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)

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I. Defendants violated Oliver's First Amendment rights by deducting dues from her without affirmative consent to waive her right to not pay the union.

In *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), the Supreme Court explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to waive the right to not pay a union. Such a waiver cannot be presumed and must be freely given and shown by "clear and compelling" evidence. "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id*.

The Supreme Court's application of federal law is generally the "controlling interpretation of federal law and must be given full retroactive effect." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Nothing in the Court's opinion in *Janus* indicates that the Court intended to stray from the general rule and apply its ruling in *Janus* proscriptively rather than retroactively. *See Kolkevich v. AG of the United States,* 501 F.3d 323, 337 n.9 (3rd Cir. 2007). Local 668 turns this rule on its head by contending that *Janus* should not be applied

retroactively because the Court did not explicitly say so. Union Br. 36. And its contention that *Janus* is not retroactive because the Court did not order the union to return Mr. Janus's money, Union Br. 36, ignores the procedural issue before the Court. The Court's opinion in *Janus* reversed the lower court's order granting a motion to dismiss Mr. Janus's complaint and remanded the case back to the lower court. *Janus*, 138 S. Ct. at 2486. The Court simply could not have issued damages to Mr. Janus at that stage in the litigation. There is no basis to assert that the Court did not intend for its ruling in *Janus* to apply retroactively. The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

The question in this case is whether Oliver's signature of the union membership card constitutes affirmative consent to waive her right to not pay the union. Supreme Court precedent dictates that the answer to this question is no.

A. Oliver's signing of the union membership card before the Supreme Court's decision in *Janus* does not constitute affirmative consent to waive her right to not pay the union.

Oliver's signing of the union membership card does not meet the Supreme Court's long-held standards for waiver of one's constitutional rights. *See* Appellant's Br. 11–13.

(1) Waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Oliver 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 to the union. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144–45 (1967) (cannot waive a right before knowing the relevant law).

(2) 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). Oliver did not *freely* waive her right to pay nothing to the union because when she began employment with the Commonwealth, she was forced to pay the union: either agency fees or membership dues. For the same reason, her waiver could not have been *voluntary*.

(3) Waiver of fundamental rights will not be presumed. *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937). 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, 683 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). There is no clear and compelling evidence that Oliver wished to waive her constitutional right to pay no money to the union. The mere fact that she signed the union membership card cannot serve as clear and compelling evidence that she wished to waive her right to pay nothing to the union since she would have still been compelled to pay the union without signing the membership card. Further, the union membership card she signed did not clearly indicate that Oliver was waiving her right to pay nothing to the union, and can hardly be considered affirmative consent. Such a situation presumes waiver.

Thus, Oliver did not waive her right to not pay the union by signing the union membership card.

B. The fact that Oliver voluntarily signed the union membership card does not constitute affirmative consent to waive her right to not pay money to the Union.

The District Court ignored the waiver analysis set forth in *Janus*, relying instead on the fact that Oliver voluntarily chose to join the

Union and was not coerced to do so. *See* App. 010–011. The District Court held that the fact that Oliver was required to pay money to the Union either as a member or as a non-member — in the form of agency fees — is irrelevant because she was not compelled to join the Union. App. 011–013. Local 668 similarly asserts that because Oliver was not compelled to join the Union, and thus voluntarily joined the Union and agreed to pay union dues, rather than agency fees, that it did not violate her First Amendment rights. Union Br. 15–16.

But the District Court and Local 668 misstate the issue: the question is not whether she was compelled to join the Union; rather, the question is whether by signing the union membership card Oliver provided affirmative consent to waive her right to pay no money to the Union. Local 668 acknowledges that at the time she signed the membership card she would have had to pay money to the Union even if she declined to join. Union Br. 16. Thus, Oliver could not have knowingly, freely, or voluntarily waived her right *to pay no money to the Union* by signing the membership card because at the time she signed it she had no choice but to pay the Union. *See* Section I.A above; *see also* Appellant's Br. 12–13.

Local 668 responds that the fact that Oliver would have been required to pay agency fees had she chosen not to join the Union does not change the analysis because *Janus* was a case about non-union members and says nothing about people who agree to join the union. Union Br. 17. But that analysis simply begs the question. Employees become union members by signing a union membership card. The question is whether the union membership card Oliver signed, when she was a non-member, constitutes affirmative consent to waive her right to not pay money to the Union. As explained above, the answer is no.

Local 668 asserts that even under the *Janus* waiver analysis, the union membership card Oliver signed constitutes a valid waiver because it clearly stated an intent to deduct dues. Union Br. 23–24. But at the time Oliver signed the membership card she would have had to pay money to the Union regardless of whether she joined and she clearly did not know she had a right to pay nothing to the Union. The Union responds to the argument that Oliver could not waive her right because she did not know of it at the time she signed the union card by asserting that when Oliver joined the Union, her right not to join was

well-established. Union Br. 24. But the relevant right here is not the right to not join the union; rather it's the right not to *pay* the union. And Oliver could not have known of that right at the time she signed the union membership card because *Janus* was not yet decided, and she was forced by Defendants to pay the Union either as a member or as a non-member.

Local 668 counters that this argument is foreclosed because Oliver signed a contract and she cannot abrogate a contract based on subsequent legal developments. Union Br. 25. But the Union's argument is circular. One cannot answer the question of whether the union membership card signed by Oliver *knowingly* waived her right to not pay money to the Union by asserting that Oliver signed the union membership card. In any case, the Union's citations do not support that assertion. Local 668 cites *Adams v. Int'l Bhd. Of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958) for the proposition that "It is well settled that the relationship existing between a . . . union and its members is contractual[.]" Union Br. 19–20.[1] But Local 668 omits the phrase "which

[1] The Union asserts that Oliver dispute that the relationship between a union and its members is contractual. Union Br. 20. But Oliver does

the courts will enforce, *if the contract is free from illegality or invalidity*." *Adams*, 262 F. 2d at 838 (emphasis added). And the question here is whether this union membership contract is free from illegality or invalidity because of the unconstitutional choice that it forced upon Oliver. It is well-established that private contracts that require a person to waive a constitutional right must meet certain standards for informed, affirmative consent, which Local 668 cannot do here. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

Local 668 cites *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) for the proposition that there is no First Amendment right to disregard contractual obligations. Union Br. 20. In *Cohen*, an informant provided confidential information to a newspaper based on a promise that it would keep the informant's identity confidential. *Cohen*, 501 U.S. at 665–66. When the newspaper published a story including informant's name, he sued under state promissory estoppel law. *Id.* at 666. The *Cohen* Court found that the First Amendment right to publish truthful information does not provide an exception to liability in a state court

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claim that the union membership card was not a valid contract. *See, e.g.*, D.C. Dkt. 39, p. 3.

action for breach of the promise of confidentiality. *Id.* at 672. But Oliver argues the original promise itself was invalid; the original dues authorization lacked her knowing, affirmative consent. *Cohen* does not stand for the proposition that Local 668 contends — that under waiver analysis signing a contract *always* results in one waiving one's constitutional rights. Union Br. 25.

