No. 19-3876

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHALEA OLIVER

Appellant

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; TERESA D. MILLER, Secretary, Pennsylvania Department of Human Services; MICHAEL NEWSOME, Secretary of Pennsylvania Office of Administration; JOSH SHAPIRO, Attorney General of Pennsylvania; JAMES M. DARBY, Chairman, Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, in their official capacities

Respondents

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:19-cv-00891
Hon. Gerald A. McHugh

APPELLANTS' OPENING BRIEF

Jeffrey M. Schwab
jschwab@libertyjusticecenter.org
Daniel R. Suhr
dsuhr@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668

Charles O. Beckley, II
Beckley & Madden, LLC
212 N. Third St., Suite 301
Harrisburg, PA 17101
Telephone (717) 233-7691
cbeckley@pa.net

Attorneys for Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, Appellant in this case is a natural person, and therefore, has no corporate interests to disclose.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the First Amendment to the United States Constitution and, therefore, presents a federal question, and has jurisdiction under 28 U.S.C. § 1343 because relief is sought under 42 U.S.C. § 1983. On December 11, 2019, Appellant filed a timely Notice of Appeal (App. 003) from the District Court's November 12, 2019 Orders (App. 005 and 006) denying Appellant's Motion for Summary Judgment and granting the motions for summary judgment of SEIU Local 668 and the Commonwealth defendants issued in accordance with the court's December 11, 2019 Memorandum Opinions (App. 007 and 022). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellant provided affirmative consent to waive her First Amendment right to not pay money to a union as articulated by the Supreme Court in *Janus* when she signed a union membership form ("union card") prior to the Court's decision in *Janus*?

See Pl's Memo. Mot. Summ. J., Dkt. 034-1; Pl's Resp. Local 668's Mot. Summ. J., Dkt. 039; Memorandum Opinion, App. 007 and 022.

2. Whether the state violated the free speech and free association rights of Appellant by granting a labor union the power to speak on her behalf

as her exclusive representative to her employer even though she is no longer a member of the union?

See Pl's Memo. Mot. Summ. J., Dkt. 034-1; Pl's Resp. Local 668's Mot. Summ. J., Dkt. 039; Memorandum Opinion, App. 007 and 022.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court prior to this appeal. Appellant is not aware of any other case, pending or completed, before this Court that is related to this case.

STATEMENT OF THE CASE

Appellant Shalea Oliver is an employee of the Commonwealth of Pennsylvania ("Commonwealth") in the County of Philadelphia Assistance Office of its Department of Human Services ("DHS"), a post she has held since December 2014. App. 048. She became a member of Service Employees International Union (SEIU) Local 668 ("the Union" or "Local 668") at the time she began her employment at DHS. App. 050. At the time Ms. Oliver joined the Union in December 2014, she was required to either join the Union as a member or pay agency fees to the Union as a non-member as a condition of her employment. App. 050.

On June 27, 2018, the Supreme Court decided *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), holding that government employees have a First Amendment right not to be compelled by their employer to pay any fees to a union unless an

employee "affirmatively consents" to waive that right. Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id*.

After the Supreme Court issued its decision in *Janus* on June 27, 2018, Ms. Oliver learned that she had the right both to be a non-member of the union and to pay no money to the union. App. 040. On August 10, 2018, Ms. Oliver sent a letter to the Union requesting to withdraw from Union membership and stating that the Union was no longer authorized to enforce her prior authorization for automatic payroll deductions of Union dues. App. 050.

On September 20, 2018, the Union sent a letter to the Commonwealth's Office of Administration enclosing a copy of Ms. Oliver's August 10 letter and instructing the Office of Administration to discontinue the payroll deduction of Union dues for Ms. Oliver effective immediately. App. 051. On November 27, 2018, the Union sent a letter to the Commonwealth's Office of Administration enclosing a copy of Ms. Oliver's August 10 letter and instructing the Office of Administration to discontinue the payroll deduction of Union dues for Ms. Oliver effective immediately. App. 051. On January 23, 2019, the Union sent a letter to the Office of Administration enclosing a copy of Ms. Oliver's August 10 letter and instructing the Office of Administration to discontinue the payroll deduction of Union dues for Ms. Oliver effective immediately. App. 052. On January 30, 2019, the Union sent a letter to Ms. Oliver stating that the Union had received her request to withdraw her participation in the

Union and enclosing a check for $263.01, an amount equal to all dues withheld for the pay period beginning August 4, 2018, through the pay period ending January 4, 2019. Ms. Oliver received and cashed the check. App. 052.

Ms. Oliver was not copied on the Union's September 20, 2018, November 27, 2018, or January 23, 2019, letters and was not otherwise informed by the Union that the Union had instructed the Commonwealth to discontinue the union dues deductions from her paychecks. App. 052. The January 30, 2019, letter was the first time Ms. Oliver had received communication from the Union regarding her August 10, 2018, letter requesting that union dues stop being withheld from her paycheck and resigning her union membership. App. 052.

The last pay period for which Ms. Oliver had dues deducted from her paycheck ended on January 18, 2019. App. 052. Ms. Oliver has not had any dues deducted from her paycheck since February 1, 2019, when she received her pay for the pay period ending on January 18, 2019. App. 052. On March 20, 2019, the Union sent Ms. Oliver a check in the amount of $24.48, an amount equal to all dues withheld for the pay period beginning January 4, 2019 and ending January 18, 2019. Ms. Oliver received and cashed the check. App. 052.

Local 668 is an "employe organization" as defined in Pennsylvania Public Employe Relations Act ("PERA"). App. 048. Pursuant to the provisions of PERA governing the designation of employee representatives, the Union has been certified by

the Pennsylvania Labor Relations Board as the exclusive representative of a bargaining unit of certain public employees of the Commonwealth, including Plaintiff, for the purposes of collective bargaining under PERA. App. 048-049.

Acting in concert under color of state law, the Commonwealth of Pennsylvania and Defendant SEIU entered into a collective bargaining agreement ("Agreement"), effective on July 1, 2016 through June 30, 2019. App. 049. The Agreement contains a "Union Security" article, which limits when union members may resign their union membership and stop union dues from being withheld from their paycheck. That article provides:

> Section 1. Each employee who, on the effective date of this Agreement, is a member of the Union, and each employee who becomes a member after that date shall maintain membership in the Union, provided that such employee may resign from the Union, in accordance with the following procedure:
>
> a. The employee shall send a certified letter (Return Receipt Requested) of resignation to the headquarters of the Union and a copy of the letter to the employee's agency. The official membership card, if available, shall accompany the letter of resignation.
>
> b. The letter referred to in a. above shall be post- marked during the fifteen (15) day period prior to the expiration date of this Agreement and shall state that the employee is resigning membership in the Union and where applicable, is revoking check-off authorization.

App. 051.

The Agreement's maintenance of membership requirement follows PERA's definition of "maintenance of membership," which states:

> (18) "Maintenance of membership" means that all employes who have joined an employe organization or who join the employe organization in the future must remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employe or employes may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement.

43 P.S. § 1101.301(18).

PERA permits the limitation of the rights of government employees to resign from the union and stop union dues from being withheld from their paychecks. *See* 43 P.S. § 1101.401 ("It shall be lawful for public employes to organize, form, join or assist in employe organizations . . . and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.").

The terms of both the Collective Bargaining Agreement and PERA limit a union member's right to resign and stop union dues from being withheld from his or her paycheck to only the 15-day window immediately preceding the expiration of the Agreement. App. 051.

The Agreement also provides that with respect to union dues that:

> Section 1. The Employer agrees to deduct the Union membership dues, an annual assessment, and an initiation fee, from the pay of those employees who individually request in writing that such deductions be made. The signature of the employee on a properly completed Union dues deduction authorization card shall constitute the only necessary authorization to begin payroll deductions of said dues. The Union shall certify to the Employer the rate at which Union dues are to be deducted, and dues at this rate shall be deducted from all compensation paid. The

> aggregate deductions of all employees shall be remitted together with an itemized statement to the Union by the last day of the succeeding month, after such deductions are made. Except as otherwise provided in Article 2 of this Agreement, the authorization shall be irrevocable during the term of this Agreement. When revoked by the employee in accordance with Article 2, the agency shall halt the check-off of dues effective the first full pay period following the expiration of this Agreement.

App. 049; Dkt. 1-1.

In a similar vein, PERA provides that:

> Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.

43 P.S. § 1101.705.

On April 2, 2019, the Union and Commonwealth entered into a Side Letter concerning certain terms of the Agreement. App. 049. This Side Letter modified and superseded certain terms of the Agreement. In relevant part, the Side Letter allows a member of Local 668 to resign from the Union at any time, regardless of any window period which may be specified in the Agreement or the Public Employee Relations Act. App. 049.

Under Pennsylvania law, a union selected by public employees in a unit appropriate for collective bargaining purposes is the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment. 43 P.S. § 1101.606. Once a union is designated the exclusive representative

of all employees in a bargaining unit, it negotiates wages, hours, terms and conditions of employment for all employees, even employees who are not members of the union or who do not agree with the positions the union takes on the subjects. Defendant Local 668 is the exclusive representative of Ms. Oliver and her coworkers in the bargaining unit, with respect to wages, hours, and terms and conditions of employment, pursuant to 43 P.S. § 1101.606. App. 048-049.

