *Screws v. United States*, 325 U.S. 91, 108 (1945). What matters is that "someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such." *Id*.

Furthermore, HGEA's initial legal interpretation of Act 7, which denied Grossman's First Amendment rights, seems to be more consistent with both the legislative history of the act and HGEA's position when the act was under consideration.

In passing Act 7, the Hawaii State Legislature was explicit that the law was meant to counteract a forthcoming ruling in the *Janus* case: "A ruling in favor of the petitioners in Janus may allow public sector employees to leave their unions and not pay dues . . . ." House Committee on Labor Report on H.B. No. 1725, H.D. 2, No. 2982, Mar. 21, 2018 at 1, available at https://www.capitol.hawaii.gov/session2018/CommReports/HB1725_HD2_SSCR2982_.pdf. Therefore, the purpose of Act 7 was to "allow[] unions to better manage the impact of potential member resignations in the wake of a possible Supreme Court ruling that goes against the unions." *Id*. at 2. The language in the report seems to indicate that it would apply to all resignations that occur in the wake of the *Janus* ruling. Nothing in the report or in the language of the law indicates that it

was meant to apply only to union resignations that occur from members who join the union after the *Janus* decision, as HGEA now argues.

This new HGEA legal interpretation is in direct conflict with the testimony given by its executive director during legislative consideration of the law. At the time, HGEA did not consider Act 7 to be creating a two-tiered system for union resignation, one for those who joined prior to passage of the law and a second for those who joined after passage of the law. Rather, HGEA stated that the law "creates a systematic process and timeline for an employee to discontinue their payroll assignment" and a "standardized process." Testimony on H.B. 1725 by HGEA Executive Director Randy Perreira before the House Committee on Labor and Public Employment, February 8, 2018 at 1, available at https://www.capitol.hawaii.gov/Session2018/Testimony/HB1725_TESTIMONY_LAB_02-08-18_.PDF. Director Perreira gave this same testimony "in strong support" of the law not once, but *eight* different times as the law made its way through the legislative process. *Id; see also* https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1725&year=2018. HGEA changed its interpretation of the law only in an effort to save it after the expansive *Janus* decision had rendered the law unconstitutional. This Court should not let a private party's interpretation of a state law deprive the Court of its jurisdiction. It is the Court's role to interpret the law,

and that's what Grossman respectfully asks it to do. Properly interpreted, the law fails to uphold the First Amendment rights of workers like Grossman and should be found unconstitutional.

That is precisely the finding in a similar case decided last month. *See Smith v. N.J. Educ. Ass'n*, No. 18-10381 (RMB/KMW), 2019 U.S. Dist. LEXIS 205960, at *19 (D.N.J. Nov. 27, 2019). The *Smith* decision addressed the constitutionality of New Jersey's one-year requirement to stay in the union, which also was signed into law in anticipation of the *Janus* ruling, that time in May 2018. *Id*. at *4. Remarkably, in that case, too, the union bent over backwards to avoid a ruling on the merits of the constitutionality of the statute: "The Union Defendants contend that the continued deduction of Mr. Sandberg's dues after his written notice was an oversight and that all dues deducted from July 1st through October 2018 have been refunded, with interest." *Id*. at *9-*10. The court then went on to explain why, but for this "oversight," the enforcement of what it calls the "draconian" law would have been unconstitutional:

> If it were enforced as written, the Member Plaintiffs are correct that the [law]'s revocation procedure would, in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union. However, in these cases, with discovery now closed, the record indicates that the [law]'s revocation procedure was not enforced against Plaintiffs as written.

Id. at *19-*20.

In Grossman's case, the union is, once again, following its nationwide playbook that Grossman's situation represented a unique oversight, and the union never applied the statute to her. In Grossman's case, however, the union cannot account for the fact that HGEA put it in writing in an e-mail to Grossman that she was being denied union resignation *precisely because of the new statute*. UF Exhibit 2 at 5. Grossman respectfully requests that this Court acknowledge this fact and conclude, as the *Smith* court did, that enforcement of the new statute "unconstitutionally restrict[s] an employee's First Amendment right to opt-out of a public-sector union." *Smith*, 2019 U.S. Dist. LEXIS 205960, at *19-*20.