Similarly, the Union's reliance on *Coltec Industries, Inc. v. Hodgood*, 280 F. 3d 262 (3d Cir. 2002), is inapposite. Union Br. 20. In that case, a coal company entered into a settlement agreement for a lawsuit it filed under the Coal Industry Retiree Health Benefit Act of 1992. When the Supreme Court subsequently found application of that Act to companies similar to the plaintiff unconstitutional, the coal company attempted to reopen the claims it had already waived via the settlement agreement, which the court rejected. *Id.* at 274–75. In contrast, here, Oliver never settled claims she wishes to reopen.

Similarly, Local 668 points to *United States v. Brady*, 397 U.S. 742 (1970), for the proposition that changes in intervening constitutional law do not invalidate a contract. Union Br. 21. In *Brady*, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment.

397 U.S. at 743–44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id.* at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id.* at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication. *Id.* at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Oliver does not ask that this Court find its way around *res judicata*, only that it find an alleged contract between the parties does not constitute a waiver of her constitutional rights.

All of the cases Local 668 cites in support of its claim that one does not have a First Amendment right to renege on a contract involve decisions made in the course of litigation — settlement agreements or plea deals — that a party later regretted because of subsequent judicial decisions. But those cases are about the *res judicata*, not whether a contract signed by a person constitutes waiver of a constitutional right. And whereas in those cases, the offer of a plea deal (or settlement) itself

was constitutional, here the choice presented to Oliver was not. In the *res judicata* cases, either the party would plead guilty (or settle) or go to trial. Even after the Supreme Court struck down the death penalty as unconstitutional, the criminal defendant's choices between pleading guilty or going to trial were the same. There was no "third option" the defendant could have taken that was unconstitutionally withheld from him. In contrast, in this case before *Janus*, Oliver was given the option of paying money to the Union as a member or as a non-member. She was not given the option of paying nothing to the Union. It was the deprivation of this choice that prevented Oliver in this case from making a knowing, voluntary choice to waive her constitutional right to not pay the union.

C. The Supreme Court's waiver analysis in *Janus* must be applied in this case.

Local 668 asserts that waiver analysis provided for in *Janus* is not the proper analysis to be applied in this case. Union Br. 22. In support, it cites several cases where the Supreme Court purportedly failed to apply a waiver analysis. Union Br. 22–23. But the fact that the Supreme Court might inconsistently apply waiver analysis does not explain why this Court should not apply waiver analysis in this case,

especially where *Janus* explicitly requires waiver. The Union fails to explain it either. Rather, in a footnote, it again asserts that *Janus* applies only to non-members. Union Br. 22, n. 5. But, again, that assertion simply begs the question of whether Oliver's signing of the union membership card when she was a non-member constitutes affirmative consent to waive her right to pay nothing to the Union. Thus, the Court must apply waiver analysis in this case.

D. Defendants' actions to deprive Oliver of her First Amendment rights involve state action.

Numerous courts have held that a union engages in state action when it uses the machinery of the government to impose and collect dues through a statutory scheme, collective bargaining agreement, and state payroll system. *See, e.g., Janus v. AFSCME Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("Janus II"); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392, at *13 (C.D. Cal. Sep. 30, 2019); *Grossman v. Haw. Gov't Emples. Ass'n/Afscme Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020); *Hernandez v. AFSCME Cal.*, No. 2:18-CV-02419 WBS EFB, 2019 U.S. Dist. LEXIS 219379, at *16 (E.D. Cal. Dec. 19, 2019); *Kabler v. United Food &*

Commerical Workers Union, No. 1:19-CV-395, 2019 U.S. Dist. LEXIS 214423, at *41 (M.D. Pa. Dec. 11, 2019); *Laspina v. SEIU Pa. State Council*, 2019 U.S. Dist. LEXIS 168917, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019).

Local 668 attempts to distinguish *Janus II* by asserting that the sources of the deprivation in that case were a state statute and a contract between the public employer and the Union. Union Br. 28–29. But this distinction is irrelevant to the Seventh Circuit's reasoning in *Janus II*. As the Seventh Circuit said: "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II*, 942 F.3d 361 (*quoting Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (quote marks omitted)). "[A] private entity can qualify as a state actor in a few limited circumstances — including . . . when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). In any event, it was not simply Oliver's own private arrangement with Local 668 that resulted in her paying money to the Union, Union Br. 29, as both the collective bargaining agreement between Local 668 and the Commonwealth and the Pennsylvania Public

Employe Relations Act ("PERA") authorized the Commonwealth to withhold money from an employee's paycheck on behalf of the Union. App. 049. Here, the Commonwealth, as Oliver's employer, did not simply withhold dues on behalf of any private entity: Local 668 was the majority-designated exclusive bargaining representative of the bargaining unit under PERA. App. 048–049.

Local 668 asserts that it is not a state actor. Union Br. 30. But it is not operating as a private association, rather as the government-authorized agency-shop. App. 048–051. When it acts in that capacity, it acts in such close concert with the state that its actions are fairly attributable as state actions. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (a public-sector union when undertaking actions pursuant to a union-shop agreement is state action). All of the Union's actions in this case also followed a collective bargaining agreement with the Commonwealth that, among other things, includes a union security provision governing membership. Such an agreement shows the deep intertwining between the government and the union, such that decisions made by the Union pursuant to the bargaining agreement constitute state action. *See Beck v. Communications Workers of Am.*,

776 F.2d 1187 (4th Cir. 1985); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971). *See also Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

Oliver was the victim of an unconstitutional scheme between Local 668 and the Commonwealth, based on statute and the collective bargaining agreement between Local 668 and the Commonwealth, to garnish her wages and spend the money on union activities.

E. The Union does not have a "good faith" defense to Oliver's 42 U.S.C. § 1983 claims.

Local 668 asserts that this Court in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994) recognized a general "good faith" defense to 42 U.S.C. § 1983 claims. Union Br. 33–34. But even if this were true, which it is not, the "good faith" defense would not insulate the Union from all of Oliver's damage claims. Oliver specifically seeks damages in the form of the return of union dues withheld from her paycheck from February 28, 2017 to August 10, 2019. Even if the Union could rely on a "good faith" defense — which it cannot — the good faith defense would not protect the Union from claims for

damages for dues withheld after *Janus*, specifically June 27, 2018, to August 10, 2019.[2]

Local 668 also asserts that Oliver's contention that *Jordan* limited a "good faith defense" to claims in which malice and lack of probable cause are elements of such claims is not supported by *Jordan*. Union Br. 33–34. But the Union's reading of *Jordan* ignores its specific language and its context.