Ms. Oliver filed a complaint on February 28, 2019, against Local 668 and Teresa D. Miller, Secretary, Pennsylvania Department of Human Services; Michael Newsome, Secretary, Pennsylvania Office of Administration; Josh Shapiro, Attorney General of Pennsylvania; James M. Darby, Chairman, Pennsylvania Labor Relations Board; Albert Mezzaroba, Member, Pennsylvania Labor Relations Board; and Robert H. Shoop, Jr., Member, Pennsylvania Labor Relations Board, in their official capacities, (collectively, "Commonwealth Defendants"), seeking declaratory relief and damages in the amount of the dues previously deducted from her paychecks. Local 668 and the Commonwealth Defendants each filed an Answer on May 7, 2019. App. 034. Plaintiff, Local 668, and the Commonwealth Defendants each filed motions for summary judgment. Dkt. 029, 034, 036. Plaintiff and Local 668 filed a Statement of Stipulated Undisputed Facts for purposes of their cross motions for summary judgment. App. 048. The Commonwealth Defendants did not join the Statement of Stipulated Undisputed Facts, but filed their own statement of facts in

their motion for summary judgment, Dkt. 029, which Plaintiff did not dispute, Dkt. 031. On November 12, 2019, the District Court issued two Memoranda in which it granted the motions for summary judgment of the Commonwealth Defendants and Local 668, and denied Plaintiff's motion for summary judgment. App. 007 and 022. The same day the District Court issued two final orders. App. 005 and 006. Plaintiff filed a timely notice of appeal on December 11, 2019. App. 003.

SUMMARY OF ARGUMENT

Government employees have a First Amendment right not to join or pay any money to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Prior to *Janus*, Ms. Oliver was forced into an unconstitutional choice between paying union dues as a member of Local 668 or paying agency fees as a non-member of the Union. The Supreme Court in *Janus* recognized that Ms. Oliver should have been given the choice to pay nothing at all to the Union as a non-member. Ms. Oliver could not have provided affirmative consent when she joined the union and signed the union membership form because she was not given a choice to pay nothing to the union. Thus, any dues withheld from Ms. Oliver's paychecks were taken unconstitutionally.

In addition, citizens enjoy a First Amendment right not to be forced by government to associate with organizations or causes with which they do not wish to associate. *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984). Yet Pennsylvania law grants

public sector unions the power to speak on behalf of employees as their exclusive representative. 43 P.S. §§ 1101.604, 606. Pursuant to this law and by agreement between the Union and Commonwealth, the Union purports to act as the exclusive representative of Ms. Oliver and other non-members. As the Supreme Court in *Janus* recognized, such an arrangement creates "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. It should no longer be tolerated in this context either: Ms. Oliver's rights of speech and association are violated by a government-compelled arrangement whereby the Union lobbies her government employer on her behalf without her permission and in ways that she does not support.

STANDARD OF REVIEW

This Court exercises plenary, or de novo, review over a District Court's grant of summary judgment and applies the same standard that the District Court would apply. *Burton v. Teleflex Inc.*, 707 F.3d 417, 424-25 (3d Cir. 2013). A grant of summary judgment is appropriate where the moving party has established "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. (*quoting* Fed. R. Civ. P. 56(a)).

ARGUMENT

I. Defendants violated Plaintiff's First Amendment rights by collecting dues from her without her affirmative consent.

The Supreme Court in *Janus*, 138 S. Ct. at 2486, explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to waive his or her right to not pay a union. This waiver cannot be presumed; it must be freely given and shown by "clear and compelling" evidence to be effective. "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.*

A. Plaintiff did not provide affirmative consent to pay the union by signing the union membership form before the Supreme Court's decision in *Janus*.

Plaintiff did not provide affirmative consent to waive her First Amendment right to not pay money to a union. The union dues authorization card that Plaintiff signed before the *Janus* decision cannot constitute affirmative consent because it does not meet the Court's standard for waiving constitutional rights.

The Supreme Court has long held that certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972). Third, because the Court will "not presume acquiescence in the loss of fundamental

rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. Thus, "[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 membership form signed by the Plaintiff fails on all these counts. She did not provide *affirmative* consent when she signed the authorization: her consent was coerced because she was given the unconstitutional choice between paying Local 668 as a member or paying it as a non-member. She did not waive a *known* right or privilege because *Janus* had not yet been decided, so she was unaware that she was entitled to pay nothing at all. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144-45 (1967) (cannot waive a right before knowing of the relevant law). Nor did Local 668 or the Commonwealth ever provide notice to Plaintiff that she had a right to not pay the Union. Thus, at the time she signed the membership form, Plaintiff did not know that she had a constitutional right to not pay the Union.

Plaintiff's choice was not made *freely* for the same reason; when she began employment with the Commonwealth, she was forced into an unconstitutional choice:

pay an agency fee or pay membership dues. App. 050. She never had the option – as she was entitled to under *Janus* – to pay *nothing*. She did not make a *voluntary* waiver because, at the time she signed the union dues authorization, she was forced into an unconstitutional choice between paying Local 668 as a member or paying it as a non-member.

Further, there is no clear and compelling evidence that Plaintiff wished to waive her constitutional right to pay no money to the union. One cannot presume that she intended to waive her constitutional right by her mere decision to join Local 668, because that decision was constrained by the fact that at the time she was unconstitutionally forced to pay Local 668 whatever decision she made – either as a member or as a non-member.

Local 668 and the Commonwealth can find no safe harbor by claiming they were operating in accordance with pre-*Janus* case law. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Supreme Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *See also United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar

to every law student"); *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years"); *Kolkevich v. AG of the United States,* 501 F.3d 323, 337 n.9 (3rd Cir. 2007) (declining to apply a ruling "only in a purely prospective fashion"). This Court has called it a "truism" that "in the context of adjudication, retrospectivity is, and has since the birth of this nation been, the norm." *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 394 (3d Cir. 1994). The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

Applying the rule of *Janus* retrospectively to the moment when Plaintiff signed her union dues authorization, Local 668 and the Commonwealth needed to secure Plaintiff's *affirmative consent* for the *knowing* and *voluntary* waiver of her rights not to join a union. This Local 668 and the Commonwealth did not do. Because they did not secure Plaintiff's affirmative consent, the Union could not compel her to continue to pay union dues. Because the dues authorization does not provide affirmative consent, any dues withheld from Plaintiff before *Janus* were unconstitutional and therefore need to be returned.

Local 668's liability for dues paid by Plaintiff, therefore, extends backward before *Janus*; limited only, if at all, by a statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. *Harper*, 509 U.S. at 97. In *Harper*, taxes collected

from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to keep the monies it seized from Plaintiff's wages before the Supreme Court put an end to this unconstitutional practice.

B. Plaintiff's damage claim for a refund of her dues is not mooted by the fact that the Union paid some of her dues back.

Although Local 668 refunded Ms. Oliver's dues from August 2018 to January 2019, App. 052, and stopped withholding dues in January 2019, Ms. Oliver has consistently sought the full refund of all her dues, stretching back to when she was forced to begin paying money to the union upon starting her job. App. 043. Pennsylvania's statute of limitations is two years, see 42 Pa. Consol. Stat. § 5524(2), so if Local 668 asserted this defense, she would be owed back dues from March 2017 to August 2018. Because *Janus* is applied retroactively, *see Harper*, 509 U.S. at

97, Plaintiff's claim for a refund of dues extends all the way back to when the Commonwealth began withholding dues on behalf of the Union since neither the Union nor the Commonwealth ever obtained affirmative consent to take such dues from Plaintiff. Since the Union only refunded dues withheld after August 2018, Plaintiff's claim for damages in the form of the return of union dues is not mooted by the Union's refund.

Moreover, her claim is also not mooted by the Side Letter between the Union and the Commonwealth. First, the Side Letter states that an SEIU member may resign at any time. But the Commonwealth's statutes mandate that "all employes who have joined an employe organization . . . must remain members for the duration of a collective bargaining agreement . . . with the proviso that any such employe . . . may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement." 43 P.S. § 1101.301(18). The statutes, then, only permit employees to opt-out from the union during the specified fifteen-day window immediately prior to the expiration of a multi-year collective bargaining agreement. A side letter between to a state agency and a private organization does not have the legal authority to override the plain text of a state statute. *State Org. of Police Officers v. Soc'y of Prof'l Journalists-University of Haw.*

Chapter, 927 P.2d 386, 412 (Haw. 1996) (the proposition that a provision in a collective bargaining agreement "suspends the effect of a validly enacted statute of the state strains credulity.").

Second, the Side Letter only excuses employees from *membership* in the union—App. 049—it explicitly states that the Commonwealth must continue to honor the dues deduction agreement. App. 049. In other words, the employee can stop receiving mailings and invitations to meetings, but the Commonwealth must continue to exact money from her paycheck until she exercises her right to revoke the authorization during the appropriate window. This is no real relief for the employee, and illustrates how other employees like Ms. Oliver can be trapped paying money to a union that they do not wish to support.

