No. 19-56271

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cara O'Callaghan and Jeneé Misraje,

Plaintiffs-Appellants,

v.

Michael V. Drake, in his official capacity as President of the University of California; Teamsters Local 2010; and Xavier Becerra, in his official capacity as Attorney General of California,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-02289
Hon. James V. Selna

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO REMAND OR DISMISS

Brian K. Kelsey*
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702
**Counsel of record*

Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

On July 25, 2018, Plaintiff-Appellant Cara O'Callaghan sent a letter to Defendant Appellee Teamsters Local 2010 ("Teamsters" or the "Union") asking to resign her membership; on August 8, 2018, Plaintiff-Appellant Jeneé Misraje did the same. Opinion Below at 2-3 (Dkt. 9, ER 009-010). They were denied. *Id.* On November 23, 2020, nearly two and a half years later, nearly two years after this case was filed, and nine months after initial briefing to this Court was complete, the Union claimed for the first time that the case was moot because of their recent gamesmanship. They sent Plaintiff-Appellants checks for roughly $2,500 and "made an unconditional, irrevocable decision to release [them] from any and all dues-deduction[s]." Exh. A to Motion to Remand or Dismiss, Dkt. 44-2 at 7. Desperate to avoid a ruling from this Court, the Union took this action just four days after the Court agreed to accept Plaintiffs' Supplemental Brief. *See* Dkt. 38, dated Nov. 19, 2020. The Supreme Court rejected just such an eleventh-hour attempt in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) and this Court should, too.

O'Callaghan and Misraje have rejected the Union's proffered payments, which even had the gall to determine that their damages in addition to the illegally taken dues were "nominal" and to unilaterally assign a dollar amount to them. Dkt 44-2 at 10, 15. Because of this rejection a live controversy remains as to monetary

damages. O'Callaghan's and Misraje's claims for declaratory judgment also remain. Their claims fall within well settled exceptions to the mootness doctrine for cases in which defendants voluntarily cease challenged conduct. This Court should deny the Teamsters' last-minute motion for a partial remand or dismissal and should, instead, set a hearing date on the Supplemental Brief that the Court accepted just last month. The Court should not allow Defendants to avoid the jurisdiction of this Court.

STATEMENT FACTS

The Statement of Facts in the Teamsters' Motion is substantively accurate, except for those portions that assume legal conclusions. Appellants are in receipt of the November 23 letter and accompanying checks sent by the Teamsters. Appellants have chosen to treat this unusual procedure as an offer of settlement, which was rejected. Counsel for Appellants advised the Teamsters of this decision formally by letter and returned the checks to the Union's counsel. *See* Declaration of Brian Kelsey, attached at Exhibit A.

ARGUMENT

I. Appellants Claims are not Moot.

For years, Appellant O'Callaghan was denied her constitutional right to

withdraw consent for union dues deductions. Appellant Misraje was denied the right for months. Yet the Union now asks this Court to allow Appellees to avoid judicial scrutiny by approving their gamesmanship, mailing checks to Appellants after appellate briefing had already taken place in this case. This Court should not allow Appellees' constitutional violations to evade its jurisdiction.

Because Appellants rejected the settlement offer, it has no legal effect on the case: "[A]n unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). If anything, the letters from the Union offering money to the plaintiffs are an admission of liability in the case. While the admissions were made in the course of settlement, their confidentiality was waived when the Union attached them as exhibits to its motion.

Even if that were not the case, The Teamsters, Appellee Michael V. Drake, and Appellee Becerra continue to enforce the unconstitutional escape window policy against any employee who is not determined enough to sue. For those, like Appellants, who do sue, they mail checks in an attempt to avoid constitutional scrutiny. This Court has already rejected this same mootness argument at least twice. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *Fisk v. Inslee*, 759

F. App'x 632, 633 (9th Cir. 2019). It should do so again here. Furthermore, the Supreme Court has also rejected this argument. *See Knox*, 567 U.S. at 307 (2012).

Unions across the country have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees that challenge their practices, as the Teamsters do here. *See, e.g.*, *Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice their policy required). This Court should not allow the Union to avoid judicial review by picking off employees one by one. A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). Yet that is precisely what the Union would like the Court to allow in this case. Appellants respectfully submit that this Court should not countenance such gamesmanship.