II. Grossman's claims for declaratory relief were not mooted by HGEA's gamesmanship.

HGEA asserts that its decision to voluntarily cease deducting union dues from Grossman after being sued is sufficient to avoid judicial review of its unlawful conduct. HGEA MSJ at 7-9. Grossman concedes that HGEA's actions have made the issuance of an injunction as to Grossman moot. However, the voluntary cessation of challenged conduct does not render declaratory relief moot.

Grossman anticipated this argument and addressed it at length in her own motion. Plaintiff MSJ at 12-16. When a defendant attempts to evade judicial review of its actions by enforcing them against all parties except for those who file suit and then changing its actions after the filing of a lawsuit, the court retains

jurisdiction to consider the merits: "[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)).

Recently, the Ninth Circuit, when faced with the same argument regarding the same claim, held that the case was not moot because these "are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019). While HGEA restates the general concept that a case can become moot when there's no ongoing injury, its analysis fails to refute the well-established exception that the Ninth Circuit, in *Fisk*, recognized applies to this case. HGEA MSJ at 7-8. In *Fisk*, union members also filed suit to end their dues deductions prior to the opening of their annual window to withdraw from the union. The conclusion of the Ninth Circuit is reasoned and plain: "claims regarding the dues irrevocability provision would last for at most a year," and the Ninth Circuit recognized that "even three years is 'too short to allow for full judicial review.'" *Id.* (quoting *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010)). This holding of the Ninth Circuit is directly on point and resolves the argument in Plaintiff's favor.

Next, HGEA argues that the case must be dismissed because "there is no reasonable possibility the conduct Plaintiff challenges could recur." MSJ at 8. But

HGEA's argument is not consistent with how the Supreme Court has addressed the doctrine of mootness. For example, Jane Roe was not required to submit an affidavit asserting that she would experience a future unwanted pregnancy in *Roe v. Wade*, 410 U.S. 113, 125 (1973). Similarly, union members in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) could not say they would be subject to a future special assessment by the union, but the case was determined to be justiciable even after the union had sent notice of a full refund of the assessment.

HGEA attempts to distinguish various cases that undermine its position by arguing that they were putative class actions. HGEA MSJ at 9 n.3. But that was not the reasoning of these cases, nor could it have been, since "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Absent class certification, collective actions only survive the mooting of the named plaintiff's claim if a new named plaintiff joins the case in the named plaintiff's place. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) ("In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action").

HGEA, therefore, asserts that in *Roe v. Wade*, the class treatment overrode the fact that the Plaintiff had already given birth. HGEA MSJ at 9 n.3. But that was not the basis of the Court's ruling. Instead, it focused on the inherent transience of

pregnancy:

> [T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.

Roe v. Wade, 410 U.S. 113, 125 (1973). The Supreme Court ruled that a constitutional violation cannot avoid court scrutiny simply because the relevant time period will run out before the appellate process is complete.

It was precisely this concern with the transience of the claim that guided the Ninth Circuit, assessing the same sort of union opt-out claim presented here, to rule that "*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." *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019) (emphasis added). The Ninth Circuit cited *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010), which held that even a three-year duration is "too short to allow for full judicial review." Grossman's declaratory relief claim would, at most, last only one year under HGEA's theory, so it should certainly survive. HGEA attempts to dismiss this ruling from the Ninth Circuit on the grounds that *Fisk* was also a class action. HGEA MSJ at 9 n.3. But as the quote above shows, the Ninth Circuit did not base its ruling on the class allegations because "*no class ha[d] been certified*."

Fisk, 759 F.App'x at 633 (emphasis added).[1] The theory that other putative class members saved the case from becoming moot is a misreading of the case's clear language.