This Court in *Jordan* held, in the context of deciding defendants' liability under § 1983 for making use of Pennsylvania's established procedure for executing on a confessed judgment, that it was "in basic agreement" with the Fifth Circuit decision that "'[p]rivate 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.'" 20 F.3d at 1276 (*quoting Wyatt v. Cole*, 994 F.2d 1113, 120 (5th Cir. 1993)). This Court in *Jordan* looked to the torts

[2] Oliver agrees with the Union that *Wenzig v. SEIU Local 668*, No. 19-3906, pending before this Court, will likely be controlling in this case on the issue of whether the Union is entitled to a "good faith" defense from claims of damages for money collected from employees by the Union before the *Janus* decision. Plaintiffs in that case are represented by the same law firm that represents Oliver here. The arguments made by Plaintiffs in *Wenzig* are relied on by Oliver here.

of malicious prosecution and abuse-of-process to define the elements of the due process claim before the courts, which arose from an alleged misuse of judicial procedures. The Court found malice and lack of probable cause to be elements of such claims. *Jordan*, 20 F.3d at 1276; *see also Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992); *id*. at 172–73 (Kennedy. J., concurring).

Jordan, and the cases on which it relied, held that good faith reliance on existing law can defeat the malice and probable cause elements of a constitutional claim arising from malicious prosecution or an abuse of judicial process. That was the claim at issue in those cases. *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *see also Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988) (state court prejudgment attachment order); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996) (state court prejudgment attachment procedure).

Thus, this Court in *Jordan* limited the "good faith" defense to claims in which malice and lack of probable cause are elements. But those elements are unnecessary to establish liability for a violation of the First Amendment under *Janus*. 138 S. Ct. at 2486. *Janus* does not

require proof of malice or a lack of probable cause. It would defy *Janus* to add those additional elements to the claim. Therefore, the "good faith" defense that rebuts those elements has no application to the First Amendment claim made here.

Given that malice and probable cause are not elements of a First Amendment claim made under *Janus*, it is irrelevant what tort is most analogous to such claims. Common law is merely a guide for determining the elements of § 1983 claims. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920–21 (2017). That guide is unnecessary when, as here, the Supreme Court has already defined the elements of the claim. *See Janus,* 138 S. Ct. at 2486. Nonetheless, Local 668 claims that the closest common law tort analogy here is to abuse of process. Union Br. 34. But abuse of process requires misuse of the *judicial* process. *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008); *see also Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (first element of malicious prosecution in Pennsylvania is that "the defendants initiated a criminal proceeding"); *Tulp v. Educ. Comm'n for Foreign Med. Graduates*, 376 F. Supp. 3d 531, 545 (E.D. Pa. 2019) (first element of abuse of process in Pennsylvania is that the defendant "used a legal

process against him"). That means an action literally taken by a court. *Tucker,* 515 F.3d 1037. In contrast, a First Amendment claim is not limited defendant's use of a court. Thus, there is no basis to import an abuse-of-process tort's malice and probable cause elements into Oliver's First Amendment claim. *See Janus*, 138 S. Ct. at 2486.

Local 668 also asserts that *Jordan* forecloses Oliver's contention that the recognition of a "good faith" defense is incompatible with the text of § 1983. But, again, *Jordan* did not find a broad "good faith" defense to § 1983, which would be incompatible with the its text. Defenses to any particular "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, are based on the constitutional or statutory right at issue. Malice and lack of probable cause are elements of constitutional claims arising from malicious prosecution and abuse of judicial processes. *See Wyatt*, 504 U.S. at 164–65. Thus, recognizing a good faith defense in such circumstance is not incompatible with the text of § 1983, while a broad, general "good faith" defense to all § 1983 claims — which the Union advocates — would be.

Local 668 additionally contends that *Jordan* forecloses Oliver's argument that the adoption of a § 1983 good faith defense for private

parties is incompatible with the statutory basis for qualified immunity and the Union's lack of that immunity. Union Br. 34–35. But, again, *Jordan* did not find a broad general "good faith" defense to § 1983. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012). Courts accord an immunity only when 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) (citation omitted). Here, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364. This Court in *Jordan* did not hold otherwise.

Local 668 asserts that applying the good faith defense is consistent with equitable principles because it bears no fault for acting in reliance on state law and Supreme Court precedent. Even if enforcing § 1983 were considered unfair to defendants who relied on state law, it would certainly be *more unfair* to make victims of those defendants' conduct pay the costs. *See Janus*, 138 S. Ct. at 2486 (noting "the considerable

windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.") It is not fair to make victims of constitutional deprivations pay for the Union's unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980). *Owen* held that municipalities are not entitled to a good faith immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

For these reasons, there is no broad "good faith" defense available to every private defendant under § 1983 or available to Local 668 barring Oliver's § 1983 claims for damages.

F. Oliver has standing for her claims for declaratory relief and her claims are not moot.

The District Court held, and the Defendants argue, that Oliver's claims for declaratory relief are moot because Local 668 allowed her to resign and refunded the dues she paid after August 10, 2018. App. 020; Union Br. 38–39; Commonw. Br. 21.

In this case Oliver sought declaratory relief and damages against the Union in the form of dues taken from her, and not returned, since she signed the union dues authorizations, subject only to a statute-of-limitations defense — those damages amount to union dues withheld from her paycheck from February 28, 2017 to August 10, 2019. App. 046–047. The Commonwealth Defendants ignore Oliver's damages claim and assume (wrongly) that Oliver was made whole by the Union's partial return of the dues. Commonw. Br. 23. Oliver alleges she is entitled to this money in damages because her signing of the union membership card did not constitute affirmative consent to waive her right to not pay money to the Union, as explained above. The declaratory relief that Oliver seeks is a necessary foundation to her theory for damages. The fact that Oliver was allowed to resign from the Union and that her union dues withheld after August 10, 2019 were returned are irrelevant to her claim for damages before August 10, 2019. Oliver's request for declaratory relief supporting that claim for damages is not mooted.

As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Knox v. Serv.*

Employees Int'l Union, Local 1000, 567 U.S. 298, 307 (2012). Here, Oliver's claim for damages remains and her request for declaratory relief supports her claim for damages. In order to grant damages, the Court would also need to grant at least two of her requests for declaratory relief: (1) Oliver's signing of the union dues deduction authorization did not constitute her affirmative consent to waive her First Amendment rights upheld in *Janus*, and (2) withholding union dues from Oliver's paycheck was unconstitutional because she did not provide affirmative consent.

And contrary to the Commonwealth Defendants' claim, Commonw. Br. 24, simply because Oliver's claim for damages is against Local 668, rather than the Commonwealth Defendants, does not moot the declaratory relief sought against the Commonwealth Defendants. Because Local 668 and the Commonwealth Defendants entered into a scheme to withhold money from Oliver's paycheck on behalf of the Union without her affirmative consent to waive her right to not pay money to the Union and not all of that money has been paid back, a controversy still exists between Oliver and both Local 668 and the Commonwealth Defendants. In particular, Oliver's request to declare

that withholding union dues from Oliver's paycheck was unconstitutional because she did not provide affirmative consent is necessary to entitle Oliver to damages but specifically relates the actions taken by the Commonwealth Defendants.