In *Belgau*, the Union, likewise, responded to being sued by unilaterally changing its policy. 2018 U.S. Dist. LEXIS 175543, at *7. By the time the case reached this Court, the plaintiffs had been let out of the union and were no longer suffering dues deductions. This Court held, however, that "[b]ecause Washington

continued to deduct union dues until the one-year terms expired, other persons similarly situated could be subjected to the same conduct. For these reasons, we exercise jurisdiction over Employees' claim against Washington." *Belgau v. Inslee*, 975 F.3d 940, 949-50 (9th Cir. 2020). This is precisely the scenario faced by Appellant Misraje. For Appellant O'Callaghan, the Teamsters' behavior is even more egregious than that in *Belgau* because in *Belgau* the cessation of union dues occurred before the case reached this Court on appeal. In this case, the Union had the nerve to wait almost a year after the Opening Brief was filed in this case. *See* Dkt. 8, filed December 27, 2019.

In addition to *Belgau*, this Court also denied this same mootness argument in *Fisk*:

> 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, 759 F. App'x at 633. This Court recognized that claims like Appellants'

would never be addressed by the Court if the Union were allowed to moot them in this way.

Such avoidance tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted dues 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 (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. In *Knox*, as in the case, the Court ruled against mootness in part because the late timing of the payment compounded the error: such action "must be viewed with a critical eye." *Id*. In *Knox*, the union desperately mailed checks because the Supreme Court had just granted certiorari, and in this case the Union desperately mailed checks because this Court had just accepted Appellants' Supplemental Brief. The Union is doing everything in its power to prevent this

Court from ruling on the simple question presented in the Supplemental Brief: Can a union trap government workers into paying dues for longer than one year? *See* Dkt. 37 at 2.

In *Knox*, the Court ruled on the merits of the issue because defendants "continue[] to defend the legality" of their practice. *Knox*, 567 U.S. at 307. All the defendants in this case also continue to defend the legality of trapping government workers into paying dues for longer than a year. In its motion, Teamsters mistakenly states that its checks mooted not only Counts I and IV of the First Amended Complaint regarding the taking of money but also Counts II and III. In Count II, Plaintiffs sought declaratory judgment on the issue, and in Count III they are asking the Court to rule on the constitutionality of statutes permitting such conduct. As Teamsters points out in its motion, Cal. Gov't Code § 3583 explicitly allows the unconstitutional conduct at issue in the Supplemental Brief: it allows collective bargaining agreements to contain opt-out windows that occur only once every several years. Dkt. 44-1 at 12. Therefore, both the government defendants and the Union "continue[] to defend the legality" of their practice, and the Union's claim for mootness should be denied. *Knox*, 567 U.S. at 307.

A recent case out of New Jersey addresses this same mootness strategy. As here, the union in that case attempted to moot claims about their window policies by sending a check. The Court explained:

> In short, Defendants' argument is seemingly that unions can: compel membership for up-to 11 months and 20 days from those wishing to resign, collect fees that it may not be entitled to, and avoid court intervention by paying off only those who file lawsuits. But the Third Circuit warned against nearly this exact scenario in [*Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020)]. As noted above, this Court must be "skeptical of a claim of mootness when a defendant . . . assures [the Court] that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along." *Hartnett*, 963 F.3d at 306. Indeed, the Court must focus "on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189). And when Defendants make these mootness arguments, they bear a "heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (cleaned up).

Lutter v. JNESO, No. 19-13478 (RMB/KMW), 2020 U.S. Dist. LEXIS 223559, at *13 (D.N.J. Nov. 30, 2020). The court in *Lutter,* addressing the same basic facts, rejected the mootness argument because "[t]he WDEA's resignation restrictions are still enforced today, and Defendants seemingly maintain that the statute is constitutional." *Id.* at *15.