C. The union membership form used to deprive Plaintiff of her First Amendment right involves state action.

There can be no argument that Defendants did not act under color of state law in enforcing its Constitutionally-offensive dues collection provisions. As the Seventh Circuit has recently held in *Janus v. AFSCME Council 31,* 942 F.3d 352 (7th Cir. 2019) ("*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 361.

Any 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 must fail because such a distinction is irrelevant to the Seventh Circuit's reasoning in *Janus II.* The Seventh Circuit noted that "[w]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at 361, 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 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 Commonwealth and the Union – the exclusive representative of Commonwealth employees – to garnish her wages and spend the money on union activities. The distinction between union dues and agency fees is thus irrelevant.

The key connection between the Commonwealth and the Union establishing state action on behalf of the Union is that but for state law, the Union would have no entitlement to any portion of Plaintiff's 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.").

The state action underlying Plaintiff's complaint is the Commonwealth's deduction of union dues from her wages, without her affirmative consent, for the purposes of subsidizing a political organization (the Union). *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 Commonwealth) and the employee. *See, e.g., Int'l Ass'n of Machinists Dist. Ten*, 904 F.3d at 492 ("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 Commonwealth as employer, then clearly it is state action and not a private contract.

Even if the dues authorization is a 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)).

Thus, there is no basis for the District Court's conclusion that no state action

existed in the scheme by which the Commonwealth Defendants withheld union dues from Plaintiff on behalf of Local 668 pursuant to the Collective Bargaining Agreement and state law.

D. The Union does not have a "good faith" defense for taking dues from Plaintiff against her will.

1. This Court has not recognized a "good faith" defense to Section 1983 claims for a violation of First Amendment rights.

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.

The "good faith" defense this Court recognized in *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1274 n.29 (3d Cir. 1994), on which the District Court relied, does not help the Union because, unlike in claims arising from abuses of judicial processes, malice and lack of probable cause are not elements of a First Amendment deprivation under *Janus*.

"[S]ection 1983 does not include any *mens rea* requirement in its text." *Jordan*, 20 F.3d at 1277. However, there can be a "state of mind requirement specific to the particular federal right underlying a Section 1983 claim." Unlike with malicious prosecution or abuses of process claims, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). A

compelled speech violation, in particular, does not require any specific intent (much less malice). 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.

Thus, whether the Union acted with malice and without probable cause when it seized Plaintiff's dues is irrelevant. Either way, the action deprived the Plaintiff of her First Amendment right. Good faith simply is not a defense to a union fee seizure under *Janus*.

Some constitutional claims actionable under Section 1983 have no common law analogue. Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims" but "is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012).

Plaintiff's First Amendment claim has no common law analogue. The Supreme Court explained that "[c]ompelling a person to subsidize the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment. There is no basis for importing the elements of any common law tort into a First Amendment, compelled-subsidization-of-

speech claim.

This includes malice and probable cause elements of an abuse of process tort. "[T]he tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added). That means an action literally taken by a court. *Id.* "Misuse of an administrative proceeding—even one that is quasi-judicial—does not support a claim for abuse of process." *Id.* Moreover, the tort exists to protect the integrity of the judicial process and litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). In contrast, the First Amendment prohibits compelled speech to protect individual autonomy and government distortion of the marketplace of ideas. *See Janus*, 138 S. Ct. at 2464. There is no basis to import an abuse-of-process tort's malice and probable cause elements into Appellants' First Amendment claim. To do so would defy *Janus*, which requires only that a government union seize money from individuals without their affirmative consent. 138 S. Ct. at 2486.

2. A "good faith" defense is incompatible with the text of Section 1983.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). 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*, 566 U.S. at 361 (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. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013) (comparing a statute's permissive "may" with the "mandatory" "shall"). The statute's plain language requires that Local 668 be held liable to Plaintiff for damages.

3. A good faith defense is incompatible with the statutory basis for qualified immunity and Local 668's lack of that immunity.

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

carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citing *Richardson*, 521 U.S. at 409–11). Defendants are not entitled to qualified immunity to Section 1983 damages claims unless these exacting strictures are satisfied. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (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).

Local 668 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 which Local 668 asserts, 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

Local 668 seeks here. Qualified immunity bars a damages claim against an individual if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That accurately describes the ostensible "defense" the union asserts. It makes little sense to find that defendants who are not entitled to qualified immunity to Section 1983 damages liability are nonetheless entitled to substantively the same thing, but under a different name.

4. 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 SEIU 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 public employees. 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.

E. Oliver has standing for her claims for declaratory relief.

The District Court held that Plaintiff's claims for declaratory relief were moot because the Union allowed her to resign and refunded the Union dues she paid after August 10, 2018. App. 020. But Local 668's attempt to moot this case by refunding Plaintiff her money and allowing her to resign does not relieve the Union and the Commonwealth from having to defend the unconstitutional policy that they continue to enforce against any employee who is not determined enough, or has the means, to sue.

Unions have attempted to use similar tactics in other similar cases across the country. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice the union's policy required).

The Ninth Circuit has already rejected a similar argument on mootness that Local 668 presents here. As it explained:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages

> claims are the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.,* 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk v. Inslee, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018).[1] The Ninth Circuit recognized that claims like Ms. Oliver's would never be addressed by courts if the union is allowed to moot them by

[1] Some courts have distinguished *Fisk* from cases such as Plaintiff's by noting that the *Fisk* plaintiffs asserted their claims on behalf of a putative class. *See, e.g., Thomas Few v. United Teachers L.A.*, No. 2:18-cv-09531-JLS-DFM, 2020 U.S. Dist. LEXIS 24650, at *12 (C.D. Cal. Feb. 10, 2020); *Grossman v. Hawaii Gov't Employees Ass'n/AFSCME Local 152*, No. 18-CV-00493-DKW-RT, 2020 WL 515816, at *11-*12 (D. Haw. Jan. 31, 2020); *Stroeder v. Serv. Employees Int'l Union*, No. 3:19-CV-01181-HZ, 2019 WL 6719481, at *3 (D. Or. Dec. 6, 2019). However, this distinction does not hold up under scrutiny. Numerous courts, including the Ninth Circuit, have held that when a court analyzes standing *before* a class is certified, it is only the standing of the named plaintiffs that it may rely upon. *Titus v. BlueChip Fin.*, No. 18-35940, 2019 U.S. App. LEXIS 35769, at *3 (9th Cir. Dec. 2, 2019) ("Nor does the case's status as a putative class action affect our analysis. Because no class has been certified, Titus is the only plaintiff before the court; once she has dismissed her claims with prejudice, no other plaintiff can step into her shoes to continue this legal action…").. Thus, the *Fisk* Court based its holding on mootness on the union's behavior, not the fact of the potential class.

refunding dollars to individual plaintiffs. Indeed, since most windows are annual, few cases would reach judgment in a district court, much less have the opportunity for appellate review.

Similarly, in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted fees to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). And 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 Local 668 wishes to avoid this Court determining the legality of its policies.

It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is

sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court there pointed to *Roe v. Wade,* 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire,* 416 U.S. at 125. Even with the side letter, Local 668 and Commonwealth continue to force employees to pay union dues taken from employees without their affirmative consent, because the letter obligates the Commonwealth to continue with dues deduction even when an employee resigns union membership (Side Letter ¶ 5). This policy continues to impact present interests, as Local 668 and the Commonwealth continue to enforce it. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of a declaration that these provisions of the side letter and collective bargaining agreement, and the statutes they rely on, are unconstitutional.

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

Recognizing the Union as Ms. Oliver's exclusive representative for bargaining purposes violates her First Amendment rights of speech and association. She cannot

be forced to associate with a group that she disagrees with.

A. Forcing Ms. Oliver to have the Union serve as her exclusive representative is unconstitutional.

Under 43 P.S. §§ 1101.604-606, as a condition of her employment, Plaintiff must allow the union to speak (lobby) on her behalf on wages and hours, matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. Pennsylvania law grants the union prerogatives to speak on Ms. Oliver's behalf on not only wages, but also "terms and conditions of employment." 43 P.S. §§ 1101.606. These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When the Commonwealth certifies the Union to represent the bargaining unit, it forces all employees in that unit to associate with the Union. This coerced association authorizes the Union to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, even if the employees disagree with the Union's positions and speech.

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

Legally compelling Ms. Oliver to associate with the Union demeans her First

Amendment rights. Although the issue has not been directly before the Supreme Court, it has questioned whether exclusive-representation in the public-sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive representation forces the employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. Pennsylvania laws command Ms. Oliver's involuntary affirmation of objected-to beliefs. The fact that she retains the right to speak for herself in certain circumstances does not resolve the fact that the Union organizes and negotiates as her representative in her employment relations.

Exclusive representation is also forced association: Ms. Oliver is forced to associate with the Union as her exclusive representative simply by the fact of her employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Yet Ms. Oliver

has no such freedom, no choice about her association with the Union; it is imposed, coerced, by the Commonwealth's laws.