In addition, Plaintiff asked this Court to declare unconstitutional 43 P.S. §§ 1101.301(18); 1101.401; and 1101.705, to the extent that they prohibit a government employee who has not provided affirmative consent, like Oliver, to stop union dues from being withheld from his or her paycheck. Sections 1101.301(18) and 1101.401 operate together to define and enforce a so-called "maintenance of membership" provision, which requires that anyone who joined or joins the union "must remain members for the duration of a collective bargaining agreement." Where an employee, like Oliver, has not provided affirmative consent, a provision of law that requires anyone who signed a union card to pay union dues for the duration of a collective bargaining agreement is unconstitutional. Section 1101.705 authorizes state and local employers to enact maintenance-of-membership provisions in their collective bargaining agreements. Where these provisions of law force government workers who have not provided affirmative consent to pay union dues,

they violate the constitutional rights guaranteed in *Janus*. If the Court finds that Oliver's signing of the union membership card does not constitute her affirmative consent to waive her First Amendment rights upheld in *Janus*, and Oliver is entitled to damages in the form of dues withheld from her paycheck, the application of 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 to Oliver after the time she signed the union card and before she withdrew from the Union is unconstitutional. Therefore, Oliver's request for a declaratory judgment that 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 are unconstitutional is not moot.

II. Forcing Oliver to associate with the Union as her exclusive representative violates her First Amendment rights to free speech and freedom of association.

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

Like the District Court, Defendants assert that the Supreme Court's decision in *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), forecloses Oliver's argument that forcing her to associate with Local 668 as her exclusive representative violates her First Amendment rights to free speech and freedom of association. Union Br. 43; Commonw. Br. 29. The issue in *Knight* was whether the plaintiffs "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. That question is fundamentally different from Oliver's claim that the government cannot compel her to associate with Local 668 by authorizing the Union to bargain on her behalf. Appellant's Br. 38.

Nonetheless, Local 668 asserts that the Court went on to consider whether Minnesota's public employee labor relations act violated the right to speak and the right to "associate or not to associate," finding that speech rights were not infringed because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." Union Br. 47 (*citing Knight* 465 U.S. at 288; *accord* Commonw. Br. 30. But Defendants are wrong. The Court was not considering whether Minnesota's public employee labor relations act violated the right to speak and the right to "associate or not to associate." Rather, it was still addressing the question of whether there is a constitutional right to be heard. The Court explained that the government's right to "choose its advisers" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288.

The *Knight* Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id*. This is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id*. at 287. The Court in *Knight* did not directly address whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union that has been designated as their exclusive representative and does not foreclose Oliver's claim that her First Amendment rights are violated by forcing her to have the Union serve as her exclusive representative.

Nor is the Commonwealth Defendants' assertion that *Janus* "expressly approved of exclusive representation schemes" credible. Commonw. Br. 33. The Commonwealth Defendants quote *Janus* as saying that "the State may require that a union serve as exclusive bargaining agent for its employees." Commonw. Br. 33 (*quoting Janus*, 138 S. Ct. at 2478). But the full quote provides: "*It is also not disputed*

that the State may require that a union serve as exclusive bargaining agent for its employees—*itself a significant impingement on associational freedoms that would not be tolerated in other contexts*." *Janus*, 138 S. Ct. at 2478 (emphasis added). Far from "expressly approv[ing] of exclusive representation schemes," the Court was simply stating that Mr. Janus had not brought a claim challenging the constitutionality of exclusive representation schemes. And the Court's comments that such schemes are themselves a "significant impingement on associational freedoms that would not be tolerated in other contexts," *id*., is far from a solid endorsement.

B. Forcing Oliver to have Local 668 serve as her exclusive representative is unconstitutional.

Local 668 asserts that even if *Knight* did not foreclose Oliver's argument, that her claim is properly denied because Union's representation of Oliver's bargaining unit says nothing about Oliver's *own* views or positions, so there is no compelled *expressive* association. Union Br. 52 (*citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65, 69 (2006)). But this ignores the fact that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message."

Rumsfeld, 547 U.S. at 63. Pennsylvania's exclusive representation requirement takes away dissenting employees "choice . . . not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control" in the same way that compelling a parade organizer to accept an unwanted group carrying its own banner. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). The fact that Oliver must speak out to distance herself from the Union's speech on her behalf escalates, not diminishes, her constitutional injury. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In any event, the Union's reliance on *Rumsfeld* is inapposite: while "a law school's decision to allow recruiters on campus is not inherently expressive," 547 U.S. at 64, the Union's advocacy on matters of public concern in the context of collective bargaining surely is, *see Janus*, 138 S. Ct. at 2475–77.

Finally, the Union argues that even if Pennsylvania's exclusive-representative bargaining system *did* impinge on First Amendment rights, it would satisfy exacting scrutiny because exclusive

representation is necessary to facilitate labor peace. Union Br. 53. But the state interest in labor peace is neither compelling nor narrowly tailored to force public employees to accept union representation. In *Janus*, the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest, but the Court rejected it as a justification for agency fees. The interest should likewise be rejected as a justification for exclusive representation. The Supreme Court recognized that "it is now clear" that the fear of "pandemonium" if the union could not charge agency fees was "unfounded." *Janus*, 138 S. Ct. at 2465. To the extent that individual bargaining is claimed to raise the same concerns of pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id.*

The "labor peace" concept was borrowed by *Abood*, 431 U.S. at 220–21, from the Court's jurisprudence concerning Congress's Commerce Clause power to regulate economic affairs. *See, e.g.*, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937). That the promotion of labor peace might justify congressional regulation of economic affairs, subject only to rational-basis review, says nothing about whether labor-

peace interests suffice to clear the higher bar of First Amendment scrutiny. The Court's cases recognize that the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988). But that is in essence what the labor peace rationale does.

Thus, Oliver's First Amendment rights to free speech and freedom of association are violated by the exclusive bargaining law that forces Oliver to associate with the Union.

CONCLUSION

For these reasons, this Court should reverse the District Court.

Dated: May 13, 2020

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

1. I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6347 words, excluding the items exempted by Fed. R. App. P. 32(f), in compliance with Fed. R. App. P. 28(a)(10) 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) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

4. No paper copies of the foregoing brief were filed, pursuant to the Court's Notice Regarding Operations to Address the COVID-19 Pandemic, dated Mar. 17, 2020.

5. A virus check was performed on this brief using Sophos Anti-Virus Endpoint Advanced Version 9.9.8, and no virus was detected.

6. On May 13, 2020, I caused the foregoing to be electronically filed with the Clerk of Court 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.