HGEA likewise tries to distinguish *Knox v. SEIU* on the theory that in that case "there remained a live dispute about whether the union's notice and refund offer was adequate." HGEA MSJ at 9 n.3. But, again, that was not the basis for the Court's ruling. Instead, the Court explained that the union's refund, like the refund offered to Grossman, was irrelevant because "[t]he 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." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). Only *after* making this determination did the Court in the next paragraph explain that the case would still survive *if voluntary succession did not apply* because "even if that is so . . . there is still a live controversy as to the adequacy of the SEIU's refund notice." *Id.* For these reasons, the Court should find that Grossman's claims constitute an ongoing case or controversy.

III. HGEA violated Grossman's First Amendment rights by deducting union dues from her wages.

A. Grossman did not provide HGEA a valid waiver of her First

[1] Grossman concedes that *Fisk* is an unpublished opinion but submits that a very recent ruling from the Ninth Circuit assessing the exact legal question at issue warrants strong consideration by this Court.

Amendment rights.

Janus is clear that workers must not only consent to waive their First Amendment rights not to pay union dues, but they must "clearly and affirmatively consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. *Janus* further explains:

> 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.

Id. (internal citations omitted). Grossman's consent was not "freely given" because she was not informed of her right to pay nothing at all to the union. That right had not yet been recognized by the Supreme Court. Therefore, the waiver of that right "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Grossman could not possibly have waived a right that she did not know existed.

HGEA claims that Grossman received consideration for joining the Union, but it fails to mention that Grossman did not want this consideration. Grossman jumped at her first chance to give up these rights and benefits (indeed, her emails with the union demonstrate she thought she had already refused them), asking to give them up within 10 days of the *Janus* decision. *See* UF ¶ 14, Exhibit 2.

None of HGEA's citations overcome this basic problem. For instance, HGEA invokes *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), in defense of its argument. But in *Cohen*, a newspaper agreed not to reveal a source, and

having made that agreement, could not rely on the First Amendment to protect its publication of the information it had agreed not to reveal. *Cohen* amounts to a statement that one can waive a constitutional right, which Grossman acknowledges is consistent with *Janus*. But the First Amendment rights of newspapers were long established when *Cohen* was decided in 1991. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971). There was no intervening change in the law that recognized a new right of newspapers between when the promise was made and when the case was decided. In this case, however, an intervening Supreme Court decision has clarified that Grossman signed her authorization subject to an unconstitutional choice between paying dues to the Union or paying agency fees to the Union.

HGEA also relies on *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. In that case, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. *Id*. 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. Grossman does not ask that this Court find its way around *res judicata*, only that it find an alleged contract between the parties unenforceable.

B. HGEA cannot rely on a waiver based in a mutual mistake of law.

HGEA argues that Grossman "voluntarily" entered into an agreement to pay union dues. HGEA MSJ at 9. Quite the contrary, as explained in Grossman's Motion, Plaintiff MSJ at 17-18, she 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 Grossman asserts her First Amendment right to withdraw her affirmative consent to pay union dues.

The Hawaii Supreme Court has endorsed this traditional rule. When faced with the question, that Court applied the Restatement (Second) of Contracts, which holds that "[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he [or she] bears the risk of the mistake." *AIG Hawai'i Ins.*

Co. v. Bateman, 82 Haw. 453, 457, 923 P.2d 395, 399 (1996) (quoting Restatement § 152).

The Ninth Circuit, likewise, explained 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); *see also* 3 Corbin on Contracts § 616 (1960); 13 Williston on Contracts § 1549 at 135 (3d ed. 1970)).

The "mutual mistake of law" doctrine applies to the circumstances of this case. Both HGEA and Grossman were laboring under the same mistake at the time the contract was ostensibly formed—that the union was permitted to take money from her whether she 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 HGEA is not permitted to take advantage of her now that the truth is known.