Exclusive representation is therefore subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at 2465-69. And Ms. Oliver is not seeking the right to form a rival union or to force the government to listen to her individual speech. She only wishes to disclaim the Union's speech on her behalf. She is guaranteed that right, not to be forced to associate with the Union and not to let the Union speak on her behalf by the First Amendment.

B. The District Court's reliance on *Knight* is misplaced.

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

U.S. at 273.

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

The court explained the issue it was addressing: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. Confronted with this claim, the court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

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

The central issue of the *Knight* decision is whether plaintiffs could compel the

government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Ms. Oliver's claim that the government cannot compel her to associate with the Union by authorizing the Union to bargain on her behalf.

Knight is, therefore, not responsive to the question Ms. Oliver now raises: whether someone else can speak in her name, with her imprimatur granted to it by the government. She does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. She does not demand that the government schedule meetings with her, engage in negotiation, or any of the other demands made in *Knight*. She only asks that the Union not do so in her name.[2]

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's orders denying Plaintiff's motion for summary judgment and granting Local 668 and the Commonwealth Defendant's motions for summary judgment.

[2] In the alternative, Plaintiff reserves the right to to argue on appeal that *Knight* should be overruled. *Knight* asserted that exclusive representation "in no way restrained [plaintiff's]…freedom to associate," *Knight*, 465 U.S. at 288. However, the Supreme Court in *Janus* stated that exclusive representation "substantially restricts the rights of individual employees," *Janus*, 138 S. Ct. at 2460. *Knight* is therefore, in error on this point and should be overruled to bring greater clarity to the doctrine.

Dated: February 18, 2020

Respectfully submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab
jschwab@libertyjusticecenter.org
Daniel Suhr
dsuhr@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702

Charles O. Beckley, II
Pennsylvania Bar No. 47564
Beckley & Madden, LLC
212 N. Third St., Suite 301
Harrisburg, PA 17101
Telephone (717) 233-7691
Facsimile (717) 233-3740
cbeckley@pa.net

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Third Cir. Case Number: 19-3876

I certify that this brief contains 9435 words, excluding the items exempted by Fed. R. App. P. 32(f), in compliance with Fed. R. App. P. 28(a)(7)(B)(i) and 32(g)(1), and 3rd Cir. L.A.R. 31.1(c). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Pursuant to 3rd Cir. L.A.R. 31.1(c), I also hereby certify that the text of the electronic brief filed via the ECF system is identical to the text in the paper copies provided to this Court and to the parties.

I certify that I scanned the electronic version of this brief using Sophos Anti-Virus Endpoint Advanced Version 9.9.6, and no virus was detected.

/s/ Jeffrey M. Schwab
February 18, 2020

CERTIFICATE OF BAR ADMISSION

Third Cir. Case Number: 19-3876

Pursuant to 3rd Cir. L.A.R. 28.3(d), I certify that I, Jeffrey M. Schwab, am admitted to practice before the United States Court of Appeals for the Third Circuit.

/s/ Jeffrey M. Schwab
February 18, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I electronically filed the forgoing Opening Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab
Counsel for Appellants

No. 19-3876

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHALEA OLIVER

Appellant

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; TERESA D. MILLER, Secretary, Pennsylvania Department of Human Services; MICHAEL NEWSOME, Secretary of Pennsylvania Office of Administration; JOSH SHAPIRO, Attorney General of Pennsylvania; JAMES M. DARBY, Chairman, Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, in their official capacities

Respondents

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:19-cv-00891
Hon. Gerald A. McHugh

APPENDIX – Volume I

Jeffrey M. Schwab
jschwab@libertyjusticecenter.org
Daniel R. Suhr
dsuhr@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668

Charles O. Beckley, II
Beckley & Madden, LLC
212 N. Third St., Suite 301
Harrisburg, PA 17101
Telephone (717) 233-7691
cbeckley@pa.net

Attorneys for Appellants

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

SHALEA OLIVER, Plaintiff v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668, et al. Defendants.	CASE NO. 2:19-cv-00891-GAM *Judge McHugh*

PLAINTIFF'S NOTICE OF APPEAL

NOTICE is hereby given that Plaintiff-Appellant Shalea Oliver appeals to the United States Court of Appeals for the Third Circuit the District Court's November 12, 2019 Memorandums (ECF Nos. 41 and 43) and Orders (ECF Nos. 42 and 44).

Dated: December 11, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab

Jeffrey M. Schwab*
Daniel R. Suhr*
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

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

Attorneys for Plaintiff

* Admitted pro hac vice

CERTIFICATE OF SERVICE

This document has been filed electronically using the ECF system and is available for viewing and downloading from the ECF system. All parties are represented by counsel registered on ECF, and all counsel were served by the automatic notices generated upon filing.

Dated: December 11, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab*
Daniel R. Suhr*
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

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

Attorneys for Plaintiff

* Admitted pro hac vice

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

SHALEA OLIVER,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	**No. 19-891**
v.	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668 ET AL.,	:	
Defendants.	:	

ORDER

This 12th day of November, 2019, for the reasons stated in the accompanying memorandum, Local 668's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment against Local 668 is **DENIED**. It is **FURTHER ORDERED** that Local 668's Motion to Dismiss claims for injunctive relief is **GRANTED**. Plaintiff's Complaint against Local 668 is **DISMISSED** with prejudice.

/s/ Gerald Austin McHugh
United States District Judge

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

SHALEA OLIVER,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	**No. 19-891**
v.	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668 ET AL.,	:	
Defendants.	:	

ORDER

This 12th day of November, 2019, for the reasons stated in the accompanying memorandum, the Commonwealth Defendants' Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment against Commonwealth Defendants is **DENIED**. Plaintiff's Complaint against the Commonwealth Defendants is **DISMISSED** with prejudice.

/s/ Gerald Austin McHugh
United States District Judge

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

SHALEA OLIVER,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	**No. 19-891**
v.	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668 ET AL.,	:	
Defendants.	:	

McHUGH, J. **NOVEMBER 12, 2019**

MEMORANDUM

This is an action brought in the aftermath of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), in which a sharply divided Supreme Court significantly altered the structure under which public employee unions operate when it overruled long-standing precedent, declaring the practice of collecting fees from non-member employees unlawful. Plaintiff here, a former union member who resigned from the union after *Janus* was decided, seeks monetary damages against Defendant, Service Employees International Union Local 668 (or the Union), for membership dues paid to the Union from the beginning of her employment in December 2014 through the date of her resignation in August 2018. Although nothing compelled Plaintiff to join the Union, she argues that she cannot have given her "affirmative consent" in her choice to become a member and is now entitled to a full refund of her membership dues. Plaintiff further seeks a declaratory judgment that certain provisions of Pennsylvania's Public Employe Relations Act (PERA) are unconstitutional as applied to her.

The parties have agreed to proceed through cross-motions for summary judgment on a stipulated record.

As to Plaintiff's damages claim, the Union promptly refunded all dues deducted from her pay once she resigned from membership, and there is no factual or legal basis for any refund while she was a member.[1] Furthermore, Plaintiff's damages claim is one for violation of constitutional rights brought under 42 U.S.C. § 1983, and she cannot meet the requirement of state action. Even if she could, the Union would be protected by its good-faith reliance on settled law until *Janus* was decided.

As to Plaintiff's claim for declaratory relief with respect to the operation of PERA, she lacks standing, because she was permitted to resign from membership and the current collective bargaining agreement between the Commonwealth and Local 668 does not include the "union security" clause to which she objects. For these reasons, the Union's motion for summary judgment and motion to dismiss will be granted, and Plaintiff's motion for summary judgment will be denied.

I. Factual Background

Plaintiff Shalea Oliver is an employee of the Pennsylvania Department of Human Services working as an Income Maintenance Caseworker in the Philadelphia County Assistance Office. Employees at the Philadelphia County Assistance Office are represented in collective bargaining by Local 668, and at the time of Plaintiff's hiring, a Collective Bargaining Agreement (CBA) existed between Local 668 and the Commonwealth as authorized by PERA. The CBA at that time included union security provisions, authorized by 43 P.S. §§ 1101.301(18), 1101.401,

[1] In her complaint, Plaintiff requested damages in the form of (1) all dues paid to the Union before the June 27, 2018, *Janus* decision and (2) all dues paid after the *Janus* decision. The Union has already refunded all dues paid to Plaintiff from the August, 10, 2018 date of her resignation letter, and so Plaintiff effectively seeks a refund of all dues paid prior to that date. I deal with Plaintiff's request for declaratory and injunctive relief regarding exclusive representation in my opinion regarding Plaintiff's claims against the Commonwealth.

and 1101.705, which restricted the window of time in which Local 668 members could withdraw their membership and cease paying full membership dues.