Dated: May 13, 2020

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

TABLE OF AUTHORITIES

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ARGUMENT

I. Defendants violated Oliver's First Amendment rights by deducting dues from her without affirmative consent to waive her right to not pay the union.

In *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), the Supreme Court explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to waive the right to not pay a union. Such a waiver cannot be presumed and must be freely given and shown by "clear and compelling" evidence. "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id*.

The Supreme Court's application of federal law is generally the "controlling interpretation of federal law and must be given full retroactive effect." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Nothing in the Court's opinion in *Janus* indicates that the Court intended to stray from the general rule and apply its ruling in *Janus* proscriptively rather than retroactively. *See Kolkevich v. AG of the United States,* 501 F.3d 323, 337 n.9 (3rd Cir. 2007). Local 668 turns this rule on its head by contending that *Janus* should not be applied

retroactively because the Court did not explicitly say so. Union Br. 36. And its contention that *Janus* is not retroactive because the Court did not order the union to return Mr. Janus's money, Union Br. 36, ignores the procedural issue before the Court. The Court's opinion in *Janus* reversed the lower court's order granting a motion to dismiss Mr. Janus's complaint and remanded the case back to the lower court. *Janus*, 138 S. Ct. at 2486. The Court simply could not have issued damages to Mr. Janus at that stage in the litigation. There is no basis to assert that the Court did not intend for its ruling in *Janus* to apply retroactively. The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

The question in this case is whether Oliver's signature of the union membership card constitutes affirmative consent to waive her right to not pay the union. Supreme Court precedent dictates that the answer to this question is no.

A. Oliver's signing of the union membership card before the Supreme Court's decision in *Janus* does not constitute affirmative consent to waive her right to not pay the union.

Oliver's signing of the union membership card does not meet the Supreme Court's long-held standards for waiver of one's constitutional rights. *See* Appellant's Br. 11–13.

(1) Waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Oliver 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 to the union. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144–45 (1967) (cannot waive a right before knowing the relevant law).

(2) 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). Oliver did not *freely* waive her right to pay nothing to the union because when she began employment with the Commonwealth, she was forced to pay the union: either agency fees or membership dues. For the same reason, her waiver could not have been *voluntary*.

(3) Waiver of fundamental rights will not be presumed. *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937). 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, 683 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). There is no clear and compelling evidence that Oliver wished to waive her constitutional right to pay no money to the union. The mere fact that she signed the union membership card cannot serve as clear and compelling evidence that she wished to waive her right to pay nothing to the union since she would have still been compelled to pay the union without signing the membership card. Further, the union membership card she signed did not clearly indicate that Oliver was waiving her right to pay nothing to the union, and can hardly be considered affirmative consent. Such a situation presumes waiver.

Thus, Oliver did not waive her right to not pay the union by signing the union membership card.

B. The fact that Oliver voluntarily signed the union membership card does not constitute affirmative consent to waive her right to not pay money to the Union.

The District Court ignored the waiver analysis set forth in *Janus*, relying instead on the fact that Oliver voluntarily chose to join the

Union and was not coerced to do so. *See* App. 010–011. The District Court held that the fact that Oliver was required to pay money to the Union either as a member or as a non-member — in the form of agency fees — is irrelevant because she was not compelled to join the Union. App. 011–013. Local 668 similarly asserts that because Oliver was not compelled to join the Union, and thus voluntarily joined the Union and agreed to pay union dues, rather than agency fees, that it did not violate her First Amendment rights. Union Br. 15–16.

But the District Court and Local 668 misstate the issue: the question is not whether she was compelled to join the Union; rather, the question is whether by signing the union membership card Oliver provided affirmative consent to waive her right to pay no money to the Union. Local 668 acknowledges that at the time she signed the membership card she would have had to pay money to the Union even if she declined to join. Union Br. 16. Thus, Oliver could not have knowingly, freely, or voluntarily waived her right *to pay no money to the Union* by signing the membership card because at the time she signed it she had no choice but to pay the Union. *See* Section I.A above; *see also* Appellant's Br. 12–13.

Local 668 responds that the fact that Oliver would have been required to pay agency fees had she chosen not to join the Union does not change the analysis because *Janus* was a case about non-union members and says nothing about people who agree to join the union. Union Br. 17. But that analysis simply begs the question. Employees become union members by signing a union membership card. The question is whether the union membership card Oliver signed, when she was a non-member, constitutes affirmative consent to waive her right to not pay money to the Union. As explained above, the answer is no.

Local 668 asserts that even under the *Janus* waiver analysis, the union membership card Oliver signed constitutes a valid waiver because it clearly stated an intent to deduct dues. Union Br. 23–24. But at the time Oliver signed the membership card she would have had to pay money to the Union regardless of whether she joined and she clearly did not know she had a right to pay nothing to the Union. The Union responds to the argument that Oliver could not waive her right because she did not know of it at the time she signed the union card by asserting that when Oliver joined the Union, her right not to join was

well-established. Union Br. 24. But the relevant right here is not the right to not join the union; rather it's the right not to *pay* the union. And Oliver could not have known of that right at the time she signed the union membership card because *Janus* was not yet decided, and she was forced by Defendants to pay the Union either as a member or as a non-member.

Local 668 counters that this argument is foreclosed because Oliver signed a contract and she cannot abrogate a contract based on subsequent legal developments. Union Br. 25. But the Union's argument is circular. One cannot answer the question of whether the union membership card signed by Oliver *knowingly* waived her right to not pay money to the Union by asserting that Oliver signed the union membership card. In any case, the Union's citations do not support that assertion. Local 668 cites *Adams v. Int'l Bhd. Of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958) for the proposition that "It is well settled that the relationship existing between a . . . union and its members is contractual[.]" Union Br. 19–20.[1] But Local 668 omits the phrase "which

[1] The Union asserts that Oliver dispute that the relationship between a union and its members is contractual. Union Br. 20. But Oliver does

the courts will enforce, *if the contract is free from illegality or invalidity*." *Adams*, 262 F. 2d at 838 (emphasis added). And the question here is whether this union membership contract is free from illegality or invalidity because of the unconstitutional choice that it forced upon Oliver. It is well-established that private contracts that require a person to waive a constitutional right must meet certain standards for informed, affirmative consent, which Local 668 cannot do here. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

Local 668 cites *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) for the proposition that there is no First Amendment right to disregard contractual obligations. Union Br. 20. In *Cohen*, an informant provided confidential information to a newspaper based on a promise that it would keep the informant's identity confidential. *Cohen*, 501 U.S. at 665–66. When the newspaper published a story including informant's name, he sued under state promissory estoppel law. *Id.* at 666. The *Cohen* Court found that the First Amendment right to publish truthful information does not provide an exception to liability in a state court

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claim that the union membership card was not a valid contract. *See, e.g.*, D.C. Dkt. 39, p. 3.

action for breach of the promise of confidentiality. *Id.* at 672. But Oliver argues the original promise itself was invalid; the original dues authorization lacked her knowing, affirmative consent. *Cohen* does not stand for the proposition that Local 668 contends — that under waiver analysis signing a contract *always* results in one waiving one's constitutional rights. Union Br. 25.

Similarly, the Union's reliance on *Coltec Industries, Inc. v. Hodgood*, 280 F. 3d 262 (3d Cir. 2002), is inapposite. Union Br. 20. In that case, a coal company entered into a settlement agreement for a lawsuit it filed under the Coal Industry Retiree Health Benefit Act of 1992. When the Supreme Court subsequently found application of that Act to companies similar to the plaintiff unconstitutional, the coal company attempted to reopen the claims it had already waived via the settlement agreement, which the court rejected. *Id.* at 274–75. In contrast, here, Oliver never settled claims she wishes to reopen.

Similarly, Local 668 points to *United States v. Brady*, 397 U.S. 742 (1970), for the proposition that changes in intervening constitutional law do not invalidate a contract. Union Br. 21. In *Brady*, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment.

397 U.S. at 743–44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id.* at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id.* at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication. *Id.* at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Oliver does not ask that this Court find its way around *res judicata*, only that it find an alleged contract between the parties does not constitute a waiver of her constitutional rights.

All of the cases Local 668 cites in support of its claim that one does not have a First Amendment right to renege on a contract involve decisions made in the course of litigation — settlement agreements or plea deals — that a party later regretted because of subsequent judicial decisions. But those cases are about the *res judicata*, not whether a contract signed by a person constitutes waiver of a constitutional right. And whereas in those cases, the offer of a plea deal (or settlement) itself

was constitutional, here the choice presented to Oliver was not. In the *res judicata* cases, either the party would plead guilty (or settle) or go to trial. Even after the Supreme Court struck down the death penalty as unconstitutional, the criminal defendant's choices between pleading guilty or going to trial were the same. There was no "third option" the defendant could have taken that was unconstitutionally withheld from him. In contrast, in this case before *Janus*, Oliver was given the option of paying money to the Union as a member or as a non-member. She was not given the option of paying nothing to the Union. It was the deprivation of this choice that prevented Oliver in this case from making a knowing, voluntary choice to waive her constitutional right to not pay the union.

C. The Supreme Court's waiver analysis in *Janus* must be applied in this case.

Local 668 asserts that waiver analysis provided for in *Janus* is not the proper analysis to be applied in this case. Union Br. 22. In support, it cites several cases where the Supreme Court purportedly failed to apply a waiver analysis. Union Br. 22–23. But the fact that the Supreme Court might inconsistently apply waiver analysis does not explain why this Court should not apply waiver analysis in this case,

especially where *Janus* explicitly requires waiver. The Union fails to explain it either. Rather, in a footnote, it again asserts that *Janus* applies only to non-members. Union Br. 22, n. 5. But, again, that assertion simply begs the question of whether Oliver's signing of the union membership card when she was a non-member constitutes affirmative consent to waive her right to pay nothing to the Union. Thus, the Court must apply waiver analysis in this case.

D. Defendants' actions to deprive Oliver of her First Amendment rights involve state action.

Numerous courts have held that a union engages in state action when it uses the machinery of the government to impose and collect dues through a statutory scheme, collective bargaining agreement, and state payroll system. *See, e.g., Janus v. AFSCME Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("Janus II"); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392, at *13 (C.D. Cal. Sep. 30, 2019); *Grossman v. Haw. Gov't Emples. Ass'n/Afscme Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020); *Hernandez v. AFSCME Cal.*, No. 2:18-CV-02419 WBS EFB, 2019 U.S. Dist. LEXIS 219379, at *16 (E.D. Cal. Dec. 19, 2019); *Kabler v. United Food &*

Commerical Workers Union, No. 1:19-CV-395, 2019 U.S. Dist. LEXIS 214423, at *41 (M.D. Pa. Dec. 11, 2019); *Laspina v. SEIU Pa. State Council*, 2019 U.S. Dist. LEXIS 168917, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019).

Local 668 attempts to distinguish *Janus II* by asserting that the sources of the deprivation in that case were a state statute and a contract between the public employer and the Union. Union Br. 28–29. But this distinction is irrelevant to the Seventh Circuit's reasoning in *Janus II*. As the Seventh Circuit said: "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II*, 942 F.3d 361 (*quoting Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (quote marks omitted)). "[A] private entity can qualify as a state actor in a few limited circumstances — including . . . when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). In any event, it was not simply Oliver's own private arrangement with Local 668 that resulted in her paying money to the Union, Union Br. 29, as both the collective bargaining agreement between Local 668 and the Commonwealth and the Pennsylvania Public

Employe Relations Act ("PERA") authorized the Commonwealth to withhold money from an employee's paycheck on behalf of the Union. App. 049. Here, the Commonwealth, as Oliver's employer, did not simply withhold dues on behalf of any private entity: Local 668 was the majority-designated exclusive bargaining representative of the bargaining unit under PERA. App. 048–049.

Local 668 asserts that it is not a state actor. Union Br. 30. But it is not operating as a private association, rather as the government-authorized agency-shop. App. 048–051. When it acts in that capacity, it acts in such close concert with the state that its actions are fairly attributable as state actions. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (a public-sector union when undertaking actions pursuant to a union-shop agreement is state action). All of the Union's actions in this case also followed a collective bargaining agreement with the Commonwealth that, among other things, includes a union security provision governing membership. Such an agreement shows the deep intertwining between the government and the union, such that decisions made by the Union pursuant to the bargaining agreement constitute state action. *See Beck v. Communications Workers of Am.*,

776 F.2d 1187 (4th Cir. 1985); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971). *See also Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

Oliver was the victim of an unconstitutional scheme between Local 668 and the Commonwealth, based on statute and the collective bargaining agreement between Local 668 and the Commonwealth, to garnish her wages and spend the money on union activities.

E. The Union does not have a "good faith" defense to Oliver's 42 U.S.C. § 1983 claims.

Local 668 asserts that this Court in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994) recognized a general "good faith" defense to 42 U.S.C. § 1983 claims. Union Br. 33–34. But even if this were true, which it is not, the "good faith" defense would not insulate the Union from all of Oliver's damage claims. Oliver specifically seeks damages in the form of the return of union dues withheld from her paycheck from February 28, 2017 to August 10, 2019. Even if the Union could rely on a "good faith" defense — which it cannot — the good faith defense would not protect the Union from claims for

damages for dues withheld after *Janus*, specifically June 27, 2018, to August 10, 2019.[2]

Local 668 also asserts that Oliver's contention that *Jordan* limited a "good faith defense" to claims in which malice and lack of probable cause are elements of such claims is not supported by *Jordan*. Union Br. 33–34. But the Union's reading of *Jordan* ignores its specific language and its context.

This Court in *Jordan* held, in the context of deciding defendants' liability under § 1983 for making use of Pennsylvania's established procedure for executing on a confessed judgment, that it was "in basic agreement" with the Fifth Circuit decision that "'[p]rivate 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.'" 20 F.3d at 1276 (*quoting Wyatt v. Cole*, 994 F.2d 1113, 120 (5th Cir. 1993)). This Court in *Jordan* looked to the torts

[2] Oliver agrees with the Union that *Wenzig v. SEIU Local 668*, No. 19-3906, pending before this Court, will likely be controlling in this case on the issue of whether the Union is entitled to a "good faith" defense from claims of damages for money collected from employees by the Union before the *Janus* decision. Plaintiffs in that case are represented by the same law firm that represents Oliver here. The arguments made by Plaintiffs in *Wenzig* are relied on by Oliver here.

of malicious prosecution and abuse-of-process to define the elements of the due process claim before the courts, which arose from an alleged misuse of judicial procedures. The Court found malice and lack of probable cause to be elements of such claims. *Jordan*, 20 F.3d at 1276; *see also Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992); *id*. at 172–73 (Kennedy. J., concurring).

Jordan, and the cases on which it relied, held that good faith reliance on existing law can defeat the malice and probable cause elements of a constitutional claim arising from malicious prosecution or an abuse of judicial process. That was the claim at issue in those cases. *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *see also Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988) (state court prejudgment attachment order); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996) (state court prejudgment attachment procedure).

Thus, this Court in *Jordan* limited the "good faith" defense to claims in which malice and lack of probable cause are elements. But those elements are unnecessary to establish liability for a violation of the First Amendment under *Janus*. 138 S. Ct. at 2486. *Janus* does not

require proof of malice or a lack of probable cause. It would defy *Janus* to add those additional elements to the claim. Therefore, the "good faith" defense that rebuts those elements has no application to the First Amendment claim made here.

Given that malice and probable cause are not elements of a First Amendment claim made under *Janus*, it is irrelevant what tort is most analogous to such claims. Common law is merely a guide for determining the elements of § 1983 claims. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920–21 (2017). That guide is unnecessary when, as here, the Supreme Court has already defined the elements of the claim. *See Janus,* 138 S. Ct. at 2486. Nonetheless, Local 668 claims that the closest common law tort analogy here is to abuse of process. Union Br. 34. But abuse of process requires misuse of the *judicial* process. *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008); *see also Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (first element of malicious prosecution in Pennsylvania is that "the defendants initiated a criminal proceeding"); *Tulp v. Educ. Comm'n for Foreign Med. Graduates*, 376 F. Supp. 3d 531, 545 (E.D. Pa. 2019) (first element of abuse of process in Pennsylvania is that the defendant "used a legal

process against him"). That means an action literally taken by a court. *Tucker,* 515 F.3d 1037. In contrast, a First Amendment claim is not limited defendant's use of a court. Thus, there is no basis to import an abuse-of-process tort's malice and probable cause elements into Oliver's First Amendment claim. *See Janus*, 138 S. Ct. at 2486.

Local 668 also asserts that *Jordan* forecloses Oliver's contention that the recognition of a "good faith" defense is incompatible with the text of § 1983. But, again, *Jordan* did not find a broad "good faith" defense to § 1983, which would be incompatible with the its text. Defenses to any particular "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, are based on the constitutional or statutory right at issue. Malice and lack of probable cause are elements of constitutional claims arising from malicious prosecution and abuse of judicial processes. *See Wyatt*, 504 U.S. at 164–65. Thus, recognizing a good faith defense in such circumstance is not incompatible with the text of § 1983, while a broad, general "good faith" defense to all § 1983 claims — which the Union advocates — would be.

Local 668 additionally contends that *Jordan* forecloses Oliver's argument that the adoption of a § 1983 good faith defense for private

parties is incompatible with the statutory basis for qualified immunity and the Union's lack of that immunity. Union Br. 34–35. But, again, *Jordan* did not find a broad general "good faith" defense to § 1983. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012). Courts accord an immunity only when 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) (citation omitted). Here, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364. This Court in *Jordan* did not hold otherwise.

Local 668 asserts that applying the good faith defense is consistent with equitable principles because it bears no fault for acting in reliance on state law and Supreme Court precedent. Even if enforcing § 1983 were considered unfair to defendants who relied on state law, it would certainly be *more unfair* to make victims of those defendants' conduct pay the costs. *See Janus*, 138 S. Ct. at 2486 (noting "the considerable

windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.") It is not fair to make victims of constitutional deprivations pay for the Union's unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980). *Owen* held that municipalities are not entitled to a good faith immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

For these reasons, there is no broad "good faith" defense available to every private defendant under § 1983 or available to Local 668 barring Oliver's § 1983 claims for damages.

F. Oliver has standing for her claims for declaratory relief and her claims are not moot.

The District Court held, and the Defendants argue, that Oliver's claims for declaratory relief are moot because Local 668 allowed her to resign and refunded the dues she paid after August 10, 2018. App. 020; Union Br. 38–39; Commonw. Br. 21.

In this case Oliver sought declaratory relief and damages against the Union in the form of dues taken from her, and not returned, since she signed the union dues authorizations, subject only to a statute-of-limitations defense — those damages amount to union dues withheld from her paycheck from February 28, 2017 to August 10, 2019. App. 046–047. The Commonwealth Defendants ignore Oliver's damages claim and assume (wrongly) that Oliver was made whole by the Union's partial return of the dues. Commonw. Br. 23. Oliver alleges she is entitled to this money in damages because her signing of the union membership card did not constitute affirmative consent to waive her right to not pay money to the Union, as explained above. The declaratory relief that Oliver seeks is a necessary foundation to her theory for damages. The fact that Oliver was allowed to resign from the Union and that her union dues withheld after August 10, 2019 were returned are irrelevant to her claim for damages before August 10, 2019. Oliver's request for declaratory relief supporting that claim for damages is not mooted.

As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Knox v. Serv.*

Employees Int'l Union, Local 1000, 567 U.S. 298, 307 (2012). Here, Oliver's claim for damages remains and her request for declaratory relief supports her claim for damages. In order to grant damages, the Court would also need to grant at least two of her requests for declaratory relief: (1) Oliver's signing of the union dues deduction authorization did not constitute her affirmative consent to waive her First Amendment rights upheld in *Janus*, and (2) withholding union dues from Oliver's paycheck was unconstitutional because she did not provide affirmative consent.

And contrary to the Commonwealth Defendants' claim, Commonw. Br. 24, simply because Oliver's claim for damages is against Local 668, rather than the Commonwealth Defendants, does not moot the declaratory relief sought against the Commonwealth Defendants. Because Local 668 and the Commonwealth Defendants entered into a scheme to withhold money from Oliver's paycheck on behalf of the Union without her affirmative consent to waive her right to not pay money to the Union and not all of that money has been paid back, a controversy still exists between Oliver and both Local 668 and the Commonwealth Defendants. In particular, Oliver's request to declare

that withholding union dues from Oliver's paycheck was unconstitutional because she did not provide affirmative consent is necessary to entitle Oliver to damages but specifically relates the actions taken by the Commonwealth Defendants.

In addition, Plaintiff asked this Court to declare unconstitutional 43 P.S. §§ 1101.301(18); 1101.401; and 1101.705, to the extent that they prohibit a government employee who has not provided affirmative consent, like Oliver, to stop union dues from being withheld from his or her paycheck. Sections 1101.301(18) and 1101.401 operate together to define and enforce a so-called "maintenance of membership" provision, which requires that anyone who joined or joins the union "must remain members for the duration of a collective bargaining agreement." Where an employee, like Oliver, has not provided affirmative consent, a provision of law that requires anyone who signed a union card to pay union dues for the duration of a collective bargaining agreement is unconstitutional. Section 1101.705 authorizes state and local employers to enact maintenance-of-membership provisions in their collective bargaining agreements. Where these provisions of law force government workers who have not provided affirmative consent to pay union dues,

they violate the constitutional rights guaranteed in *Janus*. If the Court finds that Oliver's signing of the union membership card does not constitute her affirmative consent to waive her First Amendment rights upheld in *Janus*, and Oliver is entitled to damages in the form of dues withheld from her paycheck, the application of 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 to Oliver after the time she signed the union card and before she withdrew from the Union is unconstitutional. Therefore, Oliver's request for a declaratory judgment that 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 are unconstitutional is not moot.

II. Forcing Oliver to associate with the Union as her exclusive representative violates her First Amendment rights to free speech and freedom of association.

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

Like the District Court, Defendants assert that the Supreme Court's decision in *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), forecloses Oliver's argument that forcing her to associate with Local 668 as her exclusive representative violates her First Amendment rights to free speech and freedom of association. Union Br. 43; Commonw. Br. 29. The issue in *Knight* was whether the plaintiffs "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. That question is fundamentally different from Oliver's claim that the government cannot compel her to associate with Local 668 by authorizing the Union to bargain on her behalf. Appellant's Br. 38.

Nonetheless, Local 668 asserts that the Court went on to consider whether Minnesota's public employee labor relations act violated the right to speak and the right to "associate or not to associate," finding that speech rights were not infringed because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." Union Br. 47 (*citing Knight* 465 U.S. at 288; *accord* Commonw. Br. 30. But Defendants are wrong. The Court was not considering whether Minnesota's public employee labor relations act violated the right to speak and the right to "associate or not to associate." Rather, it was still addressing the question of whether there is a constitutional right to be heard. The Court explained that the government's right to "choose its advisers" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288.

The *Knight* Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id*. This is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id*. at 287. The Court in *Knight* did not directly address whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union that has been designated as their exclusive representative and does not foreclose Oliver's claim that her First Amendment rights are violated by forcing her to have the Union serve as her exclusive representative.

Nor is the Commonwealth Defendants' assertion that *Janus* "expressly approved of exclusive representation schemes" credible. Commonw. Br. 33. The Commonwealth Defendants quote *Janus* as saying that "the State may require that a union serve as exclusive bargaining agent for its employees." Commonw. Br. 33 (*quoting Janus*, 138 S. Ct. at 2478). But the full quote provides: "*It is also not disputed*

that the State may require that a union serve as exclusive bargaining agent for its employees—*itself a significant impingement on associational freedoms that would not be tolerated in other contexts*." *Janus*, 138 S. Ct. at 2478 (emphasis added). Far from "expressly approv[ing] of exclusive representation schemes," the Court was simply stating that Mr. Janus had not brought a claim challenging the constitutionality of exclusive representation schemes. And the Court's comments that such schemes are themselves a "significant impingement on associational freedoms that would not be tolerated in other contexts," *id*., is far from a solid endorsement.

B. Forcing Oliver to have Local 668 serve as her exclusive representative is unconstitutional.

Local 668 asserts that even if *Knight* did not foreclose Oliver's argument, that her claim is properly denied because Union's representation of Oliver's bargaining unit says nothing about Oliver's *own* views or positions, so there is no compelled *expressive* association. Union Br. 52 (*citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65, 69 (2006)). But this ignores the fact that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message."

Rumsfeld, 547 U.S. at 63. Pennsylvania's exclusive representation requirement takes away dissenting employees "choice . . . not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control" in the same way that compelling a parade organizer to accept an unwanted group carrying its own banner. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). The fact that Oliver must speak out to distance herself from the Union's speech on her behalf escalates, not diminishes, her constitutional injury. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In any event, the Union's reliance on *Rumsfeld* is inapposite: while "a law school's decision to allow recruiters on campus is not inherently expressive," 547 U.S. at 64, the Union's advocacy on matters of public concern in the context of collective bargaining surely is, *see Janus*, 138 S. Ct. at 2475–77.

Finally, the Union argues that even if Pennsylvania's exclusive-representative bargaining system *did* impinge on First Amendment rights, it would satisfy exacting scrutiny because exclusive

representation is necessary to facilitate labor peace. Union Br. 53. But the state interest in labor peace is neither compelling nor narrowly tailored to force public employees to accept union representation. In *Janus*, the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest, but the Court rejected it as a justification for agency fees. The interest should likewise be rejected as a justification for exclusive representation. The Supreme Court recognized that "it is now clear" that the fear of "pandemonium" if the union could not charge agency fees was "unfounded." *Janus*, 138 S. Ct. at 2465. To the extent that individual bargaining is claimed to raise the same concerns of pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id.*

The "labor peace" concept was borrowed by *Abood*, 431 U.S. at 220–21, from the Court's jurisprudence concerning Congress's Commerce Clause power to regulate economic affairs. *See, e.g.*, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937). That the promotion of labor peace might justify congressional regulation of economic affairs, subject only to rational-basis review, says nothing about whether labor-

peace interests suffice to clear the higher bar of First Amendment scrutiny. The Court's cases recognize that the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988). But that is in essence what the labor peace rationale does.

Thus, Oliver's First Amendment rights to free speech and freedom of association are violated by the exclusive bargaining law that forces Oliver to associate with the Union.

CONCLUSION

For these reasons, this Court should reverse the District Court.

Dated: May 13, 2020

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

1. I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6347 words, excluding the items exempted by Fed. R. App. P. 32(f), in compliance with Fed. R. App. P. 28(a)(10) 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) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

4. No paper copies of the foregoing brief were filed, pursuant to the Court's Notice Regarding Operations to Address the COVID-19 Pandemic, dated Mar. 17, 2020.

5. A virus check was performed on this brief using Sophos Anti-Virus Endpoint Advanced Version 9.9.8, and no virus was detected.

6. On May 13, 2020, I caused the foregoing to be electronically filed with the Clerk of Court 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.

Dated: May 13, 2020

/s/ Jeffrey M. Schwab
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