C. HGEA's actions in concert with the state government constitute state action.

HGEA asserts that actions taken by state officials pursuant to a state statute do not constitute state action. HGEA MSJ at 16-18. When state officials use the state payroll system to deduct dues from state-issued paychecks of state university employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983. The union resignation time window limitations that HGEA is enforcing are asserted pursuant to a state statute, Hawaii Act 7, that expressly grants HGEA this special privilege. *See* HRS §89-4(c).

The Central District of California, in an opinion upon which HGEA otherwise relies, expressly disagreed with the same argument HGEA is now making. *See O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *9 (C.D. Cal. June 10, 2019). In *O'Callaghan*, Plaintiffs were also government workers seeking to end their union dues deductions prior to the union's withdrawal time window. The court found "that this qualifies as joint action because the state is facilitating the allegedly unconstitutional conduct Plaintiffs complain of through the state's involvement with a private party." *Id.* (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013)) (internal quotation marks omitted). Moreover, the Seventh Circuit likewise disagreed with HGEA's argument, finding state action in the ongoing post-Supreme Court litigation in the *Janus* case itself. *Janus v. ASFCME Council 31*, No. 19-1553, ECF No. 31, at *15 (7th Cir. Nov. 5, 2019) ("*Janus* II"). In that case, Mark Janus is seeking a return of the union fees that the Supreme Court held to be

unconstitutional, and the Seventh Circuit found that the union deductions constituted state action. *Id*.

In fact, the Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the Supreme Court's *Janus* decision, in which the union's deduction of agency fees constituted state action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which held that a private debt collector's actions constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, HGEA has also invoked the aid of state officials to take advantage of a state labor statutory scheme to withdraw Grossman's dues. State officials followed and enforced Act 7, which permitted HGEA to keep Grossman stuck as a member of the union. Government officials carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

Among the tests for state action, "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). In this case, the state has affirmed, authorized, and facilitated the deduction

of dues from Grossman's paychecks. President Lassner and HGEA negotiated the contractual terms by which they would take members' dues, and Lassner carried out the union's instructions.

Adopting HGEA's position on state action would require this Court to overturn a host of Supreme Court decisions on the subject. In *Knox v. SEIU*, union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounted to state action in *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). HGEA's argument would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could have been no First Amendment question presented to the Court if the union exaction had not constituted state action. Grossman humbly submits that the Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error.

IV. Grossman's post-resignation claims are valid and should be enforced by this Court.

A. Grossman's damages claim has not been satisfied.

HGEA argues that tendering a check to Grossman mooted her claims for relief. But Grossman treated these checks as an incomplete offer of settlement and rejected them. *See* UF ¶ 21. The Supreme Court has even held that an offer of

compete relief, if rejected, cannot moot a plaintiff's claim, as the plaintiff "remains emptyhanded." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Grossman submits that a tendered check for partial settlement cannot do more to moot a claim than would a full and complete offer of relief.

Moreover, HGEA's assertion that there is "no remaining case or controversy for the Court to resolve as to the post-resignation time period" likewise falls short. Even if HGEA had satisfied the relevant damages, Grossman would still be entitled to declaratory relief. HGEA cannot avoid judicial scrutiny by voluntarily ending its challenged conduct once a lawsuit is filed. *See* Section I, *supra*.

CONCLUSION

For the forgoing reasons, this Court should deny HGEA's Motion for Summary Judgment and grant Grossman's Motion for Summary Judgment.

DATED: Honolulu, Hawaii, December 9, 2019.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICIA GROSSMAN, Plaintiff, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION / AFSCME LOCAL 152; DAVID LASSNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF HAWAII; AND CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF HAWAII, Defendants.	Civil No. 18-00493-DKW-RT **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of Plaintiff's Reply To Hawaii Government Employees Association / AFSCME Local 152's Opposition To Plaintiff's Motion For Summary Judgment And Plaintiff's Opposition To HGEA's Cross-Motion For Summary Judgment (Dkt. 63) was duly served electronically through CM/ECF upon the following:

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