Upon being hired in December 2014, Plaintiff was presented with a choice as then-sanctioned by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and PERA: either enroll in Local 668 as a member and have full membership dues deducted regularly from her pay, or decline membership and contribute a reduced amount in the form of agency fees.[2] Plaintiff elected to enroll as a member in the Union. On June 27, 2018, the Supreme Court issued its opinion in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), overruling *Abood* and holding that charging agency fees to non-member employees in public sector unions was unconstitutional under the First Amendment. On August 10, 2018, Plaintiff sent a letter to Local 668 announcing her resignation from the Union and requesting the cessation of dues deductions. The Union transmitted the letter to the Commonwealth on September 20, 2018, instructing it to cease deducting dues. When the Commonwealth did not immediately respond, the Union wrote again in November 2018 and January 2019, until the requested action was taken, and Local 668 refunded to Plaintiff the amount deducted in the interim, a total of $287.49. Stipulation ¶¶ 18-23, ECF 35. Plaintiff is no longer a member of Local 668 and does not pay any dues to the Union.

Following *Janus*, Local 668 and the Commonwealth entered into a Side Letter effective April 2, 2019, modifying the CBA and effectively nullifying the union security provisions it

[2] Agency fees, or "fair share" fees, were reduced payments that public sector unions could collect from non-member employees solely for the purposes of fulfilling their collective bargaining obligations. The levying of agency fees had been endorsed by *Abood* as a method for, *inter alia*, preventing non-members from "free riding" off of unions' efforts to obtain benefits for all represented employees, while also recognizing non-members' First Amendment rights to refrain from subsidizing ideological activity they were opposed to. *Abood*, 421 U.S. at 221-22. Workplaces governed by CBAs that allow for the collection of agency fees are known as agency shops.

contained by allowing members to resign at any time from that date forward. The Side Letter has since been superseded by a new CBA which lacks any union security provisions.

II. Standard of Review

Plaintiff and Local 668 have filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). A grant of summary judgment is appropriate "if, drawing all inferences in favor of the nonmoving party, the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009). The parties have submitted stipulated facts and agree that there are no genuine issues of material fact present in this case.

Local 668 has also filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(h)(3), on the basis that Plaintiff lacks standing to pursue its claims for declaratory relief as to the application of 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705. Rule 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

III. Discussion

A. Plaintiff's Voluntary Choice to Join Local 668 Defeats Her Claim for Damages

When Plaintiff was hired, PERA made clear that she was not obligated to join the Union: "It shall be lawful for public employes to organize, form, join or assist in employe organizations… and such employes shall also have the right to refrain from any or all such activities."[3] 43 P.S. § 1101.401. It is difficult to comprehend how Plaintiff can complain that

[3] The irregular spelling "employe" appears in public sector labor law statutes of other states as well. The Wisconsin Court of Appeals examined this anomaly with respect to its own statute and determined that it resulted from a deliberate decision made by the statute's original drafter to prevent typographical errors: "Since 'e' and 'r' are right next to each other on the typewriter keyboard, there's a real risk that 'employer' might be typed 'employee,' and

she was compelled to join the Union in violation of her First Amendment right of free association.[4] There was no legal compulsion for her to join, and the economic advantage in declining membership and paying an agency fee would have been self-evident.[5] Plaintiff contends that if only she had known of a constitutional right to pay nothing for services rendered by the Union—despite knowledge of her right at the time to refuse membership and pay less—she would have declined union membership completely. I can discern no logic in such a position. Plaintiff has not alleged she was actively pressured to join, and the Supreme Court has held that that background social pressure employees may feel to join a union is "no different from the pressure to join a majority party that persons in the minority always feel" and "does not create an unconstitutional inhibition on associational freedom." *Knight v. Minnesota Community College Faculty Association*, 465 U.S. 271, 290 (1984). Not surprisingly, other courts have held that "[w]here the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily." *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991). *Accord Farrell v. IAFF*, 781 F. Supp. 647, 649 (N.D. Cal. 1992).

In codifying Plaintiff's right to refrain from joining the Union, PERA was following Supreme Court precedent established long before *Janus*. The "First Amendment right to opt out of union membership was clarified in 1977 [by *Abood*]," with the result that an employee's decision to join a union thereafter must be viewed as voluntary. *Smith v. Sup. Ct., Cty. of Contra*

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vice-versa." *Richland Sch. Dist. v. Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 479 N.W.2d 579, 583 n.1 (Wis. Ct. App. 1991).

[4] At the Rule 16 Conference, Plaintiff's Counsel was unable to identify any values exemplified by the Union or any positions it has taken that were objectionable to Plaintiff.

[5] The parties have stipulated that agency fees would have amounted to 56.1 percent of full union dues. Stipulated Facts ¶ 13.

Costa, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018). Nothing in *Janus* suggests otherwise; in fact, the plaintiff there had invoked his right not to join the defendant union and was an agency-fee payer.

In further analyzing whether Plaintiff's decision to join the union was voluntary, it is important to bear in mind the relationship between Plaintiff and the Union was contractual in nature.[6] A subsequent change in the law does not permit a party to a contract who has enjoyed the benefit of the bargain to rescind it with the benefit of hindsight. *See Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 274-75 (3d Cir. 2002) (declining to allow party to revisit settlement agreement because of a change in background law, holding that it chose to do so "exchange for valuable consideration" and "must bear the consequences of its informed, counseled and voluntary decision"); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("Of particular concern in *Coltec* was the belief that the company was attempting to escape the consequences of a bargain it regretted in hindsight."). As the Union points out, even in the profoundly serious context of plea agreements in criminal cases, a later development in the law benefiting a defendant does not permit that defendant to revoke a plea. *Brady v. United States*, 397 U.S. 742, 756-57 (1970); *United States v. Johnson*, 67 F.3d 200, 201-02 (9th Cir. 1995).

Given the strength of these principles and their applicability to this context, federal courts have been unanimous in rejecting claims brought by former union members seeking to rescind membership retroactively. *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019); *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019); *Cooley v. Cal.*

[6] "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield v. NLRB*, 394 U.S. 423, 426 n.3 (1969); *see also Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958) (holding the "contractual conception of the relation between a member and his union widely prevails in this country"); *James v. Int'l Bhd. of Locomotive Engineers*, 302 F.3d 1139, 1146 (10th Cir. 2002) ("It is well settled that the relationship existing between a trade union and its members is contractual and that the constitution . . . constitute[s] a binding contract.") (citations omitted).

Statewide Law Enforcement Ass'n., 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019); *Smith v. Sup. Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018); *Seager v. UTLA*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019); *Babb v. California Teachers Assn.*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019).

Plaintiff may now regret the bargain she struck with the Union by choosing to become a member, but such later regret does not suffice to show that her past choice was unlawfully coerced or compelled. The facts to which the parties have stipulated cannot support a claim that Plaintiff was compelled to associate with Local 668 in violation of her First Amendment rights.[7]

B. 42 U.S.C. § 1983 and State Action

Even assuming for the sake of discussion that Plaintiff were able to show that her choice to join Local 668 was somehow unlawfully compelled, she would not be able to vindicate her rights against the Union through a § 1983 suit because the Union was not acting under "color of state law." In determining whether the conduct at issue was taken under the color of state law, courts determine whether the action may "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). There are two prongs to the "fair attribution" test: first, the conduct responsible for the alleged deprivation must have been "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible"; and second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.; see also American*

[7] Agency fees are not at issue in this case, because they would be subsumed by the union dues that Plaintiff voluntarily paid. Even if they were, no federal court has interpreted *Janus* as entitling non-members to a refund of agency fees. *See Cook v. Brown*, 364 F. Supp. 3d 1184, 1193 (D. Or. 2019) (noting that "there is no indication that *Janus* intended to open the floodgates to retroactive monetary relief"); *Hough v. SEIU Local 521*, 2019 WL 1785414, at*1 (N.D. Cal. Apr. 16, 2019); *Babb v. California Teachers Association*, 378 F. Supp. 3d at 876 (C.D. Cal. 2019); *Wholean v. CSEA Local 2001*, 2019 WL 1873021, at *3 (D. Conn. April 26, 2019); *Bermudez v. SEIU, Local 521*, 2019 WL 1615414, at *1 (N.D. Cal. Apr. 16, 2019); *Mooney v. Illinois Educ. Ass'n.*, 372 F. Supp. 3d 690, 707 (C.D. Ill. 2019); *Janus v. AFSCME*, ___ F.3d ___, 2019 WL 5704367, at *11-12 (7th Cir. Nov. 5, 2019).

Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 50 (1999) (quoting both prongs of *Lugar* test). Plaintiff satisfies the first part of the fair attribution test. The Commonwealth has established an intricate and thorough statutory scheme governing public sector collective bargaining through PERA. Although it is true that Plaintiff was not compelled under PERA to become a member of the Union, Local 668 was only able to lawfully collect membership dues from Plaintiff and other employees through authorization conferred by PERA.

Plaintiff's claim founders, however, at the second part of the test, as Local 668 is not a "state actor" for the purposes of § 1983. In determining whether a party is a state actor under § 1983, the Third Circuit applies Fourteenth Amendment state action doctrine. *Leshko v. Servis*, 423 F.3d 337, 339 (3d. Cir 2005) ("We consider actions 'under color of law' as the equivalent of 'state action' under the Fourteenth Amendment.").[8] The primary question guiding the inquiry is whether "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id*. at 340 (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)).[9]

[8] The defendants in *Leshko* were former foster parents to the plaintiff, and the foster care program is governed by Pennsylvania state law and regulations. *See* 55 Pa. Code §§ 3700 et. seq; 42 Pa. §§ 6301 et. seq. As such, the *Leshko* Court's understandably focused on the second prong of *Lugar's* fair attribution test, whether the parents were state actors for the purpose of § 1983 liability. Th e first prong of the *Lugar* test was easily satisfied.