The *Lutter* court went on to explain that "the WDEA's resignation window may still affect Plaintiff. If Plaintiff desires union representation in the future—or, possibly, the present—the WDEA's restrictive resignation scheme is undoubtedly a factor in weighing the pros and cons of union membership." *Id.* The same reasoning applies here. It is possible that Appellants could have some need arise for union membership in the future. Even more likely is that the Union will use coercive or deceitful measures to lure Appellants into membership again. In their First Amended Complaint (FAC), Plaintiffs pled that O'Callaghan did not initially

join the Union when asked at the beginning of her employment in 2009. FAC ¶ 15. Instead, less than a month prior to the Supreme Court's *Janus* decision, a Union representative "pressured workers to join the Union" at her workplace. FAC ¶ 16. He failed to inform her of the impending *Janus* decision, and she relied on this withholding of information to sign the application. *Id*. Thus, she was stuck paying dues for almost four years. *See* Appellants' Supplemental Brief, Dkt. 37, at 2-3. This activity could occur again without a ruling from this Court. It is not necessary for Appellants to prove it will recur as to them at this stage. The union members in *Knox* could not say they would be subject to a future special assessment by the union. But the case was still justiciable, as is Appellants' here.

These principles of law are not novel or unique to this case: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. Nor was Jane Roe forced to submit an affidavit of her intention to get pregnant again. The Court explained in *Super Tire* that, even if the need for an injunction

had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 125. The escape windows that Appellants were subjected to is a policy of the State of California, embodied in an agreement it negotiated with the Union and allowed by statute. This policy continues to impact present interests because Drake, the Union, and Becerra continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of declaratory relief.

Based on the arguments made by Unions in other cases, Appellants anticipate that they will attempt to distinguish *Belgau*, *Fisk*, and other cases Appellants cite on the basis that the cases were putative. This is not true of all the cases cited above—neither *Lutter* nor *Super Tire* mention a class, for instance. But even in those cases that were, the proposed class was not the basis for the ruling because "a class lacks independent status until certified." *Campbell-Ewald Co.*, 136 S. Ct. at 672. The basis for the ruling was the inherent transience of the claim. For example, in *Roe*, the Court was not concerned with the uncertified class; instead, it focused on the length of pregnancy:

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

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

It was precisely this concern with the transience of the claim that guided the Ninth Circuit, assessing the same sort of union opt-out claim presented here, to rule in *Fisk* that "*although no class has been certified* and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019) (emphasis added). *Belgau*, likewise, delt with "an inherently transitory, pre-certification class-action claim" that justified an exception to usual mootness principles". 975 F.3d at 949. In both cases, this Court cited *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010), which held that even a three-year duration is "too short to allow for full judicial review." Misraje's declaratory relief claim would, at most, last only one year under Appellee's theory, so it should certainly survive. As the quotes above show, the Ninth Circuit did not base its ruling on mootness on the fact that the plaintiffs represented a class because "*no class ha[d] been certified*." *Fisk*, 759 F.App'x at 633 (emphasis added). The theory that other putative class members saved the case from becoming moot is a misreading of the clear

language.

Moreover, in *Knox*, there was a class, but that was not the basis for the Court's ruling. Indeed, the union in *Knox* had offered refunds to the *entire class*, so there were no absent class members who hadn't received the money. Instead, the Court explained that the union's refund, like the refund offered to Appellants, was irrelevant because "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). This is precisely the scenario O'Callaghan and Misraje urge this Court to avoid.

II. A Remand in This case would not serve the interests of the court or the parties.

Whatever decision this Court comes to in addressing the arguments raised by the Union in its motion, a remand in this case is not the proper course: the Union's arguments address only Counts I-IV of the complaint, and they do not argue that their actions mooted Counts V-VII. Sending this case back to the district court to dismiss half the case would simply entail further delay and prove detrimental to the interests of the parties and judicial economy. This case has been fully briefed, as well as supplementally briefed, and now briefed again as to this motion. Sending this case back on the mootness issue, just to require another appeal later, is not the

appropriate course of action. Rather, this court should issue a decision addressing each of the claims dismissed by the district court and appealed here—dues, windows periods, and exclusive representation, such that the losing party may pursue a petition for certiorari in a timely manner. Allowing this case to languish further would poorly serve the interests of justice.

CONCLUSION

For the reasons stated above, this Court should deny Appellee's Motion.

Dated: December 18, 2020

Respectfully submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey*
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center
208 South LaSalle Street, Suite 1690
Chicago, Illinois 60604
Phone: 312-263-7668
Fax: 312-263-7702

Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297

**Counsel of record*
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

9th Cir. Case Number: 19-56271

I certify that this Response complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2). This Response was prepared in 14-point Times New Roman, and it contains 3,211 words.

/s/Brian K. Kelsey
Brian K. Kelsey

December 18, 2020