[9] It is worth echoing the Third Circuit's characterization of state action doctrine as "labyrinthine." *Leshko*, 423 F.3d at 338. Even while articulating the inquiry in terms of there existing a close nexus between the state and the challenged action, the *Leshko* Court acknowledged there is "no 'simple line' between states and private persons." *Id*. at 339. In *Kach v. Hose*, 589 F.3d 626, 646 (3d. Cir. 2009), the Third Circuit reaffirmed *Leshko's* formulation of the inquiry but made additional reference to "three broad tests generated by Supreme Court jurisprudence" that it had outlined in an earlier case, *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3d. Cir. 1995). As formulated by *Mark* and *Kach*, these tests are: (1) "whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state"; (2) "whether the private party has acted with the help of or in concert with state officials"; and (3) whether "the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity." *Kach*, 589 F.3d at 646 (quoting *Mark*). In my view, the *Leshko* Court's categorization of state action cases, along with the fair attribution test laid out by *Lugar*, are largely complementary with the criteria that comprise the "broad tests" previously identified by the Third Circuit in *Mark* and *Kach*. Furthermore, both *Leshko* and *Kach* emphasize that the state action inquiry is fact-specific, and thus resistant to fixed categorization. *Leshko*, 423 F.3d at 339; *Kach*, 589 F.3d at 646.

Leshko further refined the inquiry by identifying two factual categories of cases that may constitute state action, those involving activities and those involving actors. Under *Leshko*, a private party that undertakes "an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant" would be a state actor under § 1983. *Id*. at 340. "Determining state action in such cases requires tracing the activity to its source to see if that source fairly can be said to be the state." *Id*. Stated differently, "[t]he question is whether the fingerprints of the state are on the activity itself." *Id*. Alternatively, "an *actor* that is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management" can implicate § 1983 state action doctrine. *Id*.

It is simple to dispense with the second category of cases identified by *Leshko*. Local 668 is not an actor controlled by the state, is not performing a function delegated by the state, and is not entwined with government policies or management. The leadership, bylaws, operations, and priorities of Local 668 are all determined by its membership, not by the Commonwealth. Local 668 has not been delegated any state functions, nor does it rely upon material resources from the state in carrying about its own activities. Additionally, although public sector collective bargaining is sanctioned by the Commonwealth, Local 668 does not play a managerial role in shaping government policies or management decisions; to the contrary, it negotiates with the Commonwealth in an adversarial posture on behalf of its membership. All these facts would indicate that Local 668 is not a state actor under *Leshko*.

In determining whether the *activity* of enrolling public sector employees as members pursuant to agency shop provisions constitutes state action, Local 668 emphasizes that public sector employees had and continue to have the option of joining or refraining from joining unions as members. Moreover, as Local 668 correctly observes, it is unlawful for the

Commonwealth or public sector unions to coerce employees into becoming members, because PERA confers a statutory right on employees to abstain from taking part in union activity. These arguments reinforce the fact that the state cannot be said to putting its thumb on the scale in promoting union membership enrollment. Weighing against the Union's position is the broader structural context through which Local 668 and the Commonwealth interact in the collective bargaining process. Local 668 is only able to organize, enroll, and collect dues from members insofar as it has been authorized to do so by PERA, and the Commonwealth is authorized to deduct dues payments from employee paychecks.

None of these facts, however, rise to the level required to find that the Commonwealth is a "joint participant" for the purposes of state action under § 1983. The Third Circuit has analyzed this question with respect to the National Labor Relations Act (NLRA), a statute analogous to PERA in many respects, squarely holding that "state action is not present" in circumstances involving "actions taken by a union pursuant to an agency-shop provision in a collective bargaining agreement." *White v. Communications Workers of America, AFL-CIO, Local 1300*, 370 F.3d 346, 349-50 (3d Cir. 2004). In doing so, the *White* Court adopted the analysis of the District of Columbia Circuit in an earlier case, *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), which had found that the NLRA's authorization of agency shop provisions did not amount to state action because the "NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues," and "the parties, like any two parties to a private contract, were still free to adopt or reject an agency shop clause" in their CBA. *Id*. at 478.[10] Both plaintiffs in those cases were unsuccessful in arguing that the NLRA's

[10] Plaintiff cites to *Abood*, *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985), and *Linscott v. Millers Falls Co*., 440 F.2d 14 (1st Cir. 1971), for the proposition that a public-sector union acting

authorization of agency shop provisions in CBAs was enough to satisfy § 1983's state action requirements.

Although *White* and *Kolinske* did not involve public employee unions, their shared rationale also has logical force in this context. Like its NLRA counterpart, PERA does not mandate the inclusion of agency shop provisions in agreements negotiated between the Commonwealth and public sector unions, but instead merely authorizes them. The fact that the parties availed themselves of the collective bargaining procedures established by PERA is not sufficient to establish state action. Finding otherwise would contradict the principles of *White*.

In searching for additional avenues to bolster its argument that state action is present, Plaintiff cites to several cases which hold that dues authorization constitutes a contract between the employee and the employer, not the Union. Pl.'s Resp. to Mot. for Summ. J. at 3-4, ECF 39; *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.").[11] If dues deduction authorizations are properly considered as two-party contracts between the employee and the employer, Plaintiff reasons, then state action must necessarily be implicated.

I find this view of dues-deduction provisions unrealistic and artificial, because once the Commonwealth has issued a wage payment under the CBA to its employee it has no beneficial

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pursuant to an agency shop agreement authorized by statute is "state action." But within this circuit, *White* controls, and the *White* Court explicitly noted a split among the circuits and chose to follow *Kolinske*. *White*, 350 F.3d at 353. It is also important to note that the cases on which *Abood* relied, *Employes' Dept. v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961), were concerned with the Railway Labor Act ("RLA"), which goes further than the NLRA or PERA by not merely permitting parties to bargain for agency shop agreements, but also preempting any state laws that might otherwise seek to prevent parties from agreeing to implement union shop provisions, which require union membership as a condition of employment. 45 U.S.C. § 152 subd. 11.

[11] *See also NLRB v. Atlanta Printing Specialties & Paper Prods. Union*, 523 F.2d 783, 785 (5th Cir. 1975); *NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987).

interest in any portion of those wages. In deducting dues from the employee's pay it is simply acting as a transfer agent carrying out the separate agreement between the union and its member. Such an arrangement is, as the National Labor Relations Board has found, accurately described as a third-party assignment of a right:

> A check-off authorization is that special form of contract defined in the Restatement 2d, *Contracts* Section 317 (1981), as an "assignment of a right." More specifically, a checkoff authorization is a partial assignment of a future right, that is, an employee (the assignor) assigns to his union (the assignee) a designated part of the wages he will have a right to receive from his employer (the obligor) in the future, so long as he continues his employment. The employer is thereby authorized to pay the specified amounts to the union when the employee's right to wage payments accrues.

IBEW Local No.2088 (Lockheed Space Operations), 302 N.L.R.B 322, 327 (1991) (internal citations omitted).

The union's right to collect the dues is not created by the Commonwealth; it is created by the union's contract with its members. The Commonwealth's role as employer role is strictly ministerial, implementing the instructions of the employee. The union would ultimately collect its due regardless, but by some other means. It cannot credibly be said that by affording the convenience of a dues check-off a public employer is "significantly encouraging" the assignment or that the employer is its "source" under *Leshko*. As a result, the Union is not involved in state action by collecting dues pursuant to an agency-shop agreement with the employer.[12]

[12] In *Janus v. AFSCME*, ___ F.3d ___, 2019 WL 5704367 at *7 (7th Cir. Nov. 5, 2019), following remand, the Seventh Circuit recently reached a different conclusion as to state action even as it rejected the plaintiff's claim for a refund of his agency fee payments. But I am bound by *White*, and in any event do not find the Seventh Circuit's analysis persuasive for the reasons set forth above.

C. Good-Faith Defense

Even if there were sufficient state action to permit a § 1983 suit against the Union to proceed, Local 668 would nonetheless prevail based upon its good-faith belief that it was complying with statutory and constitutional law prior to *Janus*. Numerous federal courts have held that good-faith reliance on prior precedent defeats refund claims brought in the aftermath of *Janus.*[13] The Third Circuit, following the Fifth Circuit's lead, has found that "private defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1274 n.29 (3d Cir. 1994) (quoting *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993)). Under the Third Circuit's standard, Plaintiff would need to prove that the union had a "subjective" understanding that it was violating her rights or displayed "gross negligence" in maintaining a belief that its conduct was lawful. *Jordan*, 20 F.3d at 1277-78.[14]

Plaintiff will not be able to do so on the record here. The CBA's agency shop provisions were lawful under PERA, and more importantly, were sanctioned by the Supreme Court in *Abood*. Their constitutionality had been considered and upheld by the Supreme Court multiple

[13] *See, e.g.*, *Janus v. AFSCME*, ___ F.3d ___, 2019 WL 5704367 (7th Cir. Nov. 5, 2019); *Danielson v. AFSCME Council 28*, 340 F. Supp. 3d 1083, 1086 (W.D. Wash. 2018); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1232 (W.D. Wash. 2019); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1193 (D. Or. 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1006 (D. Alaska 2019); *Hough v. SEIU Local 521*, 2019 WL 1274528 at *1 (N.D. Cal. Mar. 20, 2019), *amended*, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 981 (N.D. Ohio 2019); *Mooney v. Illinois Educ. Ass'n*, 372 F. Supp. 3d 690, 706 (C.D. Ill. 2019); *Bermudez v. SEIU Local 521*, 2019 WL 1615414 at *1 (N.D. Cal. Apr. 16, 2019); *Akers v. Maryland Educ. Ass'n*, 376 F. Supp. 3d 563, 572 (D. Md. 2019); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 at *3 (D. Conn. Apr. 26, 2019); *Babb*, 378 F. Supp. 3d at 870; *Hernandez v. AFSCME Cal.*, 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019); *Diamond v. Pa. State Educ. Ass'n*, 2019 WL 2929875 at *29 (W.D. Pa. July 8, 2019); *Ogle v. Ohio Civil Svc. Employees Ass'n, AFSCME, Local 11*, 397 F. Supp. 3d 1076, 1087-88 (S.D. Ohio 2019).

[14] Though some courts and commentators have looked to common law tort analogues to determine whether and how the good-faith defense should apply to private parties sued under § 1983, the Third Circuit has not required such an approach and it not my place to adopt one.

times after *Abood*, including most recently in *Harris v. Quinn*, 573 U.S. 616 (2014). As noted at the outset, *Janus* was decided by a five-to-four majority, with a powerful dissent grounded in the doctrine of *stare decisis*. Against that background it would be unreasonable to hold that the Union should have known of the constitutional infirmity of agency shop provisions.

D. Plaintiff's Claims for Declaratory Relief Are Moot

Finally, Plaintiff's claims for declaratory and injunctive relief regarding the application of 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 suffers from lack of standing and mootness. As Plaintiff is no longer a member of the Union, she has no cognizable interest in determining the constitutionality of the union security provisions, and an opinion rendered by me on the issue would be advisory.[15] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). As to mootness, Plaintiff obtained relief even before the Side Letter was negotiated. Plaintiff cites Paragraph 5 of the the Side Letter to suggest that the Commonwealth is required to deduct dues regardless of the employee's wishes. But this is intellectually dishonest because it ignores Paragraphs 6 through 8, which make clear that the opposite is true. Side Letter, ECF 26-6. Moreover, the parties have stipulated that the CBA in effect at the time has been superseded by an amended CBA, which does not have a "maintenance of membership" provision. Stipulation ¶ 7. Finally, as noted in my memorandum dismissing claims against the Commonwealth, because the Commonwealth has no institutional incentive to lend support to the Union, there is no reasonable basis for suggesting that a violation might recur.

[15] Plaintiff's citation to *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) is inapposite. In *Knox*, the union levied a special assessment on non-members. Some non-members sued the union to obtain a refund: the district court found in favor of the plaintiffs but the Ninth Circuit reversed. After the Supreme Court granted certiorari, SEIU voluntarily refunded plaintiffs the assessments in an effort to render their claims moot. Here, Plaintiff resigned her membership several months before bringing her suit, and thus lacks standing to have her claims heard before this court. Furthermore, the Union and the Commonwealth have since removed the union-security provisions at issue in the current CBA between them.

IV. Conclusion

Plaintiff's claim for damages suffers from multiple defects, the most significant of which is that the record cannot support a conclusion that she was in any sense compelled to join the Union. Furthermore, Plaintiff is no longer a member of the Union and the current CBA does not contain any union security provisions, creating issues as to both standing and mootness. Accordingly, I grant both Local 668's Motion for Summary Judgment and its Motion to Dismiss, and deny Plaintiff's Motion for Summary Judgment.

/s/ Gerald Austin McHugh
United States District Judge

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

SHALEA OLIVER,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	**No. 19-891**
v.	:	
	:	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668 ET AL.,	:	
Defendants.	:	

McHUGH, J. **NOVEMBER 12, 2019**

MEMORANDUM

This is an action brought in the aftermath of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), in which a sharply divided Supreme Court significantly altered the structure under which public employee unions operate when it overruled long-standing precedent, and declared the practice of collecting fees from non-member employees unlawful. Plaintiff here, a former union member who resigned after *Janus* was decided, seeks monetary and injunctive relief from the Commonwealth of Pennsylvania for alleged violations of her First Amendment rights, including a complete refund of her membership dues and an end to public sector exclusive bargaining. Because she can neither show an ongoing controversy as to her claims against the Commonwealth, nor show that *Janus* has made exclusive bargaining unlawful, the Commonwealth Defendants are entitled to judgment as a matter of law.

I. Factual Background

Plaintiff Shalea Oliver is an employee of the Pennsylvania Department of Human Services working in the Philadelphia County Assistance Office. Employees at the Philadelphia County Assistance are represented in collective bargaining by Service Employees International

Union Local 668, and at the time of Plaintiff's hiring, a Collective Bargaining Agreement (CBA) existed between Local 668 and the Commonwealth, as authorized by Pennsylvania's Public Employe Relations Act (PERA).[1]

Upon being hired in December 2014, Plaintiff was presented with a choice as then-sanctioned by the Supreme Court's decision in *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977), and PERA: either enroll in Local 668 as a member and have full membership dues deducted regularly from her pay, or decline membership and have a lesser amount deducted from her pay in the form of an "agency fee" to account for the services the Union provided in protecting her financial interests. Plaintiff chose to enroll as a member in the Union, paying full membership dues.[2] On June 27, 2018, by a 5-to-4 majority, the Supreme Court issued its opinion in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), overruling *Abood* and holding that charging agency fees to non-member employees in public sector unions was unconstitutional under the First Amendment. On August 10, 2018, Plaintiff sent a letter to Local 668 announcing her resignation from the Union and requesting the cessation of dues deductions. After being notified by Local 668 of Plaintiff's request, the Commonwealth stopped deducting dues from Plaintiff's paychecks in January 2019. Local 668 then refunded the money deducted from Plaintiff's paychecks from the date of Plaintiff's letter to the time the Commonwealth suspended

[1] The irregular spelling "employe" appears in public sector labor law statutes of other states as well. The Wisconsin Court of Appeals examined this anomaly with respect to its own statute and determined that it resulted from a deliberate decision made by the statute's original drafter to prevent typographical errors: "Since 'e' and 'r' are right next to each other on the typewriter keyboard, there's a real risk that 'employer' might be typed 'employee,' and vice-versa." *Richland Sch. Dist. v. Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 479 N.W.2d 579, 583 n.1 (Wis. Ct. App. 1991).

[2] Plaintiff contends that her choice to join the Union cannot be deemed voluntary. That contention will be separately addressed in a memorandum opinion dealing with her claims against Local 668.

the deductions. Plaintiff is no longer a member of Local 668 and does not currently pay any dues or agency fees to the Union.

II. Standard of Review

Plaintiff and the Commonwealth have filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). A grant of summary judgment is appropriate "if, drawing all inferences in favor of the nonmoving party, the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009). The parties have submitted a statement of undisputed facts, ECF 35, and agree that there are no genuine issues of material fact.[3]

III. Discussion

In Count I of the complaint, Plaintiff asserts that Commonwealth Defendants and Local 668 violated her rights to free speech and freedom of association under the First Amendment by collecting membership dues from her. Plaintiff argues that she did not provide the Defendants her "affirmative consent" so as to waive her First Amendment right to refrain from contributing money to Local 668, either as a member or a non-member. In Count II of the complaint, Plaintiff contends that her First Amendment rights to free speech and freedom of association continue to be impinged by the system of exclusive representation effectuated by PERA, which requires a single union representative to bargain on behalf of a represented group of public sector workers. Although she is no longer a member of Local 668, Plaintiff argues that she is still

[3] The parties were granted leave to conduct discovery but have not cited to anything beyond the stipulated facts.

unlawfully compelled to associate with the Union based on its status as her bargaining unit's exclusive representative.

In moving for summary judgment, the Commonwealth makes two arguments: (1) Plaintiff's claims under Count I are moot or otherwise barred by sovereign immunity, and (2) Plaintiff's claims under Count II cannot succeed because exclusive representation does not violate Plaintiff's First Amendment rights. I agree with the Commonwealth that Plaintiff's claims under Count I are moot, and further agree that Plaintiff's Count II claims fail because *Janus* has not rendered public sector exclusive representation unconstitutional. Its motion will therefore be granted and Plaintiff's cross-motion denied.

A. Plaintiff's Claims Under Count I are Moot

Federal courts lack jurisdiction where no real controversy exists. Thus, if the issues presented are "no longer live," the case is moot. *Brown v. Philadelphia Housing Authority*, 350 F.3d 338, 343 (3d Cir. 2003). "The doctrine of mootness requires that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* (quoting *New Jersey Turnpike Authority v. Jersey Cent. Power*, 772 F.2d 25, 31 (3d Cir. 1985)). Thus, "[a] case may become moot if (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have 'completely and irrevocably eradicated the effects of the alleged violation.'" *Finberg v. Sullivan*, 658 F.2d 93, 97-98 (3d Cir. 1980) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

The question before me is whether Plaintiff has alleged the existence of any ongoing violations, or, if the violations alleged have ceased, whether Plaintiff might reasonably expect the violation to recur. The party asserting mootness bears a heavy burden to show the case is moot. *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 254 (3d Cir. 2017). But on the record

here, the Commonwealth has met that burden because Plaintiff's rights are not currently being violated and the Commonwealth has shown that potential future violations are highly unlikely to occur.

Plaintiff seeks declaratory relief against the Commonwealth that its applications of 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 in PERA, which all concern "maintenance of membership" provisions in CBAs between the Commonwealth and representative employee organizations, are unconstitutional. 43 P.S. § 1101.301(18) defines such provisions as follows:

> "Maintenance of membership" means that all employes who have joined an employe organization or who join the employe organization in the future must remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employe or employes may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement.

43 P.S. § 1101.401 outlines the scope of employee rights under PERA:

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

Taken together, these sections of PERA permit CBAs between the Commonwealth and employee organizations such as unions to include time restrictions specifying when an employee has the right to resign from membership. They do not, however, *require* all CBAs to include maintenance of membership provisions. This is further clarified by a separate provision of the statute, § 1101.705:

> Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments *while members*, may be the only requisite employment condition (emphasis added).

Plaintiff mischaracterizes PERA as binding all employee members of public unions by maintenance of membership provisions, when in fact the statute goes no further than to recognize that maintenance of membership provisions are a proper subject of collective bargaining.

This is an important distinction, as reflected by the facts of this case. The previous CBA between the Commonwealth and Local 668, effective from July 1, 2016 to June 30, 2019, included a maintenance of membership provision limiting the timeframe within which members could resign from the Union. In reaction to *Janus*, however, the Commonwealth and the Union agreed to amend the CBA through a Side Letter on April 2, 2019. The Side Letter allowed any member of Local 668 to withdraw membership at any time. The Commonwealth, in turn, agreed to cease deducting dues from former members' pay upon notification by Local 668. The Side Letter did not conflict with or purport to override the statutory scheme created by PERA regarding maintenance of membership provisions; to the contrary, it was executed pursuant to 43 P.S. § 1101.705, altering the terms of the CBA to comply with *Janus.* In short, Plaintiff's argument that the issue is not moot because the Side Letter cannot overcome the statute fails because it is premised upon Plaintiff's misreading of the statute.

Furthermore, as a factual matter PERA did not preclude Plaintiff from resigning, as even before the Side Letter was negotiated and the CBA was amended her wishes were honored and her dues refunded. Plaintiff sent a letter of resignation on August 10, 2018. The Union transmitted the letter to the Commonwealth on September 20, 2018, instructing it to cease deducting dues. When the Commonwealth did not immediately respond, the Union wrote again in November 2018 and January 2019, until the requested action was taken, and Local 668 refunded to Plaintiff the amount deducted in the interim, a total of $287.49. Stipulation ¶¶ 18-23, ECF 35. In summary, the Union acted promptly, persisted when the Commonwealth did not

immediately respond, and returned dues erroneously collected. Any violation of Plaintiff's First Amendment rights was limited in time, and quickly redressed.

Finally, the Plaintiff's misreading of the statute is confirmed by the fact that the new CBA negotiated post-*Janus* does not have any maintenance of membership provision. Stipulation ¶7, ECF 35.

Plaintiff attempts to overcome the lack of present harm by arguing that her claim is capable of repetition but evading review, invoking the principle that declaratory relief is appropriate where there is "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." Pl.'s Resp. to Commonwealth MSJ at 7, ECF 31 (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974)). As an initial matter, it should be noted that the Supreme Court has since narrowed the breadth of *Super Tire*, holding that "the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Plaintiff has pointed to nothing that would suggest the Commonwealth is undertaking action or likely to undertake action that would contravene *Janus*. The conduct of both the Union and the Commonwealth to this point weighs strongly against any such an eventuality.

In that regard, the Commonwealth and the Union are typically in an adversarial posture, both at the bargaining table and with respect to employee discipline and termination. *Janus* is a decision that indisputably weakens unions of public employees. The Commonwealth has no incentive whatsoever to undermine the substantial institutional advantage *Janus* confers, rendering the likelihood of any future violation nil.

As a result, Plaintiff's claims for declaratory relief against the Commonwealth under Count I of her complaint are moot, and accordingly, this Court does not have subject matter jurisdiction to hear them.[4]

B. Public Sector Exclusive Representation Remains Lawful After *Janus*

Plaintiff's claims under Count II of her complaint seeking injunctive relief cannot succeed either, for her federal rights are not violated by the system of exclusive representation enacted by PERA. Although Plaintiff does not explicitly say so in her briefing, she appears to be invoking the *Ex parte Young* exception to Eleventh Amendment immunity in seeking equitable relief against the Commonwealth defendants, in the form of a declaration that public sector exclusive representation is unconstitutional.[5] To that end, Plaintiff has not sued the Commonwealth as a defendant directly, but rather has named the Secretary of the Pennsylvania Department of Human Services, the Secretary of the Office of Administration, the Pennsylvania Attorney General, and members of the Pennsylvania Labor Relations Board as defendants in their official capacities and has sought declaratory relief against them. *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697 (3d Cir. 1996) ("[T]he state official, although formally acting in an official or representative capacity, may nevertheless be sued in federal court.").

The exception recognized in *Ex parte Young* allows courts to provide only prospective,

[4] Plaintiff's monetary claims against Local 668 will be addressed in a separate opinion.

[5] The Commonwealth Defendants have raised Eleventh Amendment sovereign immunity defenses to Plaintiff's claims to which Plaintiff has failed to respond, but I will nevertheless independently analyze those defenses here. Eleventh Amendment immunity prevents private citizens from bringing actions in federal court against states. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). Aside from suits for injunctive relief under *Ex parte Young*, two other clear exceptions apply: Congress may statutorily abrogate states' Eleventh Amendment sovereign immunity, or states may waive their sovereign immunity and consent to be sued by private parties. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Plaintiff is suing the Commonwealth defendants under 42 U.S.C. § 1983, which does not by itself override Eleventh Amendment sovereign immunity. *Quern v. Jordan*, 440 U.S. 332, 342 (1979). And the Commonwealth defendants have not consented to being sued except under limited circumstances, none of which are present in this case. 42 Pa. C.S. § 8521 *et seq.*

equitable relief to enjoin state actors from ongoing violations of federal law. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). On the record here, Plaintiff's claim for injunctive relief fails, because PERA's system of exclusive representation does not violate Plaintiff's First Amendment free speech and associational rights. In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court upheld Minnesota's system of public sector collective bargaining, which allowed the state to discuss non-mandatory subjects of bargaining solely with employees' exclusive representative. The *Knight* court rejected dissenting teachers' arguments that such a scheme harmed their First Amendment free speech and associational interests, explaining that "[t]he state has in no way restrained appellees' 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. Nor has the state attempted to suppress any ideas." *Id.* at 288.

Read properly, *Janus* reaffirms rather than undermines *Knight*. Although *Janus* contains a brief passage stating that exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts," earlier in that same sentence the Court held "[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees." *Janus*, 138 S. Ct. at 2478. Furthermore, *Janus* emphasizes elsewhere that "States can keep their labor-relation systems exactly as they are" and makes no reference to *Knight* in the opinion. *Id.* at 2485 n.27. In that regard, if *Knight* were overruled, public employers would lack a readily identifiable, authorized representative with whom to negotiate, and the practical challenges for public employers in managing their workforce would be daunting.

The Third Circuit has not yet addressed the issue, but the Eighth and Ninth Circuits have held that the Supreme Court sanctioned the practice of exclusive representation in public sector collective bargaining in *Knight* and agree that *Janus* cannot be read to have overruled it. *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (noting that "the constitutionality of exclusive representation standing alone was not at issue" in *Janus*); *Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019) ("*Janus*'s reference to infringement caused by exclusive union representation . . . is not an indication that the Court intended to revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation.").

Based on my reading of *Janus*, and these circuit decisions, I decline to hold that Local 668's status as an exclusive representative for the purposes of collective bargaining under PERA violates Plaintiff's First Amendment speech or associational rights. Consequently, there is no ongoing violation of federal rights that Plaintiff can seek to enjoin under *Ex parte Young*.

IV. Conclusion

Because Plaintiff's complaints as to past conduct are moot, and because there is no ongoing constitutional violation, the Commonwealth Defendants are entitled to judgment as a matter of law. An appropriate order will be issued.

/s/ Gerald Austin McHugh
United States District